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Northwestern University School of Law

THE
FEDERAL REPORTER.

VOLUME 39.

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT AND DISTRICT COURTS
OF THE
UNITED STATES.

JULY—NOVEMBER, 1889.

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ARGUED AND DETERMINED

IN THE

United States Circuit and District Courts.

FREEMAN v. BUTLER.

(Circuit Court, D. Kentucky. May 11, 1889.

1. REMOVAL OF CAUSES—CITIZENSHIP—PETITION—AMENDMENT.

Where neither the petition for removal of a cause from state to federal court on the ground of diverse citizenship, under the removal act of March, 1887, nor the record, shows that defendant was a non-resident of the state where the suit was brought at the time of filing the petition, the federal court does not obtain jurisdiction, and cannot allow the petition to be amended so as to give it jurisdiction.

2. SAME—REMAND.

Where the federal court has remanded the cause because of the defective record and petition, an amended petition, filed in the state court, relates back to the time when the original petition was filed, and is in time if that was.

3. SAME.

The federal court not having obtained jurisdiction, its order remanding the cause is no bar to a subsequent removal on the same transcript.

4. SAME—APPEAL.

A petition for removal, filed in the state court on the earliest day possible, is an abandonment of a prior appeal from an interlocutory order which cannot be superseded, where the appeal does not appear to have been perfected.

At Law. On motion to set aside a former order, and to file papers.

A. P. Humphrey, for complainant.

A. W. Sanders, for defendant.

BARR, J. The defendant, Butler, on the 1st day of May, 1889, filed in this court a transcript of a record from the common pleas court of Knox county, state of Kentucky, in which J. T. Freeman was plaintiff, and the said Butler was defendant. Subsequently the plaintiff, Freeman, by counsel, entered his appearance in this court, and moved that the cause be remanded to the state court, from whence it had been removed. This court, after an examination of the transcript on file, and the hear-

ing of the argument of counsel, remanded the cause to the state court, because it did not appear from the allegations of the petition for removal to this court, or from the record in the state court, that Butler was a non-resident of the state of Kentucky at the time of the filing of his petition for removal. The defendant, Butler, presents a petition to the court, in which he alleges that, subsequent to the order of this court remanding the cause, he filed a copy of said order in the common pleas court of Knox county, and then filed in said court an amended petition for the removal of the cause to this court, in which he corrected the omissions of the first petition, and he now offers to file a complete transcript of the record in the cause in the state court, including the amended petition for removal, and asks that the same be docketed and proceed here. He also asks that the order of this court remanding the cause be set aside. The plaintiff, Freeman, appears by counsel and objects to both motions.

The questions raised by these motions are: (1) Whether this court can set aside the order remanding the cause to the state court, after that order has been presented to the state court by the defendant, Butler, and entered on its records. (2) If this court has the control over this order to set it aside, can it allow the petition for removal, which was originally filed in the state court, to be amended here? (3) Should the court allow the transcript now tendered to be filed, and proceed with the cause here?

The court decided that the transcript which was heretofore filed did not give it jurisdiction of the cause, because neither the petition for removal nor the record showed that Butler was a non-resident of the state of Kentucky at the time the petition for removal was filed. That petition made no allegation upon the subject of the non-residency of the defendant, Butler, and, although the plaintiff's petition stated that he (Butler) was a non-resident of the state at the time of the filing of his petition, that was not enough. The language of the second section of the act of March, 1887, is "being non-residents of that state." This may not require a defendant who is a citizen of another state, and who is sued in a state court, to be a non-resident of the state in which he is sued at the commencement of the action,—and as to this it is not necessary to express an opinion,—but I think it is plain the defendant must be a non-resident at the time of the filing of the petition for removal, and that must appear affirmatively in the record which is sent from the state court. The allegations of a petition may be aided by the facts which are alleged, or otherwise appear in the record, but the necessary facts to give this court jurisdiction must appear affirmatively. *Robertson v. Cease*, 97 U. S. 646; *Chapman v. Barney*, 129 U. S. 681, 9 Sup. Ct. Rep. 426.

This court has ordinarily control over its orders during the term in which they are entered, but here the order remanding the cause to the common pleas court of Knox county has been executed, by being filed and entered upon the records of that court. I am therefore inclined to the opinion that this court has lost control of the order. This, however, is not necessary to decide, as I am of the opinion that if this court had

control of the order remanding the cause to the state court it could not allow the grounds for the removal from the state court to be made out by an amendment of the petition of removal in this court. The reason is that this court never had jurisdiction of the cause of *Freeman v. Butler* brought in the state court, because the facts which were necessary to give it jurisdiction were not in the record. The question of jurisdiction in such cases arises between the state and federal courts. The federal courts get jurisdiction, if at all, by removal from the state court. The jurisdiction depends upon, and is grounded upon, not only the fact of the difference in the citizenship, and the non-residence of the defendant seeking to remove the cause from the state court, but upon the further fact that these essentials appear in the transcript of the record from the state court. Undoubtedly, congress could have provided that this class of cases should be removed by the circuit court upon petition filed there, and by means of a *certiorari*, but it has not so enacted. Congress has provided this mode of removal from the state courts when the ground for removal is local prejudice or influence, but in all other cases it requires the petition to be filed in the state court where the suit is pending. There may be some difference in the language of the opinions of the supreme court, but the decisions are consistent. The court has uniformly decided that when the petition for removal has been filed in the state court, and the allegations, being taken as true, are sufficient to give the federal court jurisdiction, and the proper bond has been executed, the jurisdiction of the state court ceases, and the jurisdiction of the federal court attaches. *Railroad Co. v. Koontz*, 104 U. S. 5; *Steam-Ship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. Rep. 58; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. Rep. 799; *Railway Co. v. Dunn*, 122 U. S. 514, 7 Sup. Ct. Rep. 1262. In the later case, *Railway Co. v. Dunn*, the supreme court again declares that all issues of fact arising on the petition for removal or upon the grounds for removal must be tried in the federal courts, and uses this language:

"The theory on which it rests is that the record closes, so far as the question of removal is concerned, when the petition for removal is filed, and the necessary security furnished. It presents then to the state court a pure question of law, and that is whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, that the petitioner is entitled to a removal of the suit. That question the state court has a right to decide for itself."

The court go on to say that if the state court errs in keeping the case, and that decision is affirmed by the supreme court of the state, the supreme court of the United States can correct the error. This, however, does not prevent the transcript from being filed in the United States circuit court, and the case proceeding there, if that court decides that the facts as stated, if taken as true, properly transfer the case. This right of decisions in both the state and federal courts as to the sufficiency of the allegations of the petition to remove the cause is certainly undesirable, but such is the will of congress, as determined by the supreme court.

This right of decision which is declared to remain in the state court is clearly inconsistent with the right of the United States circuit court to allow an amendment of the petition for removal so as to state the facts necessary to give that court jurisdiction. It is possible to have uniformity of decision upon the question of whether or not in a particular case the jurisdiction of the state court has ceased, and the jurisdiction of the United States circuit court has attached at a certain time, if the supreme court is to revise the decisions of the state and federal courts upon the same record, but is utterly impossible if the federal courts are authorized to allow necessary jurisdictional facts to be pleaded after the cause has been removed from the state court. The true distinction in these cases is stated by the supreme court, but the question under discussion was left undecided. The distinction is that where the facts, as stated, or which are in the record, if true, would give the circuit court jurisdiction, then the jurisdiction attaches, and then the amendments may be allowed, even to the extent of changing the grounds upon which the court is to continue its jurisdiction; but if the allegations in the petition of removal or the facts in the record as filed, if true, are not sufficient to transfer the case from the state court, then the federal court never had jurisdiction, and of course cannot take jurisdiction for the purpose of allowing an amendment. In *Carson v. Dunham*, 121 U. S. 427, 7 Sup. Ct. Rep. 1032, in considering this question, the court uses this language:

"The petition, [removal,] on its face, made a case for removal by reason of the citizenship of the parties, and the suit was properly taken from the state court and entered in the circuit court on that ground, if not on the others. The statute made it the duty of the state court to proceed no further until its jurisdiction had in some way been restored. Had it proceeded, its judgment could have been reversed, because on the face of the record its jurisdiction had been taken away. The suit was therefore rightfully in the circuit court when the record was entered there, and when the answer was filed, which, for the purposes of jurisdiction, may fairly be treated as an amendment to the petition for removal, setting forth the facts from which the conclusions there stated were drawn. As an amendment, the answer was germane to the petition, and did no more than set forth in proper form what had before been imperfectly stated. To that extent we think it was proper to amend a petition which on its face showed a right to the transfer. Whether this could have been done if the petition as presented to the state court had not shown on its face sufficient ground of removal we do not now decide."

The petition of Butler as originally presented to the state court, taken with Freeman's petition, did not state facts, if true, sufficient to give this court jurisdiction. Hence, as the court did not have jurisdiction, but the jurisdiction remained in the state court, it cannot allow that petition to be amended so as to state facts which are necessary to give this court jurisdiction. In the recent case of *Cameron v. Hodges*, 127 U. S. 324, 8 Sup. Ct. Rep. 1156, in which one of the parties sought to file an affidavit in the supreme court, and thus amend his grounds of removal from the state court, the court refused him leave, and uses this very pertinent language:

"The case in this court must be tried upon the record made in the circuit court. In this instance there has been a removal from a tribunal of a state

into a circuit court of the United States, and there is no precedent known to us which authorizes an amendment to be made, even in the circuit court, by which grounds of jurisdiction may be made to appear which were not presented to the state court on the motion for removal."

This is not a decision, because the question of an amendment in the circuit court did not arise for determination, but it clearly shows the trend of the court, and taken with the case of *Carson v. Dunham*, *supra*, indicates at least a decided opinion of the distinguished justice (MILLER) who decided the case, and to whom the question was evidently not new. What is said in *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. Rep. 207, is not inconsistent with the opinion expressed in *Cameron v. Hodges*. The case of *Parker v. Overman*, 18 How. 139, decided in 1855, is seemingly against the view here presented, but it does not distinctly appear where the amendment was made,—whether in the state or the federal court. Whatever may have been the fact in that case, it is evident the mode and manner of removing a case from the state courts to the United States courts had not then received the careful consideration they have had since that time. The distinction suggested by the court in *Carson v. Dunham* is sound and logical. Unless the supreme court shall decide amendments alleging facts indispensable to give the circuit court jurisdiction in removal cases cannot be allowed in any other than the state courts in which they were pending, then the court must overrule the decision in *Railway Co. v. Dunn*, in which it is said the state court may decide for itself whether or not the allegations of the petition for removal are sufficient to remove the cause, and decide that whenever a petition for removal is filed, whether sufficient or insufficient on its face, the state court ceases to have jurisdiction and the jurisdiction of the federal court attaches, without regard to the allegations of the petition. It follows from what has been written that in our opinion the common pleas court of Knox county was not divested of its jurisdiction until the jurisdictional facts were alleged in a petition for removal, or that they appear otherwise in the record. The order of this court on May 1st, remanding the case to the state court, was simply a declaration of this court that the case had not been transferred to it, and that therefore it did not have jurisdiction. Hence the amended petition for removal was properly filed in the state court, and upon the execution of the bond the state court ceased to have any further jurisdiction over the case, and the jurisdiction of this court attached, unless it was too late, or the defendant had lost the right to a removal to this court because of his previous acts in the state court or in this court, or in both.

The original suit was brought April 6, 1889, and the summons, which was returnable at the next ensuing April term of the Knox court of common pleas that commenced April 22, 1889, was executed April 8th on Butler. On the 9th of April the judge heard, in chambers, a motion for an injunction and the appointment of a receiver. This motion was granted by the judge, and the defendant excepted to the order appointing a receiver, and prayed an appeal, which was granted. The order appointing a receiver is an appealable order under the Kentucky

Code, but it cannot be superseded, and in the mean time the suit itself remains in the lower court. The court of common pleas commenced on the 22d of April, and the answer of Butler was due on the third day of the term, but he did not wait, and filed his petition for the removal to this court on the 22d of April, the first day of the term, and executed bond. Subsequently he filed a transcript of the then record in this court. The plaintiff appeared in this court, and on May 1st moved to remand the case, which was done for the reason already stated. Subsequently, on the 3d day of May, and during the same term of the Knox county common pleas court, the defendant Butler filed in that court the order of this court remanding the case, and tendered and filed an amended petition for the removal of the case to this court. The learned counsel insists that, as the amended petition was not filed until after the answer was due in the state court, it is too late, but the answer to this suggestion is that, being filed as an amended petition, it related back to the time when the original petition was filed. He also insists that, Butler having filed a transcript in this court under the petition and bond which was filed April 22, 1889, he cannot file a transcript of the same record with the addition of his amended petition filed May 3d for removal, and he refers the court to *Railroad Co. v. McLean*, 108 U. S. 215, 2 Sup. Ct. Rep. 498, and *Johnston v. Donovan*, 30 Fed. Rep. 395, as sustaining this view. The latter case is distinctly in point, but I think the learned judge who decided that case failed to recognize the distinction which we think exists between an order remanding a case to the state court because the circuit court has never had jurisdiction, and that where the order remanding to the state court is made after the jurisdiction of the state court has ceased, and the jurisdiction of the federal court has attached. It is true that under the act of March, 1875, an order remanding or refusing to remand to the state court was a final order, and could be taken to supreme court by writ of error, and that such an order is now a final order under the act of March, 1887, and would, after execution, be beyond the control of the circuit court. Yet I do not think a petition for removal from a state court which does not allege the grounds which are essential to give the federal court jurisdiction and divest the jurisdiction of a state court would be a bar to another petition, which does allege all the jurisdictional facts, any more than the dismissal of a suit by the circuit court because the petition did not state the facts necessary to give the court jurisdiction would be a bar to another suit for the same cause of action in which the necessary allegations are made. The supreme court has, in *Railroad Co. v. McLean*, declared that if a case has been removed from the state court, and the jurisdiction is in the circuit court, an order remanding the case to the state court will bar another removal on the same transcript. But it has not declared that, if the case is remanded because the circuit court has never had jurisdiction, such an order would prevent a legal removal thereafter. The court says:

"Assuming that the second petition for removal was filed before or at the term at which the cause could have been tried in the state court, we are of

opinion that a party is not entitled, under existing laws, to file a second petition for the removal upon the same grounds, where upon the first removal by the same party the federal court declined to proceed, and remanded the suit because of his failure to file the required copy within the time fixed by the statute. When the circuit court first remanded the cause, the order to that effect not being superseded, the state court was reinvested with jurisdiction, which could not be defeated by another removal upon the same grounds, and by the same party. A different construction of the statute, it can be readily seen, might work injurious delays in the preparation and trial of causes."

It will be seen by a reference to the facts of this case that the removal from the state court was complete, and the jurisdiction of the circuit court had attached by reason of the first petition; but in the case at bar there had not been a removal from the state court, nor had the jurisdiction of this court attached.

It is insisted that because the defendant, Butler, prayed an appeal to the Kentucky court of appeals from the order of the judge made April 9, 1889, appointing a receiver, which appeal was granted, he could not thereafter file in the Knox court of common pleas a petition for removal to this court, and we are referred to the case of *Railroad Co. v. Railroad Co.*, 29 Fed. Rep. 337, to sustain this view. That case arose under the act of 1875, and the court indicated the opinion that the motion for an injunction which was granted in that case was a trial within the meaning of that act, and therefore the petition for removal from the state court came too late. The court commented upon the fact that the order granting an injunction had been appealed from and superseded, and that before this was done the party had an opportunity of filing his petition for removal in the state court. In the case at bar Butler could not have filed his petition until the term of the state court, which commenced on the 22d of April, which was the day upon which he did file it. The order of the judge of the state court, appointing a receiver, was appealable, but it could not be superseded. The appeal, though prayed and granted, does not appear to have been perfected by the filing of the transcript there, and we think the effect of the petition to remove to this court was an abandonment of the appeal by Butler. We are of the opinion that Butler's motions to set aside the order of May 1, 1889, and to file an amended petition of removal in this court, should be overruled, and that his motion to file the transcript from the Knox county common pleas court should be sustained, and it is so ordered.

HOOVER v. CRAWFORD COUNTY.

(Circuit Court, W. D. Arkansas. June 13, 1889.)

FEDERAL COURTS—JURISDICTION—ACTIONS AGAINST COUNTIES.

If a legislature of a state permits a county to contract and issue obligations as evidences of indebtedness to citizens of other states, such legislature cannot prevent such citizens from bringing suits in a federal court in the state of the county by a law which provides that counties cannot be sued, for the laws of the state permit the counties to create on behalf of the citizens of

other states a property right as against the counties, and this gives the right to such citizens to sue the counties in the federal courts. And such right is one which is beyond the control of any legislative action of the state, and can be regulated alone by the constitution and laws of the United States.
(*Syllabus by the Court.*)

At Law.

Suit by J. W. Hoover against the county of Crawford, on 59 pieces of county scrip of different values, and of the aggregate value of \$3,000. All of said scrip bears date July 12, 1887. Defendant demurs to the complaint "because it fails to state facts sufficient to constitute a cause of action."

Du Val & Cravens, for plaintiff.

Lee Sandels & Warner, for defendant.

PARKER, J. It is claimed in this case that the defendant county cannot be sued because its suable character has been taken away, unless the right is asserted in its own court, by the act of the legislature of Arkansas of February 27, 1879. At that date the legislature passed the following act:

"Section 1. That sections 937, 938, 939, 944, 945, 946, 947, 948, 949, and 4516 of Gantt's Digest of the Statutes of Arkansas, and all laws and parts of laws making counties corporations, and authorizing them to sue and be sued as such, be, and they and each and every of them are hereby, repealed. Sec. 2. That hereafter all persons having demands against any county shall present the same, duly verified according to law, to the county court of said county for allowance or rejection. From the order of the county court thereon appeals may be prosecuted, as now provided by law. If on any such appeal the judgment of the county court is reversed, the judgment and reversal shall be certified by the court rendering the same to the county court, and the county court shall thereupon enter the judgment of the superior court as its own. Sec. 3. When any county has any demand against any persons or corporations, suit thereon may be brought in the name of the state for the use of the county. * * *"

The sections of the general law of the state referred to in the act set out above as being repealed by said act provide that the counties may sue and be sued, and also for the method of getting service on them. The purpose of the legislature evidently was to take away from the federal courts the right to entertain a suit against the county in the state. We have a right to infer this from the nature of the act passed by the legislature of the state, and from the existing condition of things at the time the act was passed. Previous to that time many suits had been brought in the federal courts in the state against counties upon evidences of indebtedness similar in character to these sued on in this suit. Judgments had been obtained, and payment compelled, by such courts. I have never heard that any act of intentional wrong or injustice had been done by these courts. They had simply enforced the collection of honest debts. This act seems to me to be but the exhibition of a foolish and futile purpose founded on an unwarrantable and unreasonable prejudice against federal courts, which are as much the courts of the whole people as the courts of the counties or of the circuits in a state. Can

the purpose of this act be accomplished by the legislature of the state? The legislature has not taken away the whole character of the county as such. Under the general laws of the state it has a right to make contracts, and to issue obligations similar to the ones sued on here. To this extent the legislature has left the county with a function characteristic of a corporate existence. For this purpose it is a civil division of a state, and, consequently, to this extent a county. It is an axiom of the law of this country that the legal jurisdiction of the United States courts comes from the constitution and laws of the United States; and under our system it can come from no other source. And when the conditions exist which under the constitution and laws of the United States give jurisdiction, the same is free from the touch of any legislative body of a state as the legal jurisdiction of the state courts is free from the touch of congress. I think it enough for this case to find that the defendant county had a right to contract with a citizen of another state. This right to contract implies liability to suit by a citizen of another state, and this gives jurisdiction to the federal courts. The supreme court of the United States, in *Cowles v. Mercer Co.*, 7 Wall. 118, which is a case analogous in principle to this, said:

"It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. The power to contract with citizens of other states implies liability to suit by citizens of other states, and no statute limitation of suability can defeat a jurisdiction given by the constitution."

This seems to be conclusive of this question. In *Payne v. Hook*, Id. 430, the supreme court says:

"We have repeatedly held that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power."

The laws of the state give the county the power to create on behalf of the plaintiff a property right as against it. In *Railway Co. v. Whitton*, 13 Wall. 270, the supreme court of the United States decides it is a correct principle that "whenever a general rule as to property or personal rights or injuries to either is established by state legislation, its enforcement by a federal court in a case between proper parties is a matter of course, and the jurisdiction in such case is not subject to state limitation." In *Bank v. Jolly's Adm'rs*, 18 How. 506, the supreme court of the United States declared that—

"The law of a state limiting the remedies of its citizens in its own courts cannot be applied to prevent the citizens of other states from suing in the courts of the United States in that state for the recovery of any property or money there, to which they may be legally or equitably entitled."

The doctrine of the above cases has been declared by the supreme court as long ago as the case of *Suydam v. Broadnax*, 14 Pet. 67. In *Hyde v. Stone*, 20 How. 175, the supreme court declares:

"This court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot

be impaired by the laws of the states which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment, and to afford redress to suitors before them, in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

The principle of all these cases has again but recently been reiterated by the supreme court in the case of *Ellis v. Davis*, 109 U. S. 498, 3 Sup. Ct. Rep. 327. Indeed, there is not and cannot be any dissent from it. Then, as long as the legislature of the state leaves the counties with the power to make contracts with citizens of other states, to create thereby a property right in favor of such citizens, the right to sue the counties in the federal courts exists.

It has been suggested that this scrip was taken by plaintiff subject to all the laws of the state. This is true, but he takes it subject to all valid laws. If also-called "law" is invalid under that which is the supreme law of the land,—the constitution of the United States,—then such statute is not a law, but only a simple declaration of a law-making power that is a nullity. I regard the point discussed above as the only one in the case; and, in the face of the settled law, the demurrer in this case must be overruled.

GLENN v. ABELL.

(Circuit Court, D. South Carolina. May 31, 1889.)

BANKRUPTCY—PROVABLE DEBTS.

The liability of a subscriber to corporate stock for his unpaid subscription is a provable debt in bankruptcy against the estate of such subscriber, though no assessment has yet been made, under Rev. St. U. S. § 5067, providing that all debts due and payable from the bankrupt at the commencement of proceedings or then existing and payable in the future shall be provable debts.

At Law.

Rutledge & Rutledge, for plaintiff.

Wells & Orr, for defendant.

SIMONTON, J. This is an action at law. Both parties by stipulation in writing waive a jury and submit all the issues to the court.

FINDINGS OF FACT.

The National Express & Transportation Company was a corporation created by an act of the state of Virginia, December 12, 1865. Its capital stock was fixed at \$5,000,000, with the privilege of increasing it to \$10,000,000. The shares were fixed at \$100 each. It could commence business when one-third of its shares were subscribed for, and

\$100,000 paid thereon. No special provision is made in the charter for the time and mode of paying subscriptions. The company was organized 12th December, 1865. Twenty per cent. of each share subscribed was paid in cash. It ceased business 20th September, 1866, and made an assignment for the benefit of its creditors, including in the assignment the unpaid amounts on the subscription to its stock. The assignee not proceeding properly, a bill was filed in the court of chancery at Richmond in behalf of creditors 7th November, 1871, to enforce the collection of assets and payment of the debts. On 14th December, 1880, a decree was made establishing debts to the sum of \$500,000, removing the assignee, appointing plaintiff trustee, and ordering calls on unpaid subscriptions, first for 30 per cent., then for the whole sum unpaid. The defendant was an original subscriber for 50 shares, and paid his 20 per cent. This action was brought on 2d August, 1886, to enforce payment of the remainder. On 12th January, 1876, defendant was adjudicated a bankrupt. On 4th January, 1878, he received his discharge. He sets up in defense to this action his discharge in bankruptcy and the statute of limitations.

CONCLUSIONS OF LAW.

As to the effect of the discharge in bankruptcy. Was the defendant released from this liability? He was, if this be a debt, claim, liability, or demand provable against his estate. Rev. St. U. S. § 5119. The able counsel for plaintiff contends that the remainder of the subscription for the 50 shares made by defendant was not a debt due and payable by the defendant when he was adjudicated a bankrupt, and that it was not a debt payable at a future day, (section 5067;) but that it was a contingent liability, the contingency whereof did not occur before the final dividend on the bankrupt's estate was declared, and that the present value thereof could not be ascertained. It was therefore not a liability included in the provision of section 5068, was not a provable debt, and was not released by the discharge.

The charter of this company authorized a certain capital, divided into shares of \$100 each. Every subscriber, when he made his subscription, agreed to take and pay for each share taken \$100. Mor. Priv. Corp. § 271. There is nothing in the act of incorporation allowing the company or its board of directors to reduce the value or price of the several shares, or to permit a subscriber to pay a part of the subscription price and be released from further payments thereon. There is nothing in the case to create the impression that any attempt was made to do this. If any such were made, it would have been null and void as to creditors. *Sagory v. Dubois*, 3 Sandf. Ch. 501; *Sunger v. Upton*, 91 U. S. 60. Nor was there anything said or done at the time of the subscription making the payment thereof conditional or contingent. For the same reason this also would have been void as to creditors. At the time of the subscription 20 per cent. only was paid in cash. This could not discharge the liability to pay the remaining 80 per cent., nor make it depend on a contingency. *Sawyer v. Hoag*, 17 Wall. 620; *Curran v. Arkansas*, 15

How. 307. The liability to pay was fixed; the time—the precise moment when to pay—may have been uncertain. The subscription was an absolute promise, *debitum in presenti*, a part possibly, *solvendum in futuro*. *Re Iron Works*, 20 Fed. Rep. 680. It constituted a part of the assets of the company, (*Myers v. Seeley*, 10 N. B. R. 411,) and as such was by it assigned for the benefit of the creditors,—became the property of the creditors, (*Sanger v. Upton*, *supra*; *Morgan Co. v. Allen*, 103 U. S. 498.) The subscriber was bound to pay it in full. If the corporation had been successful and thus in the uncontrolled direction of its own affairs, it may possibly have indulged its stockholders. Perhaps if its profits were sufficiently large it may have declared dividends with which the stockholder could have been credited upon his debt for subscription and in time have so paid up the debt. But when the insolvency occurred, in 1866, its capacity to do business was ended. It lost all self-control. Its existence continued for no other purpose than the realization of its assets and the payment of its debts. Its duty and the duty it devolved on its assignee was to collect in these assets immediately among them the unpaid subscription to stock and to pay the creditors. *Scovill v. Thayer*, 105 U. S. 154. This made the obligation of the subscriber to pay fixed and certain, immediate on demand; in other words, a debt. *Re Iron Works*, 20 Fed. Rep. 680. No action of the corporation, of its officers or its assignee, could discharge, alleviate, or extend this obligation. *Upton v. Tribilcock*, 91 U. S. 48; *Sanger v. Upton*, *supra*. But the subscriber was permitted to pay only 20 per cent. in cash. The other payments were to be made on calls by the company or its officers. The time or times, the proportion or proportions, of these calls were uncertain. It may be they were contingent upon the necessities of the company. Does this deprive the debt on the subscription of its provable character in bankruptcy? Here, then, we have an absolute promise to pay whenever called, “that is to say, a demand existing, the accrual of the cause of action thereon dependent on a contingency,”—the call. If so, it is provable in bankruptcy. *French v. Morse*, 2 Gray, 111. Let us assume that a call was necessary before payment could be required; that such call might never have been made, either through neglect of the corporation, its assignee, or its creditors; that thus the remainder of the subscription was “payable upon an event which might never have occurred,”—yet the contract of subscription and the liability of the defendant to pay were in full force when the petition of bankruptcy was filed. The sum for which he could be made liable was certain in amount,—\$80 per share. In the language of WAITE, C. J., in *Wolf v. Stix*, 99 U. S. 1, this clearly is such a case as was provided for in section 5068, Rev. St., and the debt was provable in bankruptcy. See also *Parbury's Case*, 64 Eng. Ch. 87. Let the complaint be dismissed.

This result renders unnecessary any discussion of the defense of the statute of limitations.

NOTE BY THE JUDGE. In the case of *Hawkins v. Glenn*, 9 Sup. Ct. Rep. 739, (May 13, 1889,) the supreme court of the United States decide that the statute of limitations is not a bar. That case was brought by the same plaintiff as in our case against a subscriber in like plight.

BARD v. BANIGAN,

(Circuit Court, D. Connecticut. June 17, 1889.)

1. PRINCIPAL AND AGENT—COMPENSATION OF AGENT.

Defendant, an experienced and successful rubber manufacturer, was employed by plaintiff's company, which was then in financial difficulties, and not succeeding well with its rubber business, to take entire charge of the business as managing agent, and as a part of the transaction he purchased 4,000 shares of its capital stock at a low price. He devoted his attention and active services to the business for over four years, when the company became insolvent. Frequently during the first year or two he stated that he was serving without compensation, but in this action, involving his right to a salary, he testified that he supposed his salary would be determined at the proper time, when the company became more prosperous, and that he would then be paid what was right for the past. There was no evidence of a contrary agreement. *Held*, that he was entitled to a reasonable salary (\$2,500 per year) from the beginning of his employment.

2. CORPORATIONS—PREFERRED STOCK—UNAUTHORIZED ISSUE.

A purchaser of preferred stock issued without express statutory authority, who voluntarily subscribed and paid for it for the purpose of promoting the scheme under which it was issued, and who was a promoter of the scheme, cannot hold it for 28 months after the conditions upon which it was issued have been fulfilled, and then, on the insolvency of the company, assert the invalidity of the stock, and recover back his money.

At Law. Action by Charles Bard, receiver of the Hayward Rubber Company, against Joseph Banigan, for money had and received.

Halsey & Briscoe, for plaintiff.

Doolittle & Bennett, for defendant.

SHIPMAN, J. This is an action at law which was tried by the court, the parties having by a duly signed written stipulation waived a jury trial, and agreed to a trial by the court. The first count of the complaint was for money had and received by the defendant for the use of the Hayward Rubber Company, before the appointment of a receiver. The second count was for money had and received for the use of the plaintiff, after his appointment as receiver. A stipulation between said parties is as follows:

"It is stipulated and agreed by and between the plaintiff and defendant in the above-entitled action that the balance due to the plaintiff from the defendant under the first count of the substituted complaint, exclusive of the disputed items of \$21,808.40 claimed by the defendant for services as general manager, and of \$17,550 had and received by Hayward Rubber Company in payment of preferred stock, is the sum of \$10,494.96, with interest thereon from December 15, 1887, and that the balance due to the plaintiff from the defendant under the second count of the substituted complaint is the sum of \$24,011, with interest from January 15, 1888."

The facts which upon such trial were found to be true, and which are true, are as follows:

The Hayward Rubber Company was a joint-stock corporation, for the manufacture of India rubber shoes, duly incorporated in accordance with the statutes of Connecticut, and located in Colchester, in this state. Its

capital stock was \$400,000. The par value of its shares was \$25. Before 1879 it had been a very profitable company, and had paid large dividends. Its last dividend was made in 1881. Thereafter its business deteriorated, and became unprofitable. In January, 1883, some of the principal stockholders endeavored to find a skilled rubber manufacturer, who would become interested in the company, and would oversee or direct its management, and would take the charge of selling its goods. Negotiations were entered into with the defendant, Joseph Banigan, who was president and general agent of the Woonsocket Rubber Company, and was a well-known and successful rubber manufacturer, which resulted in their agreeing to furnish him, and his agreement on January 12, 1883, to purchase, 4,000 shares of the capital stock of said company, at \$12.50 per share. The agreement was carried out, and on January 30, 1883, Mr. Banigan was appointed general agent by the directors, who defined his duties, which were, in general, that he was to have full control of the manufacturing, subject to their approval. No salary was then or ever designated, nor was any vote passed on the subject. Mr. Banigan still attended to his duties and business at Providence. He went to Colchester once in a week or fortnight, remaining there one, two, or three days, as the case might be. He entered actively upon the oversight of the business; laid out and arranged for new buildings; bought new machinery; ordered new lasts, tools, rolls, and cutting machinery; had automatic sprinklers put in the mill,—all at an expense of some \$120,000; inspected the new goods; secured the dismissal of old officers, appointed a new superintendent; caused a saving in the management of the business; and reduced the pay-roll, while not reducing the quantity of manufactured goods; and carried on correspondence with the new superintendent and the treasurer. He also purchased the supplies, except for three months, when he was in Europe. In April, 1883, the Woonsocket Rubber Company, 40 or 50 per cent. of the stock of which Mr. Banigan owned, became the selling agents of the Hayward Rubber Company, and so continued until 1886. At that time the various rubber manufacturing companies formed a corporation called the Rubber Boot & Shoe Selling Company, in which each company took stock, and which was to sell all the production of all the stockholders. The Hayward Rubber Company took about \$24,000 of stock. The agency continued a year, with disastrous results, particularly to the Hayward Rubber Company. The Woonsocket Rubber Company then declining to be its selling agent, Mr. Banigan became such agent, and sold all the goods thereafter, upon the same commission which had been paid to the Woonsocket Company. The amount of commissions was paid. In March, 1885, a committee of the directors, of which committee Mr. Banigan was a member, sent a circular to the stockholders, recommending an increase of the capital, by the issue of preferred stock to the amount of \$100,000, saying that it was desirable to have a unanimous vote in favor of the proposition, asking for proxies, and inclosing the proposed resolutions, which were to be submitted to a stockholders' meeting to be held on March 25, 1885. At said meeting the stock was increased \$100,000,

by the authorization of the issue of preferred stock entitled to cumulative dividends of 8 per cent. per annum, which should take precedence of all dividends on the common stock and any future additions thereto, and which preferred stock could be retired when the financial condition of the company would warrant, in such amounts and at such times as might be determined on by vote of the stockholders, at par and accrued dividends, and such retirement should be *pro rata*. The votes in regard to the issue of preferred stock were passed by a unanimous vote of the shares present or represented at said meeting at a time when said votes were taken; being 13,404 shares. The whole number of shares was 16,000. One stockholder of record holding stock hypothecated to it, subsequently brought to the proper state court a petition for an injunction against the issue of said preferred stock, but discontinued or withdrew said petition. Each stockholder had the privilege of subscribing to said preferred stock in proportion to the number of shares of existing stock by him owned. If any stockholder neglected, for a specified time, to subscribe for his portion of preferred stock, the same could be disposed of by the treasurer, for the use of the company, at not less than par. Mr. Banigan subscribed for 702 shares of the preferred stock, and on April 2, 1885, paid the company therefor \$17,550, and received a certificate for said shares, which contained, in substance, the provisions of said votes. Shares to the amount of \$25,000 in all were subscribed for. The subscription agreement which Mr. Banigan and the other subscribers signed was as follows: "We, the undersigned, herewith subscribe for the number of shares of the preferred stock of the Hayward Rubber Company affixed opposite our names." The defendant voted upon his stock at one or two annual meetings thereafter. On June 26, 1885, he wrote to Potter, Lovell & Co., note brokers of Boston, inclosing a statement of the company's affairs, and saying that it had arranged to issue \$100,000 preferred stock, but "only one-quarter of it has yet been issued, which I have taken principally." No claim for the repayment of this \$17,550 was made until 1888. No certificate of the increase of capital stock was filed in the office of the secretary of state, or of the town-clerk of Colchester.

Mr. Banigan continued to be the general agent until the company went into the hands of a receiver, on August 9, 1887. No charge was made by him on the books of the company and no claim was made for salary until after the appointment of the receiver. At the annual meeting of the stockholders in January, 1884, he said to them that he was serving the company without compensation. At another subsequent meeting of the stockholders, when his management was criticised, he justified it, and said that he was not receiving compensation for his services. On May 26, 1887, he wrote to the treasurer criticising a neglect to receive the company's goods from the selling company, and said: "I am not under pay by the Hayward Rubber Company, and I should not be expected to look after such business, but, if no one gives it any attention, I feel it incumbent on myself to protect the company." He testified, upon cross-examination, that he supposed his salary would be

determined at the proper time, when the company was in funds; and, further, that he supposed when the company got in good condition he was to have a salary. There was no understanding, express or implied, that he was to have no salary in consideration of the sale of 4,000 shares at \$12.50 per share. Nobody testifies to that effect. He made a large investment in the stock, at a price supposed to be cheap, in the expectation that it would be a profitable one. The stockholders wanted him to become pecuniarily interested in the company, and so he stimulated to render it valuable services and assistance. He thought that the company was not in a condition to pay large salaries, and was out of funds, and therefore took no money and made no charge. When it became prosperous, he expected to have a large salary for the future, if he remained in the company, and that he would be paid something that was in the way towards compensation for the past. He trusted that future success would enable him to be compensated. He thus truthfully said that he was serving without pay. He was not at that time receiving, and it might be that he would never receive, pay. I find no agreement between the parties for service without compensation, and no abandonment on the part of Banigan of a claim for some compensation for the current service, but the subject was one to be determined at a future time, when the company was pecuniarily able to determine it. He was serving upon a contract that he should have payment in the future, and his conduct and testimony show that the time and amount of payment were to be contingent upon the time when, and the sum which, the company should be able to pay. In now ascertaining the proper amount, the contract is to control and reference is to be had to the financial ability of the company, as well as to the amount of services, and what would have been the market value under other and different circumstances. The company is now insolvent, and unable to pay its creditors in full. Mr. Banigan actually served from January 13, 1883, to August 9, 1887, except an absence of about three months, and is entitled to compensation for the period of four years and four months at the rate of \$2,500 per annum, being \$10,833.33.

The claim for \$17,550 rests upon a question of law. The contention of the defendant is that, inasmuch as the statutes of Connecticut simply allow a joint-stock company to increase its capital stock, and the articles of association gave no authority to make preferred stock, it was beyond the power of the Hayward Rubber Company to create such a class of stock, and there was a total failure of consideration for the contract; that no estoppel can exist against the assertion of the invalidity of the stock; and that the defendant is entitled to recover the amount paid by him from the corporation. The text-books announce the doctrine that, in the absence of authority in the charter or statutes or articles of association to make a preferred or a special stock, and in the absence of unanimous consent on the part of the stockholders preferred stock cannot be created. Mr. Beach, whose learning on the subject of corporations made any utterance of his on that subject valuable, said, in his treatise on the joint-stock act of Connecticut, (page 25:) "It seems to

be a valid objection to the issue of preferred shares that it impairs the existing equality among the stockholders, but no good reason can be assigned why the articles of association may not lawfully provide for the issuing of such preferred shares, and probably the issue of such shares by the unanimous consent of all the stockholders of an existing company would be held valid." For the purposes of this case I shall assume that, the unanimous consent of all the stockholders not having been affirmatively expressed by vote or by equivalent act, the preferred stock was invalid. If so, the acquiescence of the stockholder cannot give it validity, and he is not estopped from asserting that it is invalid. *Scovill v. Thayer*, 105 U. S. 143. If a stockholder could be estopped, Banigan would necessarily be, because he was one of the promoters of the scheme, urged his co-stockholders to buy, voted upon it, and, for the purpose of favorably explaining the company's position to the firm which was to take and negotiate its paper, asserted that it could issue preferred stock, and had done so, to the amount of \$25,000.

Notwithstanding the Massachusetts authorities to the contrary, (*Tube-Works v. Machine Co.*, 139 Mass. 5, *Reed v. Machine Co.*, 141 Mass. 454, 5 N. E. Rep. 852,) I am not favorably impressed with the doctrine that, as against the assignee or receiver of an insolvent corporation, the owner of preferred stock, who has voluntarily subscribed and paid for it for the purpose of promoting the scheme, and has received his certificate therefor, and the terms and conditions upon which the subscription was made have been fully complied with by the corporation, can recover the amount paid. In *Winters v. Armstrong*, 37 Fed. Rep. 508, Judge JACKSON guards against such a broad principle, and it is not in accordance with the teaching of *Scovill v. Thayer*, *supra*.

If he can recover the amount from the insolvent estate, in a case where there is no claim of an unfulfilled condition, it is upon the theory of a rescission of the contract, because the stockholders had received nothing of value. *Tube-Works v. Machine Co.*, *supra*; *Allen v. Herrick*, 15 Gray, 274. This rescission must be made within a reasonable time. In this case Mr. Banigan paid for his stock, April 2, 1885, and was still a stockholder when the receiver was appointed, August 9, 1887. I do not think that the preferred stockholder who voluntarily creates stock of this kind, for this Mr. Banigan virtually did, can hold it for 28 months in the hope of dividends, and then, upon finding the company insolvent, come in as a creditor and receive back his money. Let judgment be entered for the plaintiff for the sum admitted in the stipulation to be due upon the second count, with interest from January 15, 1888, to June 15, 1889; the amount being \$26,051.93. The amount admitted to be due upon the first count is \$10,494.96, and with interest from December 15, 1887, to June 15, 1889, is \$11,439.50. The amount due from the corporation to the defendant for his salary, and a proper set-off against the last-named sum, is \$10,833.33, which with interest from August 9, 1887, to June 15, 1889, is \$12,033.83. The excess, being \$596.33, is a proper claim for a dividend against the insolvent estate.

HALL v. GALVESTON, H. & S. A. Ry. Co. *et al.*

(Circuit Court, W. D. Texas, San Antonio Division. May 25, 1889.)

1. MASTER AND SERVANT—FELLOW-SERVANTS.

A telegraph operator is not a fellow-servant with a brakeman.

2. SAME—RAILROAD COMPANIES—RULES.

Under rules requiring a telegraph operator "to report defects in roads and bridges, or obstructions of any kind, wherever met, to the superintendent, and, if possible, to the nearest section master or bridge foreman," it is the operator's duty to report such defects, etc., when they come to his knowledge, whether he is requested to do so by another employe or not.

3. DEATH BY WRONGFUL ACT—DAMAGES.

In an action by a father for damages for the negligent killing of his son, under Rev. St. Tex. art. 2909, limiting the damages in such cases to pecuniary loss only, the jury may consider the circumstances of the son, his occupation, age, health, habits of industry, sobriety, and economy, his annual earnings, and his probable duration of life at the time of the accident; also the amount of property, age, health, and probable duration of plaintiff's life, and the amount of assistance he had a reasonable expectation of receiving from the son.

At Law. Action for damages for negligent killing.

McLeary & King and *H. H. Boone*, for plaintiff.

Columbus Upson, for defendants.

MAXEY, J., (*charging jury*.) The plaintiff, Lemuel H. Hall, as the surviving father of Lemuel R. Hall, deceased, brings this suit against the Galveston, Harrisburg & San Antonio Railway Company and the Southern Pacific Company, to recover damages resulting from the death of his son, Lemuel R., growing out of injuries received by the son at Hondo river bridge while in the service of defendants as a brakeman. The cause of the disaster, as claimed by the plaintiff, and the death of his son, will be stated to you partially in the language of the petition, as follows: "That the proximate cause of the said injury done to the said Lemuel R. Hall, resulting in his death, was the defective and unsafe condition of the said defendants' railroad bridge across the Hondo river, and the track laid thereon; that the said bridge was at the time of the said disaster so broken and damaged as to be wholly unfit for trains to pass over, and incapable of bearing the weight of an ordinary engine and train of cars." The petition of plaintiff further alleges that the son of plaintiff was ignorant of the unsafe condition of the bridge, and believed it to be perfectly safe, and sufficient to support the weight of the train on which he was riding; "and although the defendants well knew that said bridge was unsafe and insufficient to support the weight of locomotives and trains crossing the same, yet they wholly failed and neglected to repair the said bridge and track thereupon, and to put the same in good and safe condition for the use of their employes, and even wholly failed and neglected to warn the said Lemuel R. Hall and their other employes of the unsound, unsafe, and dangerous condition of the said bridge, but suffered them unawares, in the discharge of their duty to the defendants, to rush headlong upon certain death."

The defendants, in their answer, deny plaintiff's right to recover on the following grounds: (1) That the bridge was a good and substantial structure, and in a good state of preservation and repair, and hence that the injuries resulting to the deceased, Hall, from its giving away, were included in the risks assumed by him upon entering the service of defendants; (2) that Hall, the deceased, was guilty of negligence which contributed directly to his injuries; and (3) that, if there was any negligence at all on the part of defendants in connection with the accident which befell plaintiff's son, it was the negligence of a fellow-servant, for which the defendants are not liable.

In order to relieve this case of the irrelevant matter which has crept into it, I propose to direct your attention to what I regard as the real issues in the controversy, and, with that view, you are instructed that the following facts are indisputably shown by the testimony: (1) On the 1st day of March, 1888, two trains of cars of the defendants—one going east and the other west—met at Hondo City, a station on the line of the road, from three to five miles west of Hondo river. (2) The west-bound train was a regular freight train, and the east-bound train was what the witnesses term an "extra." (3) Thayer was the conductor, Crowley the engineer, and Erkel was one of the brakemen, on the west-bound train. On the east-bound train Davidson was the conductor, Hilliard the engineer, and Hall (the plaintiff's son) and Hardesty were the brakemen. (4) Prior to reaching Hondo City, at the date mentioned, the west-bound train, partially laden with lumber, passed over the Hondo river bridge, which was, before the crossing of that train, in a good and safe condition. While this train was passing over the bridge, a heavy piece of bridge timber fell from one of the cars on the bridge; and it is not denied by either side that this piece of timber, in falling, injured the bridge; but the train then on the bridge passed over safely. (5) The east-bound train left Hondo City between 10 and 30 minutes after the arrival there of the train going west. This train (the east-bound train) continued east at a rapid rate of speed, and in passing over the Hondo river bridge the structure gave away, and in the disaster plaintiff's son was so severely injured that he died within a few days thereafter.

The facts of this case develop nothing, prior to the crossing of the bridge by the west-bound train, which would render the defendants liable in this suit, and you are so instructed. And the mere fact, gentlemen, disconnected from other facts, that a good, substantial railway bridge, in a state of safe preservation and in good repair, suddenly gives away under the weight and force of a moving train, would not render the company liable in a suit brought by an employé for injuries resulting therefrom; for in that case the injury would be included in the risks assumed by him in entering the service of the company for which no liability would attach to the latter. But the petition of the plaintiff alleges that the defendants failed and neglected to warn the deceased of the unsafe condition of the bridge, but suffered him and his co-employés to rush headlong upon sudden death. In support of this allegation it is insisted by the plaintiff that the engineer, Crowley, and the telegraph operator at Hondo City, (the latter being also

in the employ of the defendants,) although having knowledge that the bridge crossing Hondo river was defective, failed to report its defective condition to the superintendent, or the nearest section-master or bridge gang, and because of their failure so to do the train upon which deceased was working (with Davidson as conductor) proceeded down the track, without notice or warning of the dangerous condition of the bridge, and thus the disaster was precipitated.

Now, in this connection, you are instructed that, if Crowley was negligent in the performance of his duties, his negligence would not be imputable to the defendants, and they would not be liable therefor for any injuries which may have resulted to the deceased, for the reason that Crowley and the deceased were fellow-servants. But the rule of law as to fellow-servants would not exempt the defendants from liability for the negligence of Sale, the operator, (if any has been shown by the testimony,) if the injuries of deceased resulted from such negligence, because the operator and deceased did not occupy, with reference to each other, the attitude of fellow-servants in the sense of exempting an employer from liability to a servant for the negligent acts of a fellow-servant. Now, was Sale negligent in failing, as claimed, to report the condition of the bridge to the superintendent and the other officers above named, if he knew the bridge was injured? That he did not make a report to the superintendent admits of no doubt, as he so testified himself. Rules of the defendants have been introduced in evidence to show that it was the duty of Sale "to report defects in roads or bridges, or obstructions of any kind, wherever met, to the superintendent, and, if possible, to the nearest section master or bridge foreman." Sale testified that it was not his duty to telegraph reports in reference to bridges, etc., unless requested by some employé of the company. You are charged that, under the rules admitted in evidence, it was his duty to make reports as required by the rules, whether he was requested to do so by any other employé or not, if he knew of the existence of the rules; and of his knowledge in that regard you must satisfy yourselves from the testimony. It is shown by the testimony that Sale knew that a heavy bridge timber had fallen on the bridge from Crowley's train; and you are instructed that, if he knew of the existence of the rule to which I have referred, and knew that the bridge had been probably injured by the falling timber, and was wanting in the exercise of such reasonable care in not reporting the condition of the bridge to the superintendent, as a person of ordinary prudence and caution would have exercised, then such failure of duty of Sale was negligence; and if the injuries of the deceased resulted from such negligence on the part of Sale, the defendants would be liable in this suit, and in that event your verdict should be for the plaintiff, unless the deceased, Hall, was himself guilty of negligence which contributed to his injuries. The defendants insist that he was so negligent, in that Hall knew of the defects in the bridge, and, notwithstanding his knowledge, continued on the train, and carelessly exposed himself to the impending danger. Upon this point, gentlemen, the law requires a man to take due and reasonable care for his own safety, and,

failing in that, he will not be permitted to recover damages for injuries which he brings upon himself. If the deceased knew that the bridge was dangerous, from information received from Crowley or Davidson, or from any other source, and did not avail himself of the knowledge acquired for his own safety, and if he failed to exercise that reasonable care for his own preservation as an ordinarily prudent person would have exercised in a similar situation, and under like circumstances, and his injuries resulted therefrom, then the plaintiff would not be entitled to recover, and your verdict should be in favor of the defendants.

The plaintiff in this case does not contend that the injuries of his son resulted from any act of negligence on the part of the conductor, Davidson, and therefore that feature of the case will not be submitted to your consideration.

The questions, touching the alleged negligence on the part of Sale, the telegraph operator, and contributive negligence on the part of the deceased, Hall, are questions purely of fact, and remitted solely to your determination, and you must form your conclusions in reference to them from a consideration of all the facts and circumstances before you. You have heard the testimony of the witnesses, both for plaintiff and defendants, and have observed their demeanor upon the stand, and their manner of testifying. Of their credibility you are the exclusive judges, as well as of the weight to be attached to their testimony. With these principles of law as a guide, consider the case, and render such a verdict as the law and testimony may warrant. If, in view of the evidence and the foregoing instructions, your finding should be in favor of the defendants, you will go no further, and simply render a verdict in their favor; but, if you find in favor of the plaintiff, you will proceed to determine the amount of damages which you should award him, and upon this question it will be necessary for the court to give you instructions.

This suit, you are aware, is brought, not by the person injured in the bridge disaster, but by his father. The measure of damages in the two cases is entirely different. In both, the amount is left largely to the discretion of the jury, but that discretion must be exercised in view of the evidence, and should not be a matter of mere guess-work and speculation. In suits of this character, instituted by the father for the negligent killing of his son, the father is not entitled to recover anything for physical suffering, or mental pain and anguish, endured on account of the son's death; nor can he recover damages because of the loss of the son's society, (see *Railroad Co. v. Barron*, 5 Wall. 105; *March v. Walker*, 48 Tex. 375;) nor, under the facts of this case, is the plaintiff entitled to recover punitive or exemplary damages. The statute, which authorizes the maintenance of suits "for injuries resulting in death," provides that "the jury may give such damages as they may think proportioned to the injury resulting from such death." Rev. St. art. 2909. It is necessary for the plaintiff, in cases of this kind, to show a damage of a pecuniary nature; yet such damages are not to be given merely in reference to the loss of a legal right, but may be calculated with reference to the reasonable expectation which the plaintiff had, resulting from his

condition, and the disposition and ability of his son, during his life, to bestow upon him pecuniary benefit as of right, or in obedience to the dictates of filial duty without legal claim. *Railroad Co. v. Kindred*, 57 Tex. 498. The damages in this case, if any are awarded, being for the pecuniary loss only, sustained by the plaintiff on account of the death of his son, it is incumbent upon the plaintiff to prove such facts and circumstances as will enable the jury to return a verdict upon the evidence which would approximate reasonable certainty; and the testimony may include the circumstances of the deceased son, his occupation, age, health, habits of industry, sobriety, and economy, his skill and capacity for business, the amount of his property, his annual earnings, and the probable duration of his life. *Railroad Co. v. Cowser*, Id. 304. And so the testimony should include the circumstances of the plaintiff, his age and health, the amount of his property, and the probable duration of his life. How long, gentlemen, under the testimony in this case, will be the probable duration of the plaintiff's life, dating from his son's death, and how much pecuniary assistance would he have had a reasonable expectation of receiving from his son, had he lived? These are important questions for you to consider, and their solution is involved in some difficulty. It is shown by the testimony that, at the date of his son's death, plaintiff was 57 years old, and in feeble health, and that prior to that time the son had sent him sums of \$40 or \$50, as plaintiff had asked for them. The testimony further shows that the son had urged plaintiff to move elsewhere,—that is, change his residence for his health,—and promised and pledged plaintiff to give him \$40 or \$50 per month. Calling your attention to that promise on the part of the son to give plaintiff that sum of money monthly, you are instructed that the son, had he lived, would not have been compelled to pay that amount of money monthly to his father. He would have been under no legal obligation to do it, but could have paid it to him or not, at his option. In connection with the question of damages you may also regard the contingency of the son's marriage, had he lived, and whether that circumstance would have affected—either in increasing or diminishing—the sum which the son would probably have contributed to the support and maintenance of the plaintiff.

Consider all the facts and circumstances in evidence, and return such a verdict as you may deem right and proper, in view of the testimony and these instructions.

FOOTE v. MASSACHUSETTS BEN. ASS'N OF BOSTON.

(Circuit Court, N. D. New York. June 13, 1889.)

SERVICE OF PROCESS—OBJECTIONS WAIVED.

A general appearance by the defendant in an action is a waiver of the objection that the service of summons on him was irregular, because not made in the district of which he was an inhabitant, as required by act Cong. March 3, 1887.

At Law. On motion to vacate certain orders.

William Blaikie, for the motion.

J. K. Hayward, *contra*.

WALLACE, J. This action is brought upon a policy of life insurance. The requisite diversity of citizenship to confer jurisdiction of the controversy upon this court exists between the parties; the plaintiff being a citizen of this state, and the defendant a corporation of Massachusetts. The action was commenced by the service of a summons upon the agent of the defendant designated to receive service of process within this state, pursuant to the provisions of the state laws requiring foreign insurance companies doing business here to designate such an agent. Before the time for answering expired, the defendant, by its attorney, entered a general appearance in the action. This was in November, 1887. From that time until March, 1888, no formal proceedings appear to have been taken in the action, but negotiations seem to have been carried on between the parties, and the time for serving pleadings was extended from time to time by stipulation between the attorneys. In March the defendant made an application to the court for leave to substitute another attorney in lieu of the one who had appeared for it, and to withdraw the notice of appearance which had been served by him with leave to enter a new appearance *nunc pro tunc*. The plaintiff's attorney did not receive notice of this application, owing to his absence from the state, and no one represented the plaintiff when the application was brought to a hearing. The application was granted, and leave was given to the defendant in effect to enter a special appearance for the purpose of moving to vacate the service of the summons which had been made upon its agent. The defendant, by its new attorney, then made an application to the court to vacate the service of the summons upon the ground that the defendant was not an inhabitant of the district in which the service was made. The plaintiff's attorney failed to receive notice of this application also, owing to his absence from the state. No one appeared for the plaintiff upon the hearing of that application, and the court made an order dismissing the action, and vacating the service of the process. Notice of both applications was duly served by mail upon the plaintiff's attorney by the attorney for the defendant, and the orders authorizing the special appearance and vacating the service of the process were in all respects regular. A motion has now been made for the plaintiff, upon affidavits explaining and excusing the neglect of her attorney to appear upon the

hearing of the applications, to vacate the orders. Although the affidavits show quite grave laches on the part of the plaintiff's attorney, they are not of such a gross character as to be wholly inexcusable; and it would be a great hardship upon the plaintiff to deprive her of an opportunity of having the questions involved in the action disposed of upon their merits. The policy in suit contains a condition which provides that no suit shall be brought upon it unless commenced within one year from the death of the assured; and, as the suit was not commenced until the year had nearly expired, the defendant apparently would have a complete technical defense to any action upon the policy brought after the order dismissing the present action was made. Undoubtedly, under the provisions of the act of March 3, 1887, the service of process upon the defendant, as made in this suit, was irregular. That act confers the privilege upon a defendant to be sued by the service of process upon him exclusively in the district of which he is an inhabitant. Consequently jurisdiction of the person of the defendant, in the sense that effective service of process is requisite to such jurisdiction, was not acquired by the service made here. No doubt, however, is entertained that the privilege of the defendant may be waived just as it could have been under the first section of the act of March 3, 1875 which was a repetition of a provision of the judiciary act of 1879. Under the former acts it was always held that, notwithstanding the provisions requiring process to be served in the district only in which the defendant could be found, if it was served elsewhere, and the defendant appeared generally in the action, the court had jurisdiction to proceed; and the appearance of the defendant was a waiver of the right to raise the objection. It is unnecessary to cite the numerous adjudications to this effect. It is sufficient to refer to one in this court,—*Kelsey v. Railroad Co.*, 14 Blatchf. 89; and to two in the supreme court,—*Jones v. Andrews*, 10 Wall. 327, and *Atkins v. Disintegrating Co.*, 18 Wall. 272. The latter citations are referred to especially because they meet one of the positions taken in the present case by the counsel for the defendant. He contends that an appearance, not accompanied by a plea, answer, or demurrer, is not a waiver of the objection; and cites the case of *Reinstadler v. Reeves*, 33 Fed. Rep. 308, as sustaining his position. With the exception of that case no authority in support of this contention is found in the decisions of the federal courts. In *Jones v. Andrews*, the only appearance of the defendant was by a motion to dismiss the bill for want of jurisdiction apparent upon the face of it, and the court held that by moving to dismiss the bill for want of equity the defendant waived the objection that he was not properly served with process, saying: "After this the question of jurisdiction over the person was at an end." In *Atkins v. Disintegrating Co.*, there was an entry in the record of an admiralty case that an attorney "appears for the respondent, and has a week to perfect an appearance and answer," and it was held that such an appearance precluded him from raising the objection by answer of want of jurisdiction of the person. If the defendant in this case had appeared specially for the purpose of moving to vacate the service of the summons it would

have saved its right to object to the jurisdiction. Not having done this, and having continued to recognize the action as properly brought from November until the following March, it should be held that the defendant has waived its privilege to object. The defendant has been subjected to expenses consequent upon the default of the plaintiff to appear when the two orders were made. The questions that have been discussed now could have been properly disposed of at that time. The defendant should be indemnified against the unnecessary expense which it has thus been obliged to incur because of the laches attributable to the plaintiff. The order dismissing the action will be vacated, and the order substituting a new attorney for the defendant modified by striking out that part of it which in effect withdraws the general appearance of the defendant, upon condition of the payment by plaintiff to defendant of its expenses incurred by the laches of the plaintiff's attorney, to be ascertained, if necessary, by a reference to the clerk.

CONSOLIDATED ROLLER-MILL Co. v. COOMBS.

(Circuit Court, E. D. Michigan. May 20, 1889.)

1. PATENTS FOR INVENTIONS—MECHANICAL EQUIVALENTS.

A patentee, whose claims have been restricted by the action of the patent-office, is not thereby limited to the exact language of his substituted claims, nor deprived of the benefit of the doctrine of mechanical equivalents.

2. SAME—INFRINGEMENT—PRIOR STATE OF THE ART.

What will be considered an infringement of such claims depends largely upon the state of the art as it existed at the time the patent was issued.

3. SAME—CONSTRUCTION.

The prime object in construing a patent should be to preserve to the patentee his actual invention, if this can be done consistently with the language he has himself chosen.

4. SAME—ROLLER-MILLS MACHINERY.

Patent No. 222,895, issued to Gray for an improvement in roller grinding-mills, is valid, and is infringed by what is known as the "Mawhood Machine," although the devices used in the latter differ in form and location from the patented devices.

5. SAME—NOVELTY.

Patent No. 289,518, issued to Daniel E. Dowling for a feed mechanism for roller mills, is invalid for want of novelty.

6. SAME.

Patent No. 274,508, issued to D. W. Marmon for a simultaneous adjustment of both ends of the counter shaft of a roller-mill, is invalid for the want of novelty, and also because the same device had previously been patented to Marmon and Warrington.

7. SAME—RIGHT TO PATENT.

A concession of priority by a patentee to a later applicant for a patent upon the same device, after the prior patent has been issued, does not justify the issue of a second patent.

8. SAME—REISSUE.

No one can take out a patent, either severally or jointly with another, for an invention, and, after the patent is issued, without reservation in his original application, obtain a second patent, with broader claims, for the same device.

9. EQUITY—OBJECTION TO JURISDICTION.

The objection that plaintiff's remedy is at law should be taken by demurrer if the want of jurisdiction appears upon the face of the bill; if not, it should be set up by plea or answer, and called to the attention of the court at the earliest opportunity. The objection comes too late if made at a hearing upon the merits.

In Equity.

This was a bill to recover damages for the infringement of letters patent No. 222,895, issued to William D. Gray, December 23, 1879, for "an improvement in roller grinding-mills;" patent No. 289,518, issued to Daniel E. Dowling, December 4, 1883, for a "feed mechanism for roller-mills;" and patent No. 274,508, issued to D. W. Marmon, March 27, 1883, for a "roller-mill." The invention covered by the Gray patent was stated in the preamble to consist "in a peculiar construction and arrangement of devices for adjusting the rolls vertically as well as horizontally, whereby any unevenness in the wear of the rolls, or in their journals or bearings, may be compensated for, and the grinding or crushing surfaces kept exactly in line," and also "in the special devices for separating the rolls when not in action, and in other details." The Dowling patent was essentially for an agitator centrally located within the hopper of the roller-mill, above the grinding-rolls, "and provided with teeth or fingers arranged to reciprocate immediately above the surface of the feed-roll, and lengthwise thereof. * * * To loosen and disintegrate the material and distribute it in a free condition upon the surface of the feed-roll, in such manner that its delivery from the hopper is effected in a thin continuous sheet, which is delivered from the surface of the feed-roll directly to the surface of the grinding-rolls thereunder." The Marmon patent related to a counter-shaft parallel with the roll-shafts, and simultaneously adjustable at each end, so as to tighten or loosen the belts at both ends of the machine at one operation.

The defendant, by his answer and proofs, made the following defenses: (1) That the Gray patent is so circumscribed by reason of the limitations voluntarily made by the applicant or imposed by the commissioner of patents, and accepted as a condition precedent to the grant, that it does not cover defendant's machine, or any part thereof. (2) That the features of defendant's machine are found in many prior patents recited in the answer, and introduced in evidence. (3) That in view of the state of the art, as shown by prior patents and publications, the Gray patent is invalid for want of novelty. (4) That the plaintiff has never been engaged in the manufacture, sale, or use of the alleged inventions covered by its patents, denies that the same are of value, or that plaintiff is entitled to damages. The chief defenses to the Dowling and Marmon patents are want of invention, in view of the prior state of the art.

Rodney Mason, for plaintiff.

Joseph G. Parkinson and Robert H. Parkinson, for defendant.

BROWN, J. The ancient system of reducing wheat to flour by grinding between revolving stones, which obtained from the earliest historical period, has, within the last 20 years, largely given place to the system

of crushing between rolls, which seems to have originated in Buda-Pesth, in the kingdom of Hungary. These roller-mills, which, soon after their invention, were introduced into this country, and have practically superseded in all large flouring-mills the old-fashioned method of grinding, consist generally of two or more pairs of rollers mounted in a strong frame, and, as a rule, lying in the same horizontal plane. One of these rolls is fixed, and mounted in a stationary bearing, but is susceptible, of course, of revolution. The other is mounted upon an adjustable bearing, which permits it to yield or give way in case any hard substance enters between them. While these rolls are not in actual contact when grinding, they are very nearly so, and their adjustment is a matter of extreme nicety. That the wheat may be ground, and not merely crushed, it is necessary that the rolls be corrugated upon their surfaces, and driven at differential speeds, so as to give them a rubbing or tearing, as well as a crushing action; and, when driven by belts it is customary to drive one roll in each pair by a belt at one end of the machine, and the other roll by a belt at the opposite end. A counter-shaft is run through the machine from end to end, beneath the rolls, and driven by a line-shaft or suitable motor, and provided with pulleys over which the belts at each end of the machine are thrown, thereby driving the rolls with which these belts connect. It is desirable that the axes of the rolls shall always be parallel with each other, and to accomplish this the bearings of the moveable roll are made independently adjustable, both vertically, to bring the two rolls of a pair axially into the same plane, and horizontally, so that their surfaces may be exactly parallel, or else they will grind unequally. This adjustment should be so arranged that it can be made with one hand, while the other is feeling the product of the mill as it issues from the rolls. The adjustment must be absolutely rigid, so that the work may be uniform; and yet the faces must never come in contact, since that would ruin their surfaces. Above the grinding rolls is arranged a hopper, at the bottom of which is a long narrow opening, parallel with and above the line of the two rolls. This opening is nearly closed by a feed-roller, which by its revolution is intended to carry the material in an even, regular stream to fall between the grinding-rolls.

The Gray patent relates to the adjustment of the rolls, both to preserve their parallelism, their grinding distance, and the pressure of the moveable against the fixed roll. The Dowling patent relates to the feeding of the material in the hopper to the rolls; and the Marmon patent to the adjustment of the counter-shaft to tighten or loosen the belts at each end of the machine simultaneously.

THE GRAY PATENT.

We will proceed to consider the Gray patent, No. 222,895,—the first and most important in this case. As before stated, this patent relates to the means for adjusting the rolls both vertically and horizontally, the requisites of such adjustment being that it must be fixed and permanent, and at the same time be capable of yielding to a breaking strain, in case a hard substance enters between them, and at the same time of returning

to their original position without a readjustment. They must also be capable of a vertical adjustment, or an adjustment for "tramming," as it is called, so that in case of irregular wearing of the surfaces or bearing the axes may be brought exactly in line. Seven claims are made in the patent, the second, third, fourth, and fifth of which are alleged to be infringed. That part of the preamble which refers to devices for adjusting the rolls vertically as well as horizontally, relates to the subject-matter of the second and third claims, and that clause referring to the special devices for separating the rolls, relates to the subject-matter of the fourth and fifth claims.

An important question connected with this patent is the construction to be given to it in view of the limitations or restrictions imposed upon the original claims by the commissioner of patents. In his original specifications filed with his application, Gray stated his invention to consist "in devices for adjusting the rolls, vertically, as well as horizontally, whereby any unevenness in the wear of the rolls or their journals or bearings may be compensated for, and the grinding or crushing surface kept exactly in line," and also, "in the devices for separating the rolls when not in action." His claims correspond with his evident belief that he was the inventor, broadly, of devices for a roll adjustable both vertically and horizontally, and were as follows:

"(2) In combination with a stationary roll, an adjustable roll, mounted substantially in the manner described, whereby it may be adjusted both vertically and horizontally.

"(3) In a roller grinding-mill, a roll mounted at its ends in arms or supports, arranged to be independently adjusted, both vertically and horizontally, substantially in the manner described.

"(4) In combination with the roll, C, the independent arms or supports, D, mounted upon eccentrics, substantially as shown, whereby either end of the roll may be adjusted vertically.

"(5) In combination with the stationary roll, B, and adjustable roll, C, means substantially such as described, for drawing the roll, C, to a fixed point."

His application, in such form, was refused by the commissioner of patents in a letter dated August 14, 1879, notifying Gray that "the invention alleged and claimed in this case is not generic in view of the English patent No. 3,328, of 1877, this being known as the 'Lake English Patent.'" Gray thereupon concluded to submit to this opinion of the commissioner, and immediately amended his application by two insertions in the preamble, so that, instead of reading "consists in devices for adjusting the rolls vertically as well as horizontally," it reads "consists in a peculiar construction and arrangement of devices for adjusting the rolls vertically as well as horizontally," and by inserting the word "special" before the words "device for separating the rolls when not in action." Pursuant to the same intimation of the patent-office, Gray also amended his claims to read as follows:

"(2) In a grinding-mill, the combination of a roll, an upright, swinging arm at each end of said roll; an eccentric, adjustable pivot located at the lower end of said arm; and devices, substantially such as shown, acting against the upper end of the arm.

"(3) The combination of a roll and upright, swinging arms, having their lower ends mounted on vertically adjustable pivots, the latter thus serving both to sustain and adjust the rolls.

"(4) In combination with the movable roller-bearing, the rod, G, adjustable stop-devices, to limit the inward movement of the bearing; an outside spring, urging the bearing inward, and adjusting devices, substantially such as shown, to regulate the tension of the spring.

"(5) In combination with the roller-bearing, the adjusting rod, provided at one end with a stop to limit the inward movement, a spring, and means for adjusting the latter, and provided at the other end with a stop and holding devices, substantially as shown and described."

Now, if the plaintiff be limited to the literalism of these claims, and is denied the benefit of the ordinary doctrine of equivalents, as contended by the defendant, then it is clear the defendant does not infringe, since he has neither an eccentric adjustable pivot, nor a pivot located at the lower end of the swinging, sustaining arm, nor devices of any kind acting against the upper end of the arm. Authority for the proposition that plaintiff is limited to the exact language of his claims, where limitations and restrictions have been imposed upon the original claims by the patent-office, is claimed to be found in numerous decisions of the supreme court, to the effect that limitations introduced by the applicant are binding upon him, even if his actual invention be larger than his claim; that claims accepted by the patentee cannot be enlarged, and, when a claim is restricted as to specific elements, all are regarded as material; that this is particularly true of limitations introduced after rejection; and to ascertain what these limits are the court is not confined to the face of the patent, but may take into consideration the proceedings in the patent-office, in construing the meaning and scope of the claims, and for that purpose can go to the file-wrapper and contents of the original applicants. In the recent case of *Rodebaugh v. Jackson*, 37 Fed. Rep. 882, we had occasion to consider the most prominent of these cases, notably that of *Sargent v. Lock Co.*, 114 U. S. 86, 5 Sup. Ct. Rep. 1021, in which it is broadly stated in the opinion of the court—

"That in patents for combinations of mechanism, limitations and provisos, imposed by the inventor, especially such as were introduced into an application after it had been persistently rejected, must be strictly construed against the inventor and in favor of the public, and looked upon as in the nature of disclaimers."

Upon an examination of the other cases upon the same subject, however, we came to the conclusion that nothing more was intended than that where, under the state of the art and the action of the patent-office, a patentee of a combination has modified and limited his claims, he shall be held strictly to his combination as he has described it. What shall be considered as an infringement must depend largely upon the state of the art as it existed at the time the patent was issued. It has always been the law that a patentee is limited by his claims, even though his invention be broader, and that, if he include a certain element in a combination, he is not at liberty to say that such element is immaterial. *Vance v. Campbell*, 1 Black, 427. At the same time it is equally true

that a combination patent covers, not only the elements named, but also such as may be substituted therefor, and are known as mechanical equivalents. Practically, all which the rejection of a claim by the patent-office means is that, after the patentee has limited his claim, he shall not be permitted by construction to have the benefit of his claim as originally presented. *Leggett v. Avery*, 101 U. S. 256. But what shall be deemed a mechanical equivalent for his claim depends so largely upon the state of the art at the time his patent was issued that it is impossible to gather from the general language of the courts with respect to the construction of claims what should be the construction in any particular case. When we find a court using language which indicates that the patentee should be strictly limited to his claim, and to the restrictions and the provisos he has inserted therein, we shall generally find that the invention is only a trifling deviation from or improvement upon what has gone before. When, upon the other hand, the case shows the doctrine of mechanical equivalents to be vigorously asserted and liberally applied, it will usually appear that the patent is a pioneer, or a marked improvement upon any device which has previously existed. The prime object in construing a patent should be to preserve to the patentee his actual invention, if this can be done consistently with the language he has himself chosen. Occasionally it will happen that the patentee will, by inadvertence or mistake, claim less than he is entitled to, and the courts be powerless to help him, but their disposition is and should be to deal liberally with those who have made valuable contributions to the natural sciences. In this connection we fully coincide in the opinion of Judge SHIPMAN in *Shellinger v. Gunther*, 11 O. G. 831, that a strict construction should never be given to the claim where such construction would be a limitation upon the actual invention. Similar language is used by Judge SHEPLEY in the case of *Estabrook v. Dunbar*, 2 Ban. & A. 427, in which he says:

"The technical claims in a patent are to be construed with reference to the state of the art, so as to limit the patentee to, and to give him the full benefit of, the invention he has made. They are also to be construed in connection with the specification, so as to limit the patentee to, and give him the full benefit of, the invention he has described. The general terms, and sometimes special words, in the claims must receive such a construction as may enlarge or contract the scope of the claim, so as to uphold that invention, and only that invention, which the patentee has actually made and described, when such construction is not absolutely inconsistent with the language of the claim."

Indeed, the general principle is sustained by abundance of authority to the point that claims of patents should receive such interpretation as will enlarge or restrict them so as to cover the actual invention, when not absolutely inconsistent with the language used by the patentee. *Winans v. Denmead*, 15 How. 330; *Van Marter v. Miller*, 15 Blatchf. 562. If, upon the one hand, the state of the art shows the invention to have been a narrow one, a strict interpretation will be given the claims. *Manufacturing Co. v. Ladd*, 102 U. S. 408. And it is of no practical consequence whether such restrictions are imposed by the patent-office or not.

Toepfer v. Goetz, 41 O. G. 933, 31 Fed. Rep. 913. If, upon the other hand, the patentee has taken a decided step in advance of the state of the art at the time his application was filed, the courts will, if possible, construe the language of his claim so as to give him the full benefit of his improvement. *Turrill v. Railroad Co.*, 1 Wall. 491; *Rubber Co. v. Goodyear*, 9 Wall. 788.

In the case under consideration, Mr. Gray claimed broadly, in his second original claim, the combination of the stationary and movable rolls, mounted in such way that they could be adjusted both vertically and horizontally. In his third claim he limited himself only to "a roll mounted at its ends in arms or supports arranged" for vertical and horizontal adjustments. These claims were rejected in view of the Lake patent, and Gray thereupon reformed and limited them. While, of course, we are bound to acquiesce in his action, we are not fully satisfied that he was not entitled to broader claims than he actually submitted to. Undoubtedly a horizontal adjustment was provided for in the Lake patent, and some of the drawings would indicate that a vertical adjustment was also possible; but there is some doubt as to whether it was such a vertical adjustment as is contemplated in the Gray patent. It is true that Lake, in his preamble, states that his invention "relates particularly to means for varying the relative heights of the axes of the rollers to each other, and also their relative horizontal distances," but he also states that it was "for the purpose of producing a greater or less pressure of the one roller on the other;" and he further states that "the pressure of one roller upon the other depends upon the variations of the relative height of their axes to each other. This height may be altered, according to the pressure required, by displacing the block carrying the axle with the eccentric, and by adjusting the set-screws arranged beneath the bearings of the adjustable roller." In all the drawings of the Lake patent where a vertical adjustment is provided for, it appears that the two rollers are not upon the same horizontal plane, but at an angle of 45 degrees or less to each other, and that the adjustment was intended to regulate the pressure of one upon the other, and not an adjustment for tramming as provided in the Gray patent. It may be doubtful, however, whether this makes any difference in the principle, since it appears that there was provided an effective, though somewhat primitive, means of vertical adjustment, by a set-screw beneath the movable roller.

But, conceding that in the matter of the double adjustment, Gray was anticipated by Lake, it is quite evident that his machine, at least so far as concerns the vertical adjustment, is decidedly in advance of the other, if such adjustment was not provided for a different purpose. The means used to accomplish these adjustments in the Gray patents are so unlike those employed by Lake that the questions of patentability, novelty, and of superior utility can hardly be considered open ones. Indeed, their dissimilarity is such that it is quite immaterial to point out in detail the points of difference. About the only feature common to both is the use of a lever and an eccentric, though in Lake's patent they are used only for the purpose of horizontal adjustment, while in Gray's they are also

used for vertical adjustment. Perhaps Gray was entitled to broader claims than he actually made, but, at any rate, we are satisfied that he is entitled to a liberal application of the doctrine of equivalents.

None of the devices claimed as anticipations, except that of Lake, show a combination of horizontal and vertical adjustment, although devices representing the different elements of plaintiff's combination are numerous. It is clear that his patent cannot be defeated by proof that part of his combination is found in one mechanism and part in another. Walk. Pat. § 66; *Bates v. Coe*, 98 U. S. 48; *Parks v. Booth*, 102 U. S. 104. Thus, the Dinger model for grinding paint shows three rolls, the middle one of which is fixed, and the outer ones movable horizontally by springs in the shape of a bow, at each end of the rolls, connecting each movable bearing to a rod, which is also connected with an eccentric mounted upon a shaft. This device is not used for opening or adjusting the distance between the rolls, but merely for the purpose of keeping up a constant pressure of the two adjustable outer rolls against the fixed roll. There is no stop to prevent actual contact of the rolls, and determine the grinding adjustment; the only object of the eccentric being to increase or diminish the pressure, as coarse or fine grinding is desired, but never to separate the rolls. In the Nagel and Kaemp patent there are means provided for simultaneous horizontal adjustment of the two ends of a movable roll by a yoke or bell-crank lever of the first order. Not only is there no vertical adjustment, but there are no means of adjusting the two ends of the movable roll separately, or adjusting for "tram," as it is called. The only adjustment possible is that of both ends of the roll simultaneously for grinding.

Practically the same may be said of the Schacht machine, which also contains means for the simultaneous adjustment of the two ends of the movable roll, but no vertical adjustment, and, of course, no provision for tramming. In the Mechwart American patent, No. 251,124, there is a horizontal adjustment provided by means of a lever held in position by weights instead of springs, and in this arrangement it bears some resemblance to the Lake patent, but it appears to be but a clumsy contrivance, as compared with the American machines. There is here also no arrangement for vertical adjustment. Indeed, while the practice of crushing wheat by roller action was adopted by American millers, the mechanism of the foreign mills for adjusting these rollers proved so clumsy and inadequate that the machines themselves speedily went out of use.

In short, none of these prior patents, except Lake's, contain a suggestion of the underlying principle of plaintiff's patent, and are chiefly valuable as showing the extremely imperfect state of the art at the time Gray made his application. In the Lake patent there is, it is true, a provision for vertical, as well as horizontal, adjustments, sufficient, probably, to disentitle Gray to the broad claims of his original application; but it is very doubtful, in our mind, whether the Lake machine was ever intended to be or is susceptible of anything more than the regulation of the pressure, and his adjustments were accomplished by such rude devices, as compared with those of Gray, that we think his claims, unneces-

sarily restricted perhaps, are entitled to great liberality in construction.

Coming now to the question of infringement, we are compelled to analyze in some detail the elements of plaintiff's combination, and to compare them with corresponding features of defendant's machine. The second and third claims contain substantially four elements: (1) A roll; (2) upright or sustaining swinging arms at each end of the roll; (3) an eccentric vertically adjustable pivot located at the lower end of the arm; (4) devices substantially as shown, acting upon the upper end of the arm. The first two of these elements are undoubtedly contained in the Mawhood roller-mill, represented by defendant's machine, except that the swinging arm or lever of the Mawhood device is pivoted in its *center*, instead of at its *lower* end; in other words, it is a lever of the first, instead of a lever of the second, order. This is admitted by defendant's expert to be immaterial, as the different "orders of levers may be interchanged indiscriminately so far as the lever functions are concerned in modifying and converting motions." The third element is not exactly reproduced in defendant's machine. Instead of an eccentric, adjustable pivot, located at the *lower* end of the arm, there is a non-adjustable pivot located in the *center* of the arm, midway between the ends, which means merely that his lever is of the first, instead of the second, order; while the adjustable pivot is contained at the outer end of the cross-arm, supporting the main arm which carries the roller. The operation of the two is practically identical. Indeed, the adjustable pivot might have been located in the main arm, had the device regulating the grinding adjustment been located above, instead of below, the rollers. It is notable in this connection that Gray, in the sixth and seventh figures of his drawing, contemplated, as an alternative of the devices shown in Fig. 1, a lever pivoted in the middle, and operated at the outer end by a screw, to elevate or depress the swinging arm, D, located at the other end. It may be said in general that anything named by the patent as an equivalent will be so regarded by the court. *Hayden v. Manufacturing Co.*, 4 Fish. Pat. Cas. 86. And while the defendant has not adopted the exact device suggested by Gray, we think the deviation too trifling to avoid the charge of infringement.

Before considering the parts of defendant's devices corresponding to the fourth element of Gray's second and third claims, it is desirable to analyze his fourth and fifth claims, which define more particularly the devices acting against the upper end of the arm. The fourth and fifth claims are for a combination of (1) a movable roller-bearing; (2) the rod, G; (3) an adjustable stop device to limit the inward movement of the bearing; (4) an outside spring, urging the bearing inward; (5) means for adjusting the spring; and (6) a stop and holding device at the opposite end of the rod from the spring. There is no doubt the first two of these elements are also found in defendant's machine. It is true that in the Gray patent the rod, G, is located above, and in defendant's machine below, the rollers; but the location is not specified in the claim, and, even if it were, it would be immaterial. The change of the location of an element in a combination, where there is no new

function performed by such element in its new location, will not avoid the charge of infringement. *Adams v. Manufacturing Co.*, 3 Ban. & A. 1; *Ives v. Hamilton*, 92 U. S. 426; *Knox v. Mining Co.*, 6 Sawy. 430. Nor is it of any greater consequence that Gray's operated as a draw-rod to coerce the two devices together, while defendant's is a thrust-rod, operating in a different direction. *Ives v. Hamilton*, 92 U. S. 426; *Rodebaugh v. Jackson*, 37 Fed. Rep. 882. The third element, viz., the adjustable stop-device, to limit the inward movement of the bearing, is represented by the nut, "1," of the Gray patent, and by the nut, "1," outside the spring of the Mawhood machine.

(4) The outside spring urging the bearing inward is lettered, "H," in both patents. What is meant by the term "outside spring" is somewhat uncertain. The expert See defines it as "a spring located on the outer side of the thing it is intended to exert its operative pressure upon, as distinguished from a spring located on the inner side, pressing outwardly against the thing which it is to exert its pressure upon." Plaintiff's expert Smith considers the word "outside" as a word of description only, and not a word of limitation. "In the machine of the defendant the spring acts against the lower end of the bearing, D. In order that the movable roll may be moved towards the fixed roll, or inward, the lower end of the bearing must be moved outward by the spring. In the machine of the patentee the spring acts against the upper end of the bearing; and, in order that the roll may be urged inward, the upper end must be pressed inward by the spring." However this may be, there is no doubt but that both springs operate alike, to press the movable roll against the fixed roll, and that the different kinds of springs—as for instance, those operated by contraction, instead of expansion—are, like the different orders of levers, mere matters of mechanical contrivance, or of convenience, or ease of construction. The object of the spring in both cases is to permit the movable roll to recede from the fixed roll whenever any foreign, hard substance passes between them, so that the surfaces of the roll may not be damaged.

(5) The means for adjusting the tension of the spring, the hand-nuts, *j*, in both cases, differ only in the fact that in plaintiff's machine this nut is located outside, and in the defendant's machine inside, the spring. Their operation is identical.

(6) The stop and holding devices at the opposite ends of the rod, G, are an eccentric, shown in Fig. 8 in plaintiff's patent, operated in one case by a wheel and in the other by a lever.

In short, we regard defendant's entire machine as simply a re-arrangement of the Gray combination, for the obvious purpose of an attempt to avoid his patent. The result attained by both combinations is the same. The means adopted to attain such result differ only in the location of the several elements, and such dependent differences as are made necessary by such change of location. As we had occasion to observe in *Rodebaugh v. Jackson*, the rearrangement of an old combination, where each element operates practically as before, is not patentable, unless a new or greatly improved result is obtained. Walk. Pat. § 41; *Woodward v. Dinsmore*, 4 Fish. Pat. Cas. 163, 169.

THE DOWLING PATENT.

Plaintiff also claims for an infringement of the first, third, and fourth claims of the Dowling patent. The fourth claim contains the clearest statement of the combination, and is the only one which is necessary to be considered. It reads as follows:

"(4) In a grinding-mill, the combination of two grinding-rolls, the feed-roll above the same, a hopper above the feed-roll, and a toothed agitator centrally located within the hopper and extending lengthwise above the feed-roll, and mechanism for reciprocating said agitator in a lengthwise direction."

The prominent feature of this combination is the centrally-located agitator, introduced for stirring up the material, and thereby keeping a continuous and uniform flow. The tendency of the material is to bank up or bridge over in the hopper when soft. This reciprocating comb prevents the bridging of the material, by working out the center, and permitting the loosened material to fall on the feed-roll. This impediment in the flow is most liable to occur in the reductions of the wheat after the first reduction, of which there are usually six or seven. It is also liable to occur in the soft material incident to finishing the middlings reductions. Agitators of this description, for the purpose of breaking up lumps in such material as plaster, ashes, lime, or manure are not uncommon, and their modes of operation are practically the same. In Caine's patents, No. 78,423, and No. 137,051, for an improved machine for sowing fertilizers and seeds, there is shown a revolving stirrer, "E," corresponding to the Dowling feed-roll, "D," and a reciprocating agitator, "F," having saw-like teeth on its lower edge resting on or near the feed-roller. The rod of this agitator is reciprocated by a cam, substantially in the same manner as the plaintiff's. It is true, this agitator is not centrally located within the hopper, but lies flat against one of its sides. But the patent to T. J. West—No. 100,573—has an adjuster which is centrally located in a machine, for sowing fertilizers, and the patent to H. E. Keeler—No. 254,140—shows a similar device similarly located, in a fanning-mill. Like devices are shown in other patents offered in evidence. In short, Dowling's combination of the two grinding-rolls, the feed-roll above the same, a hopper above the feed-roll, (used in all roller-mills,) and the toothed agitator of the Caine, West, Keeler, and Mahaffy patents, centrally located, as in the West and Keeler patents, and the mechanism for reciprocating such agitator in a lengthwise direction, is but an aggregation of old elements adapted to a new machine, but producing practically the same results. We do not think that any invention is involved in putting these devices together, and placing them in the hopper of a flouring-mill.

THE MARMON PATENT.

Plaintiff also claims an infringement of the first, second, and third claims of the Marmon patent, the first of which only it is necessary to notice. It reads as follows:

"The combination, in a roller-mill, of the supporting frame-work, the roll-shafts, a counter-shaft extending from end to end of the machine, substan-

tially parallel with said roll-shafts, pulleys on the several shafts, belts connecting the same, and means for adjusting both ends of said counter-shaft simultaneously, whereby the belts at both ends of the machine are tightened or loosened at one operation, substantially as set forth."

This claim consists of six elements, viz.: "(1) The supporting frame, which is a rigid casting in one piece, supporting all four grinding-rolls and a counter-shaft; (2) the roll-shafts; (3) a counter-shaft, extending from end to end of the machine, substantially parallel with the roll-shafts, receiving motion at one end from the main driving belt, and communicating the motion to one roll of each pair at the other end; (4) pulleys on the roll-shafts and counter-shafts; (5) belts on the roll and counter-shaft pulleys, arranged to give reversed and differential movement to the two rolls of each pair; (6) means substantially such as described for simultaneously adjusting both ends of the counter-shaft, by which means all the roll-belts may be tightened or loosened by one operation, and of which means a great variety is shown in the drawings accompanying the patent. As Gray's prior patent, No. 228,525, is admitted to contain the first five of these elements, the only question is whether the sixth element, viz., means for adjusting *simultaneously* both ends of the counter-shaft, are found in prior patents. It will be noticed that the patentee claims broadly any means of simultaneously adjusting both ends of the counter-shaft, and not specified devices for so doing, and the drawing accompanying his patent shows 12 different devices for that purpose, which are thereby made equivalents of one another. It follows that, if the defendant would be guilty of infringement by using *any* means of simultaneous adjustment, plaintiff's patent would also be anticipated by the prior use of any such means. Means for the independent adjustment of each end of such counter-shaft are admitted to be found in Gray's patent, No. 228,525. While defendant's testimony has failed to establish a case of the simultaneous adjustment of both ends of a counter-shaft, there is shown in the Lane & Bodley saw-mill a device for moving both ends of a shaft carrying a circular saw, for the purpose of tightening and loosening the belts; a similar device in Clark's patent, No. 174,719, for a coal-breaker; and in the Odell patent, No. 250,954, there is shown a roller-mill containing a device for simultaneous adjustment of two short shafts carrying pulleys, each revolving in an opposite direction. The means adopted are not dissimilar, and in our opinion there is nothing beyond mere mechanical skill required in applying these means to the counter-shaft of a roller-mill. We agree with the defendant's expert that it does not call for the exercise of the inventive faculty. *Aron v. Railway Co.*, 26 Fed. Rep. 314.

Beyond this, however, there is produced a prior patent to Marmon and one Warrington, dated October 10, 1882,—or about six weeks before the filing of the application for the Marmon patent,—in which the same adjusting devices shown in Fig. 20 of the Marmon patent are employed. This construction is made the subject-matter of the twelfth claim of the Marmon and Warrington patent, in the following language:

"The combination with the counter-shaft, M, of an adjusting mechanism consisting of the devices, N, the rods, O, and mechanism connecting said rods

together, whereby they are operated simultaneously, all substantially as set forth."

The construction and operations of the corresponding parts in the two patents are substantially the same, and the result produced by their action is the same. It is true that Marmon, in the patent under consideration, does not limit himself to any particular means for the simultaneous adjustment of the two ends of the counter-shaft, but he exhibits 12 different devices for such purpose, which are thereby made mechanical equivalents, each of the other. If this be so, then it would follow that his patent will be anticipated by the use of any one of these equivalents in the prior patent to Marmon and Warrington, since a patentee making use of any mechanical equivalent of the Marmon and Warrington combination would be equally liable as an infringer, as if he made use of the special devices therein set forth. Upon the face of these two patents there appears to be an anticipation of the claim sued upon in this case.

Plaintiff, however, seeks to avoid the force of this, by showing that Marmon and Warrington, the original patentees, conceded priority of invention to Marmon of the device in question. It appears from the file-wrapper and contents of the Marmon patent that in his application Marmon stated that "many of the devices and combinations shown and described herein are the invention of Jesse Warrington, or the joint invention of said Warrington and myself. They are therefore of course not claimed in this application, but are made the subject-matter of other applications for letters patent, either pending or in course of preparation. I regard myself, however, as the first inventor of a roller-mill having a counter-shaft extending from end to end of the mill, parallel with the roll-shafts, and simultaneously adjustable, as a whole, towards or from the roll-shafts. I therefore intend to claim the above invention broadly in this application, together with the specific means shown in the principal drawings, leaving the other constructions to be covered specifically by the other letters patent, the applications for which may have been made, or may be made, either by myself or by others." There seems to have been some effort made to have the Marmon patent advanced and passed upon before the Marmon and Warrington patent, but this does not seem to have been done, since the Marmon and Warrington patent seems to have been issued before the correspondence on this subject took place. On December 22, 1882, the examiner writes to Marmon's attorney, refusing claims 1, 2, and 3 of his patent, and stating that "an application cannot receive protection in a separate application for matter which was described, claimed, sworn to jointly by himself and another, and jointly patented prior to the filing of the subsequent application. Whatever rights the present applicant may have had, solely, for broad claims on the driving mechanism should have received protection prior to the filing of the application for the joint patent; or the right to apply for broader claims subsequently might have been saved by an express reservation in said patent." In reply to this the attorney wrote that there was no dispute between the parties as to

the matter of invention; that "each is preparing further applications, which will show just what each is entitled to separately, and what jointly with the other, and the proper steps will be taken to put the record in shape, so that the objection urged by the examiner will be overcome;" and at the same time he forwarded to the patent-office a concession on the part of Marmon and Warrington of priority of invention to Marmon of the device for simultaneous adjustment. This was stated by the examiner not to be "sufficient to warrant the office in issuing two patents for the same invention,—a joint patent to two parties and a separate patent to one of them;" and how the second patent came to be issued does not clearly appear by the record. There is nothing before us to show that the first patent was ever canceled or reissued, nor do we see how a mere concession of priority by one patentee to a later applicant, after the prior patent had been issued, could be binding as against infringers. Indeed, we are unable to see upon what theory this concession and correspondence is admissible at all. If the first patent be valid, then any infringer could be prosecuted under it at any time within 17 years from the time the patent was issued, and if the second patent, which was issued nearly 6 months after the first, be also valid, infringements could also be prosecuted at any time within 17 years from the time *that* was issued, so that the monopoly of the invention might thus be indefinitely extended. No one can have two patents for the same device, either as joint inventors or as sole inventor. No one can take out a patent, either jointly or severally, for an invention, and, after the patent is issued, without reservation in his original application, obtain a second patent, with broader claims, for the same device. The authorities upon this point are numerous and conclusive. *Sickels v. Falls Co.*, 4 Blatchf. 508; *O'Reilly v. Morse*, 15 How. 62; *Odiorne v. Nail Factory*, 1 Robb. Pat. Cas. 300; *Smith v. Ely*, 5 McLean, 76; *James v. Campbell*, 104 U. S. 356.

If there be anything in defendant's point that plaintiff's remedy is at law, the objection comes too late to be of any service. If such want of jurisdiction appears upon the face of the bill it should be taken advantage of by demurrer, (*Clark v. Flint*, 22 Pick. 231; *Ludlow v. Simond*, 2 Caines, Cas. 40, 56; *Underhill v. Van Cortlandt*, 2 Johns. Ch. 369; *Pierpont v. Fowle*, 2 Woodb. & M. 35; *Grandin v. LeRoy*, 2 Paige, 509.) if not, it should be set up by plea or answer, and called to the attention of the court at the earliest opportunity, (*Roberdeau v. Rous*, 1 Atk. 543; *Bank v. Railroad Co.*, 28 Vt. 470; *Livingston v. Livingston*, 4 Johns. Ch. 287.) The objection cannot be taken at the hearing. *Niles v. Williams*, 24 Conn. 279. It would be a great hardship in a case like this, where the parties have spent years of time and many thousands in money preparing for a hearing upon the merits, to deny the plaintiff relief upon the ground that it should have resorted to a court of law.

It results from this that the plaintiff is entitled to a decree for an injunction, and the usual reference to a master to assess damages upon the Gray patent, and that the defendant is entitled also to have inserted therein a clause dismissing the bill as to the Dowling and Marmon patents.

COLEMAN HARDWARE CO. *et al.* v. KELLOGG *et al.**(Circuit Court, N. D. Ill. nois. May 27 1889.)*

PATENTS—SASH-BALANCE—INFRINGEMENT.

The patent granted September 18, 1883, to Warren Shumard for a "sash-balance," which has a brake so arranged as to be adjustable from the outside, the brake being an ordinary brake-shoe bearing on the periphery of the drum, with the pressure secured by a spring, is infringed by the use of a band brake, bearing on the periphery of the drum, and adjustable from the outside; band-brakes having been well-known equivalents for spring-brakes at the time of the issue of the Shumard patent.

In Equity. On motion for injunction.

Bill to restrain infringement of a patent by the Coleman Hardware Company and others against Kellogg, Johnson & Bliss, impleaded with the Pullman Sash-Balance Company.

Banning & Banning & Payson, for complainants.

George P. Barton, for defendants.

BLODGETT, J This is a motion for an injunction to restrain the infringement by defendants of a patent granted September 18, 1883, to Warren Shumard, for a sash-balance. The device covered by this patent is what is known as a "spring-balance" for a window-sash, instead of the ordinary pulley balance. The proof now before me shows that this class of devices is not new, one of the patents cited having been issued in 1856; but the feature in the complainants' patent, which seems to me to be new and meritorious, is the brake so arranged that it is adjustable from the outside. Defendants' patent also shows a brake adjustable from the outside, and differing only from the complainants' in the fact that it is what is known as a "band-brake," bearing upon the periphery of the drum, while complainants' brake is the ordinary brake-shoe, bearing upon the periphery of the drum, and the pressure secured by a spring. There is no essential difference in the function of the two brakes, but the band-brake was a well-known equivalent for a spring-brake like the complainants' at the time complainants' patent was issued. I think, therefore, as at present advised from the proof before me, that the difference, so far as the brake is concerned, between complainants' and defendants' device is merely colorable, and that defendants infringe upon this feature of complainants' patent, and possibly upon other features. An injunction will therefore be ordered according to the prayer of the bill.

DOOLITTLE v. KNOBELOCH *et al.*

(District Court, D. South Carolina. June 14, 1889.)

ADMIRALTY—JURISDICTION.

A claim against the owner of a vessel for services in purchasing her, and in traveling on her, looking after the owner's interests, but having no control over or concern in the navigation of the vessel, and for advances to the master and vessel as the owner's agent, is not within the jurisdiction of admiralty.

In Admiralty. Libel for services and advances by Alvin Doolittle against William Knobloch, owner of steamer Bellevue, and the steamer Bellevue.

Trenholm & Rhett, for libelant.

W. J. Gayer and Mitchell & Smith, for respondent.

SIMONTON, J. The libel sets up a claim against the steamer *in rem* and her owner, the respondent, *in personam*, for services and advances. The services were going to New York as the agent of Knobloch, and purchasing for him the steamer Bellevue, and coming in her on her voyage from New York to Charleston, looking generally after the interests of the owner; not, however, having any control or concern in the navigation of the vessel. The advances consist of cash to the master from time to time, and moneys paid for supplies to the steamer, pilotage, and dock fees. The libel was amended by striking out all claim *in rem* on the steamer. Respondent excepts to the jurisdiction of the court. The jurisdiction in admiralty depends primarily upon the nature of the contract, and is limited to contracts, claims, and services purely maritime, and touching rights and duties appertaining to commerce and navigation. *The Jefferson*, 20 How. 393. It is not easy to get an exact definition of the term "maritime contract." It is far easier to say what is not a maritime contract. "The true criterion," says that eminent jurist, Mr. Justice BRADLEY, "is the nature and subject-matter of the contract, as whether it has reference to maritime services or maritime transactions." *Insurance Co. v. Dunham*, 11 Wall. 1. Mr. Browne, in his work on Civil and Admiralty Law, (volume 2, page 82,) asks the question: "What contracts should be cognizable in admiralty?" and answers it: "All contracts which relate purely to maritime affairs." "Maritime contracts are such as relate to commerce and navigation," says Justice CLIFFORD. *The Orpheus*, 2 Cliff. 29. The English courts limit courts of admiralty by the locality of the contract. Our courts look to the subject-matter. *De Lovio v. Boit*, 2 Gall. 398. But "to be a maritime contract, * * * it is not enough that the subject-matter of it, the consideration, the service, is to be done on the sea. It must be in its nature maritime. It must relate to maritime affairs. It must have a connection with the navigation of the ship, with her equipment or preservation, or with the maintenance or preservation of the crew, who are necessary to the navigation and safety of the ship. Thus a carpenter, a surgeon, a steward, though

not strictly mariners or seamen, may all sue for their wages in the admiralty because they contribute in their several ways to the preservation and support of the vessel and her crew." *The Farmer*, Gilp. 531. The charge for services in purchasing the steamer cannot be entertained in this court. It does not spring from a maritime contract. A ship-broker cannot sue in admiralty for services in procuring a charter-party, as they do not arise out of a maritime contract. *The Thames*, 10 Fed. Rep. 848. Nor do the services of an agent in soliciting freight come within this category. *The Crystal Stream*, 25 Fed. Rep. 575. Nor is a contract for building a ship, (*Cunningham v. Hall*, 1 Cliff. 43,) nor for furnishing materials for building a ship, (*The Orpheus*, 2 Cliff. 29,) a maritime contract. The underlying principle is this: All these are preliminary services leading to a maritime contract. They do not constitute in themselves a maritime contract. Of the same character is the purchase of a vessel. See *Edwards v. Elliott*, 21 Wall. 532. The service in the purchase of the steamer in this case was not a maritime contract.

The claim for advances made to the master and steamer do not come within our jurisdiction. "Admiralty has no jurisdiction over an account between the agent of a steam-boat and its owners for moneys paid for its use." *Minturn v. Maynard*, 17 How. 477; *White v. Dollars*, 19 Fed. Rep. 848; Hen. Adm. p. 135, § 47; *Bank v. The Charles E. Page*, (MS. Cir. Ct. South Carolina, Dec. 1886.) The same conclusion must be reached with regard to the claim for services in coming on the steamer from New York. He was not master, pilot, officer, engineer, fireman, or one of the crew. He only stood for the owner,—a privileged passenger. His service was not in its nature maritime, did not relate to maritime affairs, had no connection with the navigation of the steamer, nor with her equipment or preservation or with the maintenance or preservation of the crew. The libel is dismissed for want of jurisdiction. No decree can be made as to costs. *Railway Co. v. Swan*, 111 U. S. 387, 4 Sup. Ct. Rep. 510; *Blacklock v. Small*, 127 U. S. 105, 8 Sup. Ct. Rep. 1096; *Mayor v. Cooper*, 6 Wall. 250. Each party is responsible to the officers of the court for costs incurred at his instance.

BOVARD *et al.* v. THE MAYFLOWER.

(District Court, W. D. Pennsylvania. June 1, 1889.)

1. MARITIME LIENS—SUPPLIES FOR RESTAURANT ON BOAT.

Under the Pennsylvania act giving liens against domestic vessels navigating the rivers Allegheny, Monongahela, or Ohio, a lien exists for supplies furnished to an excursion boat, and dispensed to passengers from a lunch-counter kept on board the boat, such supplies having been furnished upon the credit of the boat on the order of the master, a part owner.

2. SAME.

Debts thus contracted for soda-water, cider, and spirituous and malt liquors, supplied to the boat and dispensed thereon to passengers, are liens under the act.

8. SAME.

The lien for a debt thus contracted for provisions supplied to the boat, is not affected by a private agreement between the owners of the boat and the person in charge of the lunch-counter, unknown to lien claimant.

In Admiralty. *Sur* exceptions to the report of the commissioner distributing the fund in the registry of the court.

E. P. & C. W. Jones, for Wilson, Bailey & Co.

A. Y. Smith, for J. C. Buffum.

Knox & Reed, (*E. W. Smith*, of counsel,) for W. H. Holmes & Son.

J. Chas. Dicken, for G. S. Martin & Co.

D. T. Watson, for Jos. Walton & Co.

Miller & McBride, for report.

ACHESON, J. The Pennsylvania act of April 20, 1858, (1 *Purd. Dig.* 126,) giving liens against domestic vessels navigating the rivers Allegheny, Monongahela, or Ohio, is awkwardly drawn, but it has always been construed by this court as embracing stores and provisions furnished to any such vessel upon the credit thereof, when ordered by the owners, or by the master or other authorized agent. Under the general admiralty law, necessity, as respects supplies to a vessel, is a relative term, and is open to much latitude of construction. *Ben. Adm.* § 268. In the case of *The Plymouth Rock*, 13 *Blatchf.* 505, it was adjudged that a lien existed for food of various kinds supplied to a vessel engaged in making several trips each day between New York and Long Branch, although the food was dispensed to passengers from a restaurant on board the vessel. In the Pennsylvania act the word "necessity" does not occur, nor is there any express limitation as respects the nature of the supplies for which a lien is given. Where the owner himself gives or sanctions the order, there would seem to be no good reason for questioning the existence of a lien because of the alleged absence of necessity, or the supposed unfitness of the articles, if the goods were furnished in good faith upon the credit of the vessel. *The Hoyle*, 4 *Biss.* 234, 238; *The James Guy*, 1 *Ben.* 112. At least that view should prevail in such a case as this, where the fund for distribution is the surplus remaining after the maritime liens are paid, and all the claimants come in only by virtue of the local statute.

The *Mayflower* was an excursion boat plying in the vicinity of Pittsburgh, and there was a lunch-counter on board the boat for the accommodation of the passengers. The claim of J. C. Buffum & Co., amounting to \$67.32, is for a class of goods designated in the testimony as "soft drinks," principally soda-water and syrup, furnished to the *Mayflower* in July and August, 1888; and the claim of W. H. Holmes & Son, amounting to \$428.20, is for spirituous and malt liquors furnished to the boat in 1887 and 1888. It is shown that, with the knowledge and sanction of Capt. Lewis N. Clark, the master of the *Mayflower*, and one of her owners, all these goods were sold and delivered to the boat, upon the credit of the boat, and were used on her—sold to the passengers. The claim of George S. Martin & Co., amount-

ing to \$48, is for cider sold and delivered to the boat upon her credit, on the order of Capt. Clark, and in large part used on the boat by the excursionists and crew. Now, these claims were disallowed upon the ground that the articles were not necessities. But in view of what I have heretofore said, and under the authorities cited I am constrained to differ from the learned commissioner. The term "provisions" has been held to embrace wines and brandy. *Mooney v. Evans*, 6 Ired. Eq. 363. Under all the circumstances, I think the debts due these claimants were liens against the Mayflower within the fair meaning of the act.

I am unable to concur with the commissioner in his disallowance of \$1,178.88, part of the claim of Wilson, Bailey & Co. for provisions furnished to the Mayflower during the few months when Fred Pastre and W. P. Clark ran the lunch-counter under an arrangement with the owners of the boat. It appears that those provisions were furnished under a general order of Capt. Lewis N. Clark. In particular instances, indeed, Pastre ordered some of the goods, but the claimants understood that he was the steward of the boat, and they gave no personal credit to him. In his report the learned commissioner refers to the evidence taken in the case of *Marx v. The Mayflower*, and treats it as evidence to be considered in this case. But this is not allowable. The present lien claimants were not parties to that suit. It does not appear that the evidence taken therein was offered in this case, and, if it really was, it was only admissible to the extent of showing that Pastre gave contradictory testimony in the two cases. But, independently altogether of Pastre's testimony, it is here clearly shown that Wilson, Bailey & Co., in pursuance of a general order given by Capt. Clark, sold and delivered all said provisions to the Mayflower upon the credit of the boat, and that they were actually used on the boat. Nor is there sufficient evidence to show that these claimants had any knowledge of the alleged arrangement between the owners of the boat and Pastre and W. P. Clark. On the contrary, it satisfactorily appears that they had no knowledge on that subject. In this respect this case differs widely from that of *Marx v. The Mayflower*.

Touching the claim of Joseph Walton & Co., for the cost of repairing their fuel-flat, the action of the commissioner was entirely correct. The damages to the flat could only be allowed as a lien of the fifth class under the act. And now, June 1, 1889, the exceptions to the commissioner's report filed by J. C. Buffum & Co., W. H. Holmes & Son, and George S. Martin & Co., and the first and second exceptions filed by Wilson, Bailey & Co. are sustained, but all other exceptions are overruled; and the case is recommitted to the commissioner, with directions to correct his schedule of distribution in conformity with this opinion.

HOADLEY *et al.* v. THE LAZZIE AND CARGO.

(Circuit Court, E. D. Louisiana. May 21, 1889.)

1. SHIPPING—CARRIAGE OF GOODS—DELAY.

On October 2d libelants chartered a vessel to carry a cargo of lumber; the vessel to be at the port of loading by October 15th, "excepting the acts of God in weather * * * preventing," and to be loaded as fast as the vessel could receive. Though ready to be moved in two or three days, the vessel was allowed to remain moored at her wharf until October 11th, and did not reach the port of loading until November 2d. She was detained for painting four or five days longer, though it appeared that the painting could have been completed in three days. Fourteen days were consumed in loading, during which time the master was absent, and the loading suspended, for four days. The loading could have been done in six days, and the lumber was ready on October 15th. An old pilot advised the master to clear a certain bar when partly loaded, and have the balance lightered down, offering him lighters, but the master refused. When the vessel arrived at the bar, it could have passed over, but the master was absent, and remained away for six days, during which time he was urged to depart promptly with the cargo. The vessel did not get across the bar until December 22d, having gone aground. Libelants had meanwhile urged lightering, saying that the cargo would be thrown on their hands unless promptly forwarded, and that they would seize the schooner for damages, and had offered the master a tug to haul the vessel over the bar, which he declined. The sale of the cargo was lost by the delay. *Heid*, that the delay in loading and departure violated the charter-party, and entitled libelants to damages.

2. SAME—FREIGHT.

Though the charter-party provided that the freight should be paid in advance on the vessel's being loaded, libelants could properly refuse to pay the freight because of the delay.

In Admiralty. Libel for damages. On appeal from district court.

Following is the opinion of the district court, delivered March 20, 1889, by BILLINGS, J.:

"The facts in this case, established by the testimony, are as follows: On October 2, 1888, the master and owner of the schooner *Lizzie* entered into a charter-party with Hoadley & Co., the libelants, to carry a cargo of lumber of about 90,000 feet, from Jay & Davis' saw-mill, on the Tchefuncta river, near Lake Pontchartrain, to Carthagenia, United States of Columbia, South America, the vessel to be at the port of loading by October 15, 1888, 'excepting the acts of God in weather, such as storms, calms, headwinds, preventing.' About the time of the making of the charter-party the schooner was at Morgan City, La., she having her center-board out of order and having it replaced. The charter-party also stipulated that 'there should be the usual quick dispatch in loading, as fast as the vessel could receive.' The master went to Morgan City. The center-board was replaced in two or three days, but the master allowed the vessel to remain inactive, and to stay moored at the wharf there, until October 11th, when he started for Jay & Davis' mill. It took him six days to come from Morgan City to the Rigolletes, where, by the quarantine, he was detained six days longer, for not having procured a clean bill of health, and he did not arrive at Jay & Davis' mill until November 2d, which will be observed was seventeen days after the time fixed for the commencement of the loading by the terms of the charter-party. Instead of proceeding at once to load, the master left the schooner in charge of a single man, and came to New Orleans and directed the schooner to be put on the ways at Madisonville for painting, where she was detained another four or five days. The evidence

shows that this painting could have been completed in three days. The lumber was ready, and had been ready for a long time prior to October 15th. When the master commenced loading he consumed fourteen days in loading the vessel, and the evidence shows that loading could have been accomplished in six days at the outside. During four of these days he again left the schooner, and all work of loading was suspended. Up to this time there was an abundance of water on the bar, even after the master's return. The schooner at that time had nearly her hold load in, and Mr. Jay, one of the owners of the mill, an old pilot, advised him to at once proceed with the cargo in the hold as far as St. Joseph's island, and to have the balance of the cargo lightered down to him at that point; offered him the lighters, and told him he would not have such an opportunity for any great length of time. The master's reply was that he knew his own business. The water on the bar fell. The master went on slowly loading until the 16th November, and loaded the schooner to a greater depth than the water on the bar allowed, and finally started down the river. After he came to the ship-yard, where his schooner had been painted, he again left the vessel anchored in the stream, with only one man, and again came back to the city, where he remained for another period of six days. The testimony of the mate shows that the vessel, after it arrived at the bar, could have passed over; but the master was absent, and there was nobody there to take the vessel over the bar. When the master returned from New Orleans he told the mate that he was going to have trouble with the charterers, and asked him to fix up the log-book so as to fit the master's side of the case, and the log was then commenced. On November 16th the schooner started for the bar, and stuck fast and remained aground until the 16th of December. The master absented himself from November 23d to December 1st, and from December 3d to December 13th, with no one on board but the mate, and a portion of the time a cook, who was not a sailor, but who was sick, and in bed. The schooner finally got over the bar on the 22d of December, when the master came to the city, leaving his vessel at the ship-yard. He was told there was urgent necessity for the prompt departure of the cargo to South America. After it was learned that the vessel was aground, the libelants sent a messenger over, urging him lightering, with the statement that the cargo would be thrown on the hands of Hoadley & Co. unless it was promptly forwarded. These representations were made to the mate in charge, who, in the absence of the master, answered that if the proper precaution and energy had been used the vessel at that date—the 22d December—would have already delivered her cargo at the place of destination, and have been on her way back to the United States. The captain was found in New Orleans, and informed that unless the cargo started at once the same would be thrown upon the hands of the charterers, and they would seize the schooner for any damages they might sustain. At the same time they offered him a tug to haul the vessel over the bar. This the master declined. Had there been help on board the schooner to handle her anchors she would have been hauled over the bar, and could have been lightered on the bar, as she was subsequently lightered on this side of the lake, before going into the new basin. The mere taking off of her deck-load would have raised her up seven inches, and she could have gone over the bar at four or five different times. On December 22, 1888, Hoadley & Co. libeled the vessel and cargo, claiming damages \$1,189 for breach of charter-party, and on January 14, 1889, the libelants discontinued the proceedings against the cargo, but reserved all rights against the vessel. Furthermore, the evidence shows that in consequence of the delay on the part of the schooner in loading and starting on her voyage the parties at Carthage, South America, to whom the cargo had been sold, receded from their bargain, as they had the right to do.

The respondents have filed a cross-bill, asking \$654 damages. The charter-

party provided that the freight should be paid upon the vessel being loaded, in advance. The libelants declined to pay the freight in advance, giving as a reason the delay which the schooner had made, and their loss of all opportunity to sell the lumber at Carthagena. The question now submitted is whether the libelants have a claim for damages, or whether the schooner is entitled to damages and freight. This being the case, so far as it is now submitted to the single question whether the master used requisite care and diligence in fulfilling the conditions of the charter-party, did he proceed in its execution with the promptness and vigilance which were requisite? The rule of law which must control this case is that the master was bound to proceed on his voyage with the first wind, and he must also proceed in loading the vessel with the requisite promptness. Upon the facts as they appear in the testimony for libelants, (for the respondents have put in no testimony, except three letters,) the court is of opinion that there was a failure on the part of the master, both in loading and in his departure, which was in law a violation of his contract; that the libelants are entitled to damages; and that the cross-bill must be dismissed. The matter is referred to K. Loew, commissioner, to take evidence, and report the same to the court, as to the damages sustained by the libelants."

R. De Gray, for libelants.

Homor & Lee, for claimant.

PARDEE, J. A careful examination of the pleadings and evidence in this case shows that the findings and decree of the district judge are correct. The delays on the part of the claimant in the execution of his contract seem to have been wanton and wholly inexcusable, and, wholly unexplained as they are, fully justified the libelants in breaking up the voyage, and in suing to recover their property and resulting damages. The claimant is entitled to no freight, because none was really earned, and because, if earned and required from libelants, then it would merely enhance their damages, all to be recovered in this case. It is therefore ordered, adjudged, and decreed that the libelants, Russell Hoadley, Chester C. Munroe, and Frank Wesson, composing the firm of Hoadley & Co., do have and recover *in solido* from William Gandy, master and owner of the schooner Lizzie, claimant in this case, and William Cunningham and Albert Gerdes, as sureties on the release bond, the sum of \$330.91 damages, and all costs of the district and circuit courts, and that execution may issue on this decree within five days after the same is entered and signed.

THE GEVALIA and THE VISION.

(District Court, S. D. New York. May 20, 1889.)

1. STRANDING VESSELS—ANCHORS AND CABLES—FOULING.

Good seamanship requires that the inboard end of the anchor cable, if fastened, be lashed with ropes only, that may be cut at a moment's notice, and the anchor slipped when necessary.

2. SAME.

The yachts G. and V. having anchored in Larchmont harbor, and a gale arising, during which both dragged their anchors, the G. got under way for another harbor, and in doing so crossed the line of the V.'s cables and fouled them with her starboard anchor, not yet hove aboard. On being hailed to slip the cable she was unable to do so, because the chain was shackled fast, and both vessels, through the fouling, shortly went ashore. *He d.*, that the G. took the risk of crossing the V.'s cables, and of her inability to slip her cable at once, and was solely liable for the damages.

In Admiralty. Libel and cross-libel for damages.

Shipman, Barlow, Larocque, & Choate, for the Vision.

Eugene L. Bushe, for the Gevalia.

BROWN, J. On the evening of June 28, 1888, the yacht Vision anchored near the mouth of the harbor at Larchmont, Long Island sound, from 200 to 300 feet nearer the shore than the yacht Gevalia, previously at anchor there, and also a little to the northward of her. On the following day a gale arose, blowing from the east or south-east, causing the Vision to drag her two anchors. Signals of distress were set, and help was subsequently procured by borrowing two anchors and cables from other vessels. Her four cables ranged from 20 to 50 fathoms; one of the borrowed ones being partly of rope, next to the yacht. With these I find that she was held safely and securely, though quite near the shore, after having dragged several hundred feet. The Gevalia, which bore off the Vision's port bow, also dragged somewhat, and her master, not wishing to remain there over night, at about 5 P. M. got under way for the purpose of seeking another haven. He was obliged to start upon the port tack, and in getting under way the Gevalia drifted astern and to leeward, so as to cross the line of the Vision about 100 feet ahead of her, or less than half the length of her longer cables; so that the starboard anchor of the Gevalia, not yet being hove aboard, in crossing the Vision's cables fouled with some one of them, the result of which was that both vessels went ashore a few minutes afterwards, and sustained damages for which the above libel and cross-libel were filed.

I think the weight of evidence is that at the time the Gevalia got under way she was from 300 to 400 feet distant from the Vision, and off her port bow; that is, at least 300 feet abreast of her, and a little ahead. The evidence also is that when she reached the line of the Vision's cables, she had attained a speed of about six knots. I am not satisfied that at this speed, or about this speed, she could not then have come about and made a short tack, and afterwards resumed her port tack,

without crossing the line of the Vision's cables. But, without regard to this question, I think she had no right to cross the cables of the Vision without taking the risk of her own anchor's fouling. Her master well knew of these cables, and of their probable lengths, which were in fact about the same as his own. He had seen additional cables brought to her aid during the day, and knew that she had drifted more than he. He knew that he would cross at half her cable's length or less. No anchor buoys could therefore have given him more serviceable information than he already had. When it was known that the anchor had fouled, because the Vision began to be hauled ahead in tow, the master of the latter hailed the Gevalia to let slip her anchor cable. That could not be done, as the master of the Gevalia says, because it was shackled so fast to a beam in the hold that it afterwards took him two hours to unshackle it. The necessity of letting anchor cables slip, and of being prepared for it upon emergencies like this, has been familiar to seamen from time immemorial. It is the customary means of averting imminent danger after fouling. To have a cable shackled so that it cannot be slipped at need is bad seamanship. If lashed at all, it must be by a rope that can be cut at a moment's notice on emergency. See Nares on Seamanship, (6th Ed.) 156. The neglect of the Gevalia to have her cable in ship-shape order in this respect, was undoubtedly the ultimate cause of this collision, as the primary cause was her crossing the line of the yacht's cable before her starboard anchor was hove up; and for both she is responsible. It is alleged as a fault against the Vision that she did not cut her cable when hailed to do so by the master of the Gevalia. But the storm was then at its height. She was near the shore and had been obliged to borrow additional cables to hold her. One of the short cables was cut for another reason, and the kedge cable parted. She was under no obligation to the Gevalia to cut her own cables, and take the risk of speedily running ashore. I do not see any fault in the Vision, and the result is that the Gevalia must be held alone answerable for the damages. Decrees accordingly, with costs.

UNITED STATES v. LEHMAN.

(District Court, E. D. Missouri, E. D. June 10, 1889.)

1. COURTS—JURISDICTION—ALIENS.

Rev. St. U. S. § 2165, confers the power to naturalize aliens on "courts of record of any of the states having common-law jurisdiction." 2 Rev. St. Mo. 1879, p. 1511, establishing the court of criminal correction, declares it to be a court of record, and gives it "exclusive original jurisdiction of all misdemeanors under the laws of the state committed in the county (now city) of St. Louis." *He d.*, that as the common law and all general statutes enacted by parliament before the fourth year of the reign of James I. have been adopted in Missouri, and as the proceedings of the court are in accordance with common law except as modified by the Code of Criminal Procedure, the court is one of common-law jurisdiction, and authorized to naturalize aliens.

2. ALIENS—NATURALIZATION—PERJURY.

Rev. St. U. S. § 2167, requires the court to ascertain whether the applicant for naturalization under that section has resided three years in the United States before attaining majority. *He d.*, that a third person, swearing falsely in that regard, is liable to the penalty prescribed in section 5424 for any witness who in such proceeding falsely makes an oath "required or authorized" by the naturalization laws.

3. SAME—INDICTMENT.

An indictment for such offense, alleging that the person who administered the oath was a deputy-clerk of the court of criminal correction, and acting as such when the oath was administered in open court, is sufficient without alleging the steps by which the officer became deputy-clerk.

4. SAME.

As the district court of the United States takes judicial notice of the laws of the state in which it is situated, an allegation that the deputy-clerk was authorized to administer such oath is not necessary.

At Law. Demurrer to indictment.

George D. Reynold, Dist. Atty., and *Thomas P. Bashaw*, for the United States.

D. P. Dyer, for defendant.

THAYER, J. 1. The first question raised by the demurrer filed in this case is whether the court of criminal correction of the county (now city) of St. Louis has power to naturalize aliens. Section 2165, Rev. St. U. S., confers such power on "courts of record of any of the states having common-law jurisdiction." The court of criminal correction is declared to be a court of record by the second section of the act establishing that court. 2 Rev. St. Mo. 1879, p. 1511. Hence the sole point for consideration is whether it is also a court "having common-law jurisdiction" within the meaning of the federal statute. That is a question, as it appears to me, that admits of little controversy. The jurisdiction of all the courts in this and other states is defined with greater or less particularity by statute, and in that sense their jurisdiction is statutory. But, as is well known, certain courts in this as well as in other states have power to punish offenses that existed at common law, and to enforce private rights and to redress private wrongs recognized by the common law, and in the exercise of that power their action is governed by the principles, rules, and usages of the common law, in so far as they have

not been modified or abolished by statute. Courts of this description are usually termed "courts of common-law jurisdiction," to distinguish them from other inferior tribunals organized to enforce local or municipal regulations, or rights and duties not recognized by the common law. Section 2165 evidently refers to courts exercising the jurisdiction first above described. Congress intended to confer the power of naturalization on all courts of record of the several states that have power to administer justice under and in accordance with that system of jurisprudence known as the common law. *In re Conner*, 39 Cal. 98. Tried by such test the court of criminal correction has power to naturalize aliens. It is a state court, and not a municipal court. It issues process in the name of the state that may run and be executed in any part of the state. The judge of the court has power to issue writs of *habeas corpus*; its proceedings are conducted according to the course of the common law, in so far as the practice at common law has not been modified by the Code of Criminal Procedure adopted in this state; and it has "exclusive original jurisdiction of all misdemeanors under the laws of the state committed in the county (now city) of St. Louis." As the common law and all general statutes enacted by parliament prior to the fourth year of the reign of James I. have been expressly adopted in this state, it follows that the court of criminal correction has power to punish acts that were misdemeanors at common law, although they have not been expressly declared to be misdemeanors by any law of this state. It must accordingly look to the common law in a measure, to ascertain the extent of its powers, and is just as truly a court of common-law jurisdiction as the circuit court of the state.

2. It is further insisted that the oath alleged to have been made by the defendant was not required to be made by any provision of the naturalization laws, and hence that no offense was committed under section 5424 of the Revised Statutes, on which the indictment is predicated, even though the oath was false. With respect to this contention it will suffice to say that an offense was committed under section 5424 if the oath alleged to have been made by the accused was either "required or authorized" by the naturalization laws, and if the same was false. According to the view taken of the question raised by the point of the demurrer now under consideration, it is unnecessary to decide whether an applicant for naturalization under section 2167 must prove his residence in the United States for three years before attaining his majority by the oath of some third party, as required by the third subdivision, § 2165, or whether the law permits the applicant to prove that fact by his own oath. That, in my opinion, is an immaterial question, so far as the demurrer is concerned. Section 2167 at least requires the court before whom the application for admission to citizenship is made to ascertain that the applicant has resided in this country for the requisite period of three years before attaining his majority. That is the basal fact on which the right to naturalization depends. It does not provide that such fact shall be established only by the oath of the applicant, or that no other testimony shall be received. Hence, according to

any view that may be taken of the subject, the court is at least "authorized" to hear testimony other than that of the applicant, touching the fact of residence, and it must do so if the construction contended for by the government is to prevail. A person who is called upon by an applicant for naturalization to testify as to the fact of residence for three years, as specified by section 2167, cannot, in my judgment, defend against an accusation of having made a false oath in that regard, upon the ground that the oath was not "required" by the naturalization laws, inasmuch as the applicant might have established the fact by his own oath. An oath so taken is at least an "authorized oath." The courts before whom such proceedings are had may desire other testimony than that of the applicant to establish the fact of residence, and even according to the construction contended for by the accused, it is clear that they have authority to receive, and that it is their duty to demand, such other testimony, when in their opinion the fact to be ascertained is not satisfactorily proven by the applicant's testimony. The only fault that can well be found with the indictment in the matter now being considered is that in alleging that the oath was "required" by the naturalization laws, instead of being "authorized," the pleader alleged more than was necessary to be alleged or proven. The point made, that the oath was "extrajudicial," and that no offense is stated for that reason, is not well taken.

3. A further objection is made to the indictment on the ground that it is not averred that the deputy-clerk of the court of criminal correction, before whom the oath is said to have been taken, was appointed deputy, as required by the act creating the court, or that he was authorized to administer an oath to the defendant. The first of these objections is not tenable. The indictment alleges that the person who administered the oath to the accused was the deputy-clerk of the court, and was acting as such when the oath was administered, and that it was administered in open court. That, in my opinion, is sufficient. It was not necessary to allege the successive steps taken by which the officer became deputy-clerk. The fact alleged, that he was such clerk and was so acting, implies a legal appointment. Everything else connected therewith is evidential, and need not be averred. The second objection mentioned above would be tenable were it not for the fact that the court of criminal correction is so located with respect to this that this court is bound to take judicial notice of its powers and of the authority of its clerk to administer oaths. If the oath had been taken before some officer, of whose power to administer oaths this court is not bound to take judicial notice, the objection would, of course, be fatal. But, inasmuch as the court takes judicial notice of the general laws of the state and of the fact that the deputy-clerk of the court of criminal correction has power to administer oaths to persons appearing as witnesses in that court, I am inclined to the view, and accordingly hold, that the allegation that the accused appeared and was sworn in open court by the deputy-clerk thereof is sufficient, even in an indictment. Certainly the government on the trial will not be bound to prove anything more in the way of establishing

the clerk's authority to administer the oath than that he was the duly-appointed deputy-clerk, and that the oath was administered in the presence of the judge in the course of a judicial proceeding. I can conceive of no sufficient reason why the allegations in a case of this sort should exceed the facts necessary to be proven on the trial.

Some other more technical objections were made to the indictment, which on due consideration do not seem to be well founded. The demurrer is accordingly overruled.

WOOD *et al.* v. CHICAGO, S. F. & C. R. Co.

SUMMERS v. SAME.

(Circuit Court, E. D. Missouri, N. D. June 4, 1889.)

1. ARBITRATION AND AWARD—CONTRACTS—ENGINEER'S ESTIMATES.

A clause in a railroad construction contract, that makes the engineer's estimate and classification of work final and conclusive, is valid and binding.

2. SAME—AVOIDING ESTIMATE—EQUITY JURISDICTION.

Estimates made by the engineer in pursuance of such contract can only be avoided in equity, on the ground of mistake, fraud, or gross error, and neither fraud nor mistake can be alleged or proven to avoid the estimates in an action at law on the contract to recover the balance claimed to be due.

3. SAME.

A proceeding on such a contract, in which it is alleged, by way of avoidance of estimates made, that they were collusive, fraudulent, or grossly unfair and erroneous, is an equitable proceeding to obtain relief on the ground of fraud and mistake.

4. SAME.

Whether the alleged errors exist in the estimates, and their probable amounts, and whether the estimate ought to be disregarded, are questions of fact for the chancellor, and not for a jury.

On Motions to Strike Out Parts of Petitions.

Craig, McCairy & Craig and *Mattock & Hiller*, for Wood and others.

Gardiner Lathrop, T. L. Montgomery, and *Ben Eli Guthrie*, for defendant.

A. J. Baker, Mattock, Hiller & Howard, and *T. L. Montgomery*, for Summers.

THAYER, J. The questions argued by counsel on the submission of the motions to strike out parts of the petitions do not properly arise, because the clause of the contracts making the engineer's decision final and conclusive as to the amount and classification of work done is not pleaded in the petitions; and the contracts themselves, which are attached as exhibits, form no part of the record, according to the view that is taken in this state. As these petitions are framed, the allegation that the engineer's estimates were fraudulent, collusive or erroneous is redundant matter, and might be properly stricken out for that reason, under the Missouri Code, treating the suits as actions at law. Inasmuch, however, as the

questions discussed by counsel must arise on the trial, I consider it proper to determine them now, although they do not arise on the record.

With respect to the question whether a clause in a railroad construction contract is valid that makes the engineer's estimate and classification of work final and conclusive, it will suffice to say that the weight of American and English authority is decidedly in favor of the view that such provisions are binding upon the contracting parties. *Herrick v. Railroad Co.*, 27 Vt. 673; *Kidwell v. Railroad Co.*, 11 Grat. 676-691; *Grant v. Railroad Co.*, 51 Ga. 352, 353; *Railroad Co. v. Veeder*, 17 Ohio, 396; *Railroad Co. v. Northcott*, 15 Ill. 49; 2 Wood, Ry. Law, 995, 996; 1 Redf. R. R. 435; *Ranger v. Railway Co.*, 1 Eng. Ry. Cas. 1; *Knoche v. Railway Co.*, 34 Fed. Rep. 471. The law seems to be quite well settled that estimates made by an engineer in compliance with contracts making him the arbiter as to measurements, amount, and classification of work, are conclusive, and can only be avoided by proof of mistake, or fraud, or of gross negligence on the part of the engineer amounting to fraud. It seems to be a mooted question whether an estimate can be avoided for any other mistakes of the engineer than those of fact, as distinguished from mistakes of judgment; the better opinion being no doubt that there is no remedy for mistakes of judgment as to the quality of work done when the engineer or arbiter has acted in good faith in the exercise of his judgment. *Ranger v. Railway Co.*, 1 Eng. Ry. Cas. 1, 13 Sim. 368.

Such provisions in contracts being binding the next question is whether an estimate made by an engineer in accordance with such a stipulation can be avoided in a strictly legal proceeding by proof of fraud, gross negligence, or mistake? Of course, if an estimate thus made is regarded in the light of an award made by an arbitrator, the authorities are practically all one way,—that recourse must be had to a bill in equity, and that neither fraud or mistake can be alleged or proven to avoid the estimate, in a suit at law on the contract to recover a balance claimed to be due. The best-considered cases on the subject, so far as my observation extends, treat estimates (especially final estimates) made by an engineer in pursuance of such provisions, as an award that can only be avoided in chancery. *Herrick v. Railroad Co.*, *supra*; *Kidwell v. Railroad*, *supra*; *Railroad Co. v. Veeder*, *supra*; *Grant v. Railroad Co.*, 51 Ga. 353. It appears to me, also, that on general principles, whether such estimates are or are not technical awards, courts of equity alone have authority to vacate them on the ground of mistake, fraud, or gross errors amounting to fraud, when such estimates have been regularly made in pursuance of contract provisions. If an engineer appointed by the parties fails to act,—that is, fails to make an estimate,—I have no doubt that a suit at law may be maintained on the contract to recover what is due. *Starkey v. De Graff*, 22 Minn. 431, *Kistler v. Railroad Co.*, 88 Ind. 460. A proceeding begun upon a construction contract containing a stipulation making the measurements, classifications, and estimates of the engineer final and conclusive, in which proceeding it is alleged by way of avoidance of estimates made by the engineer that they were collusive, fraudulent, or grossly unfair and erroneous, is, in my opinion,

essentially an equitable proceeding to obtain relief on the ground of fraud and mistake, and should be so treated. The gist of the cause of action in such a suit, is the fraud or mistake of the engineer. Whatever is done subsequent to the trial of that issue, in the way of finding out what is really due to the contractor, is incidental or collateral to the main issue. I apprehend that if on the trial of such a suit errors to any substantial amount are shown in the measurements or estimates of the engineer, such as would fairly raise the presumption that the arbitrator must have been either ignorant, inefficient, or negligent, no court would hesitate for a moment to grant relief to the contractor, but in the first instance the question whether such errors exist in the estimates, and their probable amount, and whether the estimate ought to be disregarded, is a question for the chancellor, and not for a jury. The fact, if it be a fact, that the engineer or person selected to measure and estimate the work done is in the employ of one of the contracting parties, undoubtedly makes it the duty of the court to scrutinize his estimates with great care, as the law requires of persons so situated the utmost diligence and good faith. *Pierce, R. R.* 382. This seems to be the rule fairly deducible from the best-considered cases, and the one I shall adopt.

In several cases bills have been entertained to avoid erroneous estimates on the ground of fraud and mistake, without a question as to the propriety of such a procedure, and, if equity has jurisdiction in such cases, it is clear that a court of law has not. *Vide* cases above cited, and *Sharpe v. Railway Co.*, L. R. 8 Ch. 597. The result is that, if in the cases now under consideration the proof shows that estimates have been made by the engineer, which by the provisions of the contract are made conclusive so far as the amount and classification of the work are concerned, and if counsel are relying upon the charge that the engineer acted fraudulently, collusively, or negligently to avoid the estimates, the court will hold that the cases are of equitable cognizance, and will proceed accordingly.

COWAN v. BOND.

(*Circuit Court, S. D. Mississippi, E. D. May 21, 1889.*)

1. CARRIERS—INTERSTATE COMMERCE—UNLAWFUL DISCRIMINATION.

A railroad company is not guilty of an unlawful discrimination or preference in violation of sections 2 and 3 of the interstate commerce act by receiving from a shipper cotton at Delhi, La., shipping it to Vicksburg, having it compressed there at the company's expense, and reshipped to eastern points for a rate equal to its published through rate from Delhi to such eastern points, where such an arrangement is in compliance with a recognized custom, of which all other shippers including petitioner, could or did avail themselves, and where it does not appear that petitioner desired to ship any cotton from Delhi to the eastern points, or that he was compelled to pay a higher rate under similar circumstances.

2. SAME.

The fact that cotton raised near Vicksburg being considered by eastern buyers to be superior to other cotton, arrangements are sometimes made to

induce such buyers to believe that cotton actually raised in other localities was raised in the vicinity of Vicksburg, cannot be imputed to the railroad company so as to make the transaction by which it stops and compresses cotton at Vicksburg for eastern shipment an unlawful discrimination.

Petition against Receiver.

Dabney, McCabe & Anderson, for petitioner.

Birchett & Gilland, for respondent.

HILL, J. This is a petition in the nature of an action at law against F. S. Bond, the defendant, as receiver of the Vicksburg & Meridian Railroad Company, to recover damages, which it is alleged petitioner has sustained by reason of the alleged violation of sections 2 and 3 of an act of congress approved February 4, 1887, known as the "Interstate Commerce Act." The petition, in substance, alleges that on the 1st day of September, 1887, petitioner was, and from that time has been, and still is, engaged in the business, occupation, and employment of buying, shipping, and selling cotton in bales to cotton mills and manufacturers at different places, in different states, including Massachusetts, New Hampshire, New Jersey, New York, and Rhode Island; that said defendant, as receiver, under the orders and decrees of this court, of the Vicksburg & Meridian Railroad Company, a corporation and common carrier, was engaged in operating said railroad, and receiving and transporting for hire over the line of which it is part freight, and cotton in bales, in connection with other railroad companies, from points in Mississippi, including the city of Vicksburg, to points in other states, including those above named; also in transporting from points on the Vicksburg, Shreveport & Pacific Railroad, owned by a company which operates, and did operate at the time aforesaid, a railroad from Vicksburg, in this state, to Shreveport, in the state of Louisiana, and in connection with said Vicksburg & Meridian Railroad; that between the 1st day of September, 1887, and the 1st day of September, 1888, he bought and delivered to the defendant, as such receiver, for transportation for hire as a common carrier, 9,339 bales of cotton, weighing in the aggregate 4,407,635 pounds, which defendant received and agreed to ship, and did ship and transport, to different points in said states, some to one point and some to another, of which a bill of particulars is filed as part of the petition; that from the 1st day of September, 1887, to the 1st day of September, 1888, the firm of W. L. Wells & Co. was engaged in the same business of buying, shipping, and selling cotton to points in eastern states, their business being in all respects the same as petitioner's, and located and doing business at the same place, and to all appearances under like conditions, and hence his rivals in business; that during the same period, said W. L. Wells & Co. bought and shipped over said Vicksburg & Meridian Railroad large numbers of bales of cotton, which were to be, and were, transported in many instances to the same points as that shipped by petitioner as aforesaid; that defendant charged and received from petitioner 4 cents per 100 pounds during said time more than he charged said W. L. Wells & Co. from Vicksburg to the same points,

contrary to law and just and fair dealings, whereby petitioner was greatly damaged in his business in actual outlay in freights in excess of freights paid defendant by said W. L. Wells & Co. on cotton so shipped by him to said points during said time. That in consequence of said discrimination in favor of said W. L. Wells & Co. petitioner lost large sales of cotton which said W. L. Wells & Co. were enabled to make, to-wit, 3,000 bales, on which he would have realized \$1 per bale, making \$3,000; that said unlawful discrimination was done in the following manner, that is to say, the said Vicksburg, Shreveport & Pacific Railroad Company, a corporation owning and operating a railroad in Louisiana, between Shreveport in Louisiana and Vicksburg in Mississippi, which connects with the Vicksburg & Meridian Railroad in Mississippi, is and was under the same management as the Vicksburg & Meridian Railroad, and is and was part of a system to which the Vicksburg & Meridian Railroad belonged, though said companies were separate as to their property rights; that under some complicated arrangement, which was a secret one, and not known to petitioner, or advertised to the public, the said W. L. Wells & Co. were given by the defendant a preference and advantage over petitioner in his shipment of cotton to the eastern states, as aforesaid; that the arrangement aforesaid was such that for the whole period from the 1st of September, 1887, to the 1st of September, 1888, petitioner and the whole public were kept in absolute ignorance of the fact that such arrangements were possible; that by means of such schemes, subterfuges, pretenses, and artifices, the defendant placed the petitioner at a great disadvantage in his business, and deprived him of the equality in treatment in shipping cotton as aforesaid to which he was and is entitled by law, and said W. L. Wells & Co. were given undue preference and advantage over him as aforesaid.

To the charges thus made the defendant has interposed his answer by way of plea, by which he denies this discrimination as charged, and states the facts in relation to the matters referred to in the petition to be as follows: The arrangement was for the shipping of cotton from Delhi, La., a station on the Vicksburg, Shreveport & Pacific Railroad to Boston and other eastern points, with the privilege of stopping the cotton at Vicksburg for the purpose of compressing it, under which arrangement Wells & Co. purchased cotton at Delhi, and shipped it to themselves at Vicksburg, on bills of lading to that point, and, when the cotton was compressed and ready for forwarding to destination, the bills of lading from Delhi to Vicksburg were surrendered to the agent of respondent at Vicksburg, who canceled them, and in lieu thereof issued other bills of lading from Vicksburg to final destination, at rates, which, added to the rates already paid from Delhi to Vicksburg, made totals equivalent to the direct, through, published rates from Delhi to such points of final destination; that such arrangements are now, and have been for many years, prevalent on all railroads in the cotton-growing country, which was and is well known to petitioner and all other cotton shippers, and especially to petitioner, who made a similar arrangement with respondent on cotton shipped from Greenville, Miss., over the Louisville, New

Orleans & Texas Railroad to Vicksburg, and thence to Boston and other points, and which was made during the same season as that of which the complaint is made, and was identical with it in all respects, except that petitioner's cotton was not compressed at Vicksburg, and consequently the rates given him from Vicksburg were less than those charged to Wells & Co.; that on all cottons shipped by Wells & Co. direct from Vicksburg eastward the same rates were charged as those paid by all shippers.

The facts so stated in the answer are substantially established by the proof, and the question to be determined is do they constitute a violation of sections 2 and 3 of the interstate commerce act of congress? Section 2 reads as follows:

"That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited, and declared to be unlawful."

Section 3 is as follows:

"That it shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Unfortunately I am left without any decisions of the courts or of the commission on this direct point, and am left to my own unaided judgment on the question presented. There is much testimony, and has been much comment by counsel, on the question as to whether the rates under the arrangement by which the cotton was shipped from Delhi to Vicksburg and there compressed, the expense of this compressing being paid by the defendant as part of the shipment to enable him to ship a large number of bales on a car, were posted or otherwise available to the inspection of shippers and the public. This is not an issue raised in this case, and can only be inquired into incidentally as affecting the rights of petitioner. The substantial subject of complaint is that the defendant made an unjust discrimination in the rates charged for the shipment of cotton from Vicksburg to eastern points in favor of W. L. Wells & Co., and against petitioner, by which he sustained damage. The uncontradicted fact is that the cotton shipped, of which complaint is made, was shipped from Delhi, in Louisiana, to points east, and was stopped off and compressed at Vicksburg, at the uniform and established rates from Delhi to the eastern points. The proof shows that this practice is general, and, it may be said, necessary; that it is the practice in shipping from many

other points, and was well known to the petitioner, who had availed himself of it; and it was known, and its advantages received, by all the cotton buyers at Vicksburg on cotton purchased at different points on the railroads connecting at Vicksburg, so that the petitioner cannot complain of this arrangement. The petitioner does not aver that he desired or intended to ship cotton from Delhi, and was prevented from doing so by want of a knowledge that shipments were being made by Wells & Co. under the arrangement stated. Had such been the case the question as to whether or not this arrangement was included in the rates posted, or otherwise made public, in the offices at Delhi or in Vicksburg, would be important; but as no such averment is made, it is unimportant. I am unable to perceive any difference between the shipments made by petitioner from Greenville and those made by W. L. Wells & Co. from Delhi. The Greenville cotton was compressed at Greenville, and the Delhi cotton at Vicksburg, but the costs of both were embraced in adding the local freight from that point, making one freight from the first point of shipment to the point of destination, and I cannot perceive that in either case any advantage is obtained over the other, or that there was any violation of law in either case. It is pressed in argument upon the admitted facts that what is understood by the eastern purchasers to be Vicksburg cotton—that is, such cotton as is raised in that vicinity—is superior to other cotton, and that, in some instances at least, an arrangement is made to induce these eastern purchasers to believe that cotton raised in other localities was raised in the vicinity of Vicksburg, and that this constitutes such an arrangement a violation of these sections of the act upon the part of the defendant. This may be a sort of pious fraud upon the part of these local cotton buyers upon their eastern employers, whose agents they are, but certainly cannot be imputed to the defendant or any other common carrier. To render the discrimination unlawful, the preference given to one over another must be contemporaneous, and under substantially similar circumstances and conditions. Had petitioner purchased cotton at Delhi, for shipment to the eastern points, it would have been the duty of agents at that place to have informed him that he could stop it at Vicksburg, and have it compressed and shipped through at the published rates. A neglect to do so would have been an unjust discrimination, and have entitled petitioner to his action and to a judgment for the damages sustained; but this is not such a case. I am satisfied from the pleadings and proof that the petitioner has not made out a case entitling him to damages; therefore this petition must be dismissed; but, as the question is a new one, each party will pay his own costs.

CITY OF ST. LOUIS v. WESTERN UNION TEL. CO.

(Circuit Court, E. D. Missouri, E. D. June 19, 1889.)

1. CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TELEGRAPH COMPANIES — TAX.

Telegraphs being instruments of interstate commerce, and defendant's lines in the city of St. Louis being used for transmission of messages to all parts of the United States, neither the state nor the city can impose a privilege or license tax upon defendant.

2. SAME—"REGULATION" OF TELEGRAPH COMPANIES.

A tax of five dollars per year upon every telegraph pole used by defendant in the city cannot be upheld under the city's charter power "to regulate" telegraph companies.

At Law. Suit to recover tax on telegraph poles.

Leverett Bell, City Counsellor, for plaintiff.

Cochran, Dickson & Smith, for defendant.

THAYER, J. On March 23, 1884, the municipal assembly of the city of St. Louis amended ordinance No. 11,604, entitled "An ordinance to regulate the erection of telegraph and telephone poles," by adding thereto four new sections, numbered 11, 12, 13, and 14. Section No. 11 is as follows:

"From and after the first day of July, 1884, all telegraph and telephone companies which are not by ordinance taxed on their gross income for city purposes, shall pay to the city of St. Louis, for the privilege of using the streets, alleys, and public places thereof, the sum of five dollars per annum for each and every telegraph or telephone pole erected or used by them in the streets, alleys, and public places in said city."

Suit in the nature of an action of debt is brought under this section to recover the sum of \$22,635, which is alleged to have become due in consequence of the use by the defendant of 1,509 telegraph poles since July 1, 1884; said poles having been erected prior to that date. A question is raised as to the right of the plaintiff to sue in such form, inasmuch as the ordinance contains no provisions touching the manner of bringing suits to enforce the payment of the tax; but, waiving that question, I am of the opinion that judgment must be entered for defendant on other and more meritorious grounds also urged by defendant's counsel. The city of St. Louis was originally authorized by its charter "to license, tax, and regulate * * * telegraph companies," etc.; but its power to tax the property, real and personal, of telegraph companies, including their franchises, was taken away by implication by an act approved on the 21st of April, 1877, now section 6901 of the Revised Statutes of Missouri. Section 11 of the ordinance cannot be supported, therefore, as an exercise of a taxing power vested in the municipality, unless it be contended that the municipality still has power to impose a "privilege tax" on telegraph companies, and that the charge in question of five dollars per pole is in the nature of a privilege tax levied against the defendant; that is to say, a tax imposed on it as a condition precedent to its right to carry on the telegraph business in the city of St. Louis.

Inasmuch as telegraphs are instruments of interstate commerce, and as defendant's lines extend into all parts of the United States, and its wires in the city of St. Louis, Mo., are used daily to transmit messages to all parts of the United States, it is clear that neither the state nor the municipality can impose upon it a privilege or license tax. *Almy v. California*, 24 How. 169; *Crandall v. Nevada*, 6 Wall. 35; *State Freight Tax*, 15 Wall. 232; *Car Co. v. Nolan*, 22 Fed. Rep. 276; *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380. The state may tax such property, real or personal, of the defendant as is located within its borders, at such just rate, and in such manner, as the legislature may prescribe, consistently with the laws of the state. *Telegraph Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. Rep. 961. The state of Missouri has exercised that power, and has provided how the property of telegraph lines shall be taxed through the medium of a board of equalization, thereby withdrawing the taxing power from the municipality. In no aspect of the case, therefore, can the section of the ordinance in question be sustained as a valid exercise of any taxing power vested in the city. It is obvious, I think, that the ordinance cannot be upheld under the power conferred on the municipality "to regulate" telegraph companies. By virtue of such power, the city authorities may undoubtedly make reasonable regulations touching the location of telegraph poles, their height and size, and very likely, as was recently held by Judge WALLACE in the Southern district of New York, (*Telegraph Co. v. Mayor*, 38 Fed. Rep. 552,) may require them to be carried underground rather than overhead. The section of the ordinance on which the suit is based is not, however, a regulation of that character, nor is it in any proper sense a regulation, within the meaning of the city charter. The object of the enactment was evidently to secure revenue for the municipality; hence the burden imposed is a tax, and it is imposed in such form that it can only be regarded as a privilege or license tax which the city has no authority to impose. Judgment will be entered for defendant.

UNITED STATES EXPRESS CO. v. HEMMINGWAY, Treasurer, *et al.*

PACIFIC EXPRESS CO. v. SAME.

(Circuit Court, S. D. Mississippi. May 25, 1889.)

1. CONSTITUTIONAL LAW—EXPRESS COMPANIES—TAX.

Act Leg. Miss., imposing a tax on express companies doing business in the state, is void as to all interstate transportation, being in violation of Const. U. S. art. 1, § 8, par. 3, exclusively confiding regulation of interstate commerce to congress, but valid as to all business to be exclusively performed within the state.

2. SAME—INJUNCTION.

A levy of such a tax on a company doing both a local and interstate business, will be enjoined until a separation between the two kinds of business can be made.

In Equity. Application for injunction.

R. V. Booth and *M. Marshall*, for complainant.

T. M. Miller, Atty. Gen., for defendants.

HILL, J. This is an application on behalf of the United States Express Company for an injunction to restrain the defendants, who claim the right to do so by virtue of their offices as treasurer and auditor of the state of Mississippi, from collecting the privilege tax of \$3,000, levied upon it by authority of an act of the legislature of the state of Mississippi for doing business in this state as an express company, which, it is alleged in the bill, is unconstitutional and void, being repugnant to paragraph 3, § 8, art. 1, of the constitution of the United States. The bill, in substance, alleges that it is an unincorporated, joint-stock association, organized and doing business under the laws of the state of New York, in which state it is located, and has its principal place of business; that it has been for some time past, and still is, engaged in carrying on a general express business, consisting in receiving and transporting from one state to another, by rapid transit, by railroad, and other conveyances for hire, gold, silver, and other valuable articles of many kinds, requiring great care and safe and speedy delivery, and which constitutes an important artery of commerce between the states, the regulation of which is by paragraph 3, § 8, art. 1, exclusively confided to the congress of the United States; that the defendants, as treasurer and auditor of public accounts of the state of Mississippi, under the authority of an act of the legislature of the state, imposing an annual tax of \$3,000 upon express companies doing business in this state, for the privilege of doing such business, and imposing severe and heavy penalties against any express company for doing business in the state without first paying said tax, are about to enforce the payment thereof from complainant, and will do so unless enjoined and restrained therefrom by the order and decree of this court.

The question now to be decided is as to whether or not this tax is a tax upon commerce between the states, and repugnant to the constitution of the United States, as set forth in the bill. It has been so repeatedly held by the supreme court of the United States that any tax imposed by a state upon commerce passing from one state into another is in violation of the constitution of the United States, and void, that reference to these decisions is unnecessary; the last decision on this question being *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, and in which reference is made to a large number of decisions, commencing with the *Freight Tax Case*, in 15 Wall. 232. That was a tax on a telegraph company, but there is no substantial difference between a telegraph company and an express company in this particular. It is held in these cases that a tax for the privilege of doing business in a state is a tax on the business in the state, and if the business is one of the agencies in carrying on the commerce between the states, it is an interference with the commerce between the states, the regulation of which is exclusively confided to the congress of the United States, and that such

interference is prohibited by the constitution of the United States. The purpose and business of express companies is to transport gold, silver, and articles of great value, and those requiring the most speedy and safe transit from one state to another, and for which the express companies receive extra compensation, and are strictly liable. I suppose there is scarcely an exception to this rule to be found, so that the tax imposed on the complainant, with all other express companies doing business in the state, is in part, if not mainly, for the privilege of doing the express business in relation to this interstate transportation, and, so far as it relates to that portion of the business of the complainant, is by all these decisions unconstitutional and void. It is held that when the tax is for the privilege of carrying on the transportation exclusively within the state, it is not repugnant to the constitution, and that, when the portion not embraced in the transportation from one state into another can be separated, then only the interstate transportation will be held void, the other valid. Under the decisions referred to in which it was decided that when a separation could be made between the interstate and the purely local business, that which was interstate was enjoined, and all must be enjoined in this case until the separation can be made, if such a separation is possible. The decision relied upon by the attorney general for the state is the case of *Osborne v. Mobile*, 16 Wall. 479. I am satisfied that this case is virtually overruled by the case of *Leloup v. Port of Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380. The result is that upon the complainant's entering into bond with one or more sureties in the sum of \$4,000, payable to the defendants, and conditioned for the payment of such sum as the court may decree to be paid in case the injunction shall be dissolved, to be approved by the clerk of this court, the writ of injunction will be issued as prayed for in the bill. The same order will be made in the case of the Pacific Express Company against the same defendants, submitted with this case, and being dependent on the same facts.

STOCKSDALE, Supervisor of Election, v. UNITED STATES.

BECKMAN, Special Deputy-Marshall, v. SAME.

(District Court, D. Maryland. June 17, 1889.)

1. ELECTION—SUPERVISOR—COMPENSATION—UNITED STATES MARSHAL.

The attorney general, by authority from the president, prior to the appointment of the plaintiffs, the one as supervisor and the other as special deputy-marshall, notified them that they would be paid for only four days' attendance upon the registration and one day at the polls on the day of election for representatives in congress. The registration offices were required by the state law to be open for two days in May, June, July, September, and October, making 10 days in all; and under the act of congress it was the duty of both the supervisor and the special deputy marshal to be present on duty at the offices of registration, and at the election polls, and they did so attend.

Held, that the act of congress prescribed the duties of and the compensation of both the supervisor and the special deputy-marshal, and that, having in the performance of that duty been required to actually serve more than 10 days, they were entitled to the full compensation prescribed by the act of congress.

2. SAME.

Held, that there could be no implied contract by which the appointee undertook to perform less than the whole duty, and to receive less than the full pay enacted by congress.

(*Syllabus by the Court.*)

At Law. Actions for fees as officers of election.

H. Arthur Stump, for petitioners.

Thomas G. Hayes, U. S. Dist. Atty.

MORRIS, J. The case of Supervisor Stocksdale is identical with the case of *Scholfield v. U. S.*, reported 32 Fed Rep. 576, except that Stocksdale had notice from the attorney general prior to his appointment as supervisor of election that the department of justice was authorized, under executive order of 5th November, 1886, to pay each employé only for the days served, not exceeding five in number, at five dollars per day. With full knowledge that this notice had been issued with reference to his compensation the petitioner, Stocksdale, accepted his appointment as supervisor under section 2012, was sworn in, and performed 11 days of necessary and proper service; consisting of 10 days' attendance at the sittings of the state registers of voters directed by the laws of Maryland to be held in the city of Baltimore in the months of May, June, July, September, and October in the year 1888, and attending at the polls on November 6, 1888, the day of election. He has been paid \$25 for five days' service, and it is urged that his acceptance of the appointment with the above-mentioned notice precludes him from demanding any greater compensation.

The petitioner Stocksdale was appointed by the court, and his duties are prescribed by the act of congress. By section 2016 he was authorized and required to attend at all times and places fixed for the registration of voters, and at all times and places for holding elections. By section 5521, a supervisor of election or a special deputy-marshal, who, having taken the oath of office, "neglects or refuses to perform and discharge fully the duties, obligations, and requirements of such office until the expiration of the term for which he was appointed," is declared punishable by fine and imprisonment. The Maryland law required the register of voters to sit with open doors from 10 o'clock A. M. to 10 o'clock P. M. on the 10 days during the months preceding the election for representatives in congress for which the petitioner claims compensation, and the act of congress explicitly obliged him to be present on those days and on the day of election, and the act of congress with equal explicitness fixes his compensation, and by section 2031 enacts that he shall be paid five dollars per day for each day he is actually on duty, not exceeding 10 days. Congress having thus in explicit terms fixed the duties and the compensation of the petitioner, I cannot see how

any order of the president or of the attorney general, whether issued before or after his appointment, could compel the petitioner to do less than his whole duty, or to accept less than his whole compensation.

The case of *Frank Beckman v. U. S.* is similar in all respects, except that he was a special deputy-marshal instead of a supervisor. The special deputy-marshals are not, like the supervisors, appointed by the court, but are appointed by the marshal of the district, and by section 362 it is enacted that the attorney general shall exercise general superintendence over the attorneys and marshals of all the districts in the United States as to the manner of discharging their respective duties. It is contended that this power and duty of superintendence over the marshals gave the attorney general authority to declare that the special deputies should be paid only for four days' attendance upon the registration. But it was impossible for the special deputy-marshals in Baltimore city to perform the duties which congress had required of them in less than 10 days. Section 2021 makes it the duty of the special deputy-marshals to attend each election district or voting precinct, at the times and places where and when the registration may by law be scrutinized, and the names of registered voters marked for challenge, and also to attend at all times for holding elections; and he, like the supervisor, is punishable by fine and imprisonment, if he neglects to fully perform his duties. Special Deputy-Marshal Beckman, the petitioner, could not possibly have performed the duties imposed on him by congress except by actually serving 11 days. Congress has enacted that his compensation shall be five dollars a day for each day actually on duty, not exceeding 10. I am at a loss to see how the authority to exercise general superintendence and direction over the manner of discharging his duties could confer authority to compel the petitioner to do in four days what could not by any diligence on his part be done in less than ten days, or to deprive him of the compensation which congress explicitly says shall be paid to him.

It is urged that the acceptance of the appointment from the marshal, with notice from him that the compensation would be only \$25, created a contract between the special deputy-marshal and the United States, by which the petitioner agreed to accept \$25 for the service to be rendered. It is not true, however, either in fact or in law, that the petitioner made a contract, or that any one had authority on behalf of the United States to contract with him. He did not make a contract; he accepted an office, and took an oath to perform the duties appertaining to it. Congress had prescribed those duties, and had fixed his compensation for performing them. Having performed the duties, he is under the law entitled to the compensation.

EASTON *et al.* v. HOUSTON & T. C. RY. CO. *et al.*, (LUNDIEN, Intervenor.)

(*Circuit Court, E. D. Texas.* June 13, 1889.)

MASTER AND SERVANT—DANGEROUS EMPLOYMENT—ASSUMPTION OF RISK.

Where an employé knows of the hazardous character of the work which he undertakes, and is injured by an accident which could not be foreseen by his employer, the latter is not liable in damages.

In Equity. Exceptions to master's report. Intervention of John Lundien. Petition for damages for personal injuries to employé.

John Dowell, for intervenor.

Baker & Holt, for receivers.

Before LAMAR, Justice, and PARDEE, J.

PER CURIAM. In this case we have carefully examined and considered the evidence, and have also duly considered the arguments made in support of the exceptions to the master's report. Our conclusion is that none of the exceptions are well taken. The nature of the intervenor's employment, as one of the bridge gang, to make repairs of railroad bridges, and the character of the work assigned this gang at the time of the accident, to-wit, the pulling down of an elevated water-tank, was a sufficient notice to the intervenor that the kind and quality of work which he had undertaken to do as an employé of the receiver was of a hazardous, if not positively dangerous, character. The intervenor seems to have met his injury by an accident which could not have been foreseen by the receivers, and, if it could have been foreseen at all, it was only by himself and the other members of his gang, fellow-servants of his. The evidence does not show that the pile of old scrap-iron, lying near the foundation of the tank and the railroad track cut any figure in the matter.

Conceding for this case, and this case only, that the relation between the receivers and the surgeons who conduct and carry on the railway hospital was that of master and servant, the weight of evidence is very strongly against the claim of intervenor's of malpractice in the surgical treatment he received. The nature of the fracture was such that it seems to have been impossible to have otherwise properly treated it than by amputation. Amputation, finally resorted to, was long postponed by the surgeons, at the earnest entreaties of intervenor himself.

We notice in the evidence that the intervenor was offered half pay, at the rate of his regular wages when employed, on condition that he would waive all claims against the receiver for damages. If, under the rules of the company, a person injured as intervenor was, was entitled to receive wages for the time lost during his treatment and residence in the hospital, we think it should have been given him without exacting a release of any right he may have had to apply to the court. The following decree will be entered in the case:

DECREE.

This cause came on to be further heard on the exceptions to the master's report, and was argued, whereupon, and for the foregoing reasons, it is ordered, adjudged, and decreed that the exceptions to the master's report be overruled, and that the said master's report be, and the same is hereby, confirmed. It is further ordered, adjudged, and decreed that on demand of John Lundien, intervenor herein, the receiver in this case do pay to him, from the earnings of the railway property in his possession, the sum of \$347.20, being the amount of regular wages of the said John Lundien during and from the time he received his injury until the day he was discharged from the hospital.

KIRBY *et al.* v. LEWIS *et al.*

(Circuit Court, E. D. Arkansas. June 4, 1889.)

1. PUBLIC LANDS—TITLE FROM STATE—RECITAL IN PATENT.

Recitals in the patents of the state are deemed to be made upon suggestion of the grantee.

2. SAME—DEEDS—RECITALS—PAROL EVIDENCE.

The recitals in a deed constitute a part of the title. The acceptance of a deed by a grantee makes its recitals evidence against him, and parol evidence is inadmissible to contradict or vary them.

3. SAME—SWAMP LANDS—GRANT TO STATE—SUBSEQUENT SALE BY UNITED STATES.

The grant of the swamp lands to the state by the act of congress of September 28, 1850, passed the title from its date, and after that time the United States could not make a sale of such lands that would divest the rights of the state under that act. But where the United States sold such lands subsequent to the grant, it was competent for the state to confirm the title of the purchaser from the United States; and that was done by the acts approved January 11, 1851, and December 14, 1875. By these acts the state's title to all swamp lands sold by the United States after the 28th of September, 1850, is vested in the purchasers of such lands from the United States, except in cases where such lands had been sold by the state, or persons had acquired a pre-emption or other vested right to them under the laws of the state prior to their sale by the United States.

4. SAME.

It has been the constant and uniform policy of the state of Arkansas and the United States to avoid confusion and conflict in the title to swamp lands growing out of the delay in their selection and confirmation, and their sale in the mean time by the United States. This policy has been carried out by the state confirming the titles of the purchasers of such lands from the United States, and accepting in lieu thereof the purchase money received therefor by the United States, which the latter, by the acts of congress approved March 2, 1855, and March 3, 1857, agrees to pay over to the state.

5. SAME—APPLICATION TO PURCHASE.

By law, one applying to the commissioner of state lands to purchase swamp lands, under the act of March 18, 1879, is required to prove by affidavit, before the commissioner, and to be filed in his office, the existence of certain facts. *Held*, following *Rice v. Harrell*, 24 Ark. 403, that the proof of these facts in the mode prescribed by law is a condition precedent to the right of the applicant to purchase, and to the authority of the commissioner to sell, lands, under that act.

6. SAME—QUITCLAIM DEED—BURDEN OF PROOF.

Where the state makes a quitclaim deed to land alleged to be swamp land, but which has never been selected, certified, or designated as such by any officer or agent of the state or the United States, the burden of the proof is on the grantee in such deed to show by clear and satisfactory proof that the land was swamp land on the 28th of September, 1850. Unsatisfactory character of the proof in this case commented on.

7. SAME—EVIDENCE—FIELD NOTES.

The field-notes of the survey of the public lands are competent evidence, and have the force of a deposition.

8. SAME—SELECTION BY AGENT.

By an act approved January 6, 1851, the state elected to select the swamp lands to which she was entitled under the act of September 28, 1850, and for that purpose appointed an agent in each county, whose duty it was to select and report all swamp lands in the county. The agent for the county in which the land in controversy lay selected and reported the swamp lands in that county in 1860, or earlier; and it is not shown that the state has selected or made any claim to any other lands in that county under the swamp-land grant, since that time. It is a maxim of the law that a public officer is presumed to have fulfilled every requisite which the discharge of his duty demands, and this maxim is applicable to the state agent, and it will be presumed that he selected and reported all the swamp lands in the county in accordance with his official duty; and, after the lapse of 30 years, and on the facts of this case, this presumption would seem to be conclusive.

9. SAME—EVIDENCE—OFFICIAL REPORTS.

The official reports and correspondence of public officers of the state and the United States, relating to the swamp lands of the state, and published by authority of the legislature, are public documents which the court has a right to consult, even if not made formal proof in the case.

At Law.

F. W. Compton, for plaintiffs.

Dodge & Johnson and *Scott & Jones*, for defendants.

CALDWELL, J. This is an action of ejectment. It was originally brought against numerous defendants to recover 201.52 acres of land, comprising a considerable portion of the city of Texarkana and its suburbs. The action has been dismissed as to all the lands except a part of the S. $\frac{1}{2}$ of the S. W. fractional $\frac{1}{4}$ of section 30, township 15 S., range 28 W., and as to all the defendants except John V. Lewis, William P. Anderson, Frank H. Baldwin, and Walter H. Field, who claim title to the parcel of the S. $\frac{1}{2}$ of the S. W. fractional $\frac{1}{4}$ described in the amended complaint. The case can best be understood by stating the defendants' title first. The S. W. fractional $\frac{1}{4}$ of section 30, township 15 S., range 28 W., containing 81.52 acres, was entered by the Cairo & Fulton Railroad Company at the United States land-office at Washington, Ark., December 6, 1856, and was patented to the railroad company July 1, 1859. In the certificate of entry and first patent there was a mistake in the description of the land purchased, in this: it was described as the W. $\frac{1}{2}$ of the S. W. fractional $\frac{1}{4}$, which only included a small fraction on the state line of less than two acres, whereas the United States sold and the railroad company purchased and paid for, as shown by the plats, the S. W. fractional $\frac{1}{4}$, containing 81.52 acres. This error was subsequently corrected, and a patent issued for the S. W. fractional $\frac{1}{4}$, May 1, 1884, which, by operation of law, as well as by its terms, relates back to the original entry.

The defendants are the successors and grantees of the Cairo & Fulton Railroad Company, and own all the right and title to the land that passed under the patent of the United States to that company. The practice act of this state requires the plaintiff in an action of ejectment "to set forth in his complaint all deeds and other written evidences of title on which he relies for the maintenance of his suit," and to file copies of the same. In their complaint the plaintiffs rely for the maintenance of their suit on a deed for the land in controversy, executed to them by the commissioner of state lands, which reads as follows:

"QUITCLAIM DEED TO UNAPPROVED SWAMP LANDS.—ACT MARCH 18TH, 1879.

"The State of Arkansas, to All to Whom These Presents shall Come, Greeting: Know ye, that Joseph F. and John C. Kirby have this day purchased from the state of Arkansas the north half of the south-east quarter, and the south-west quarter of the south-east quarter, and the south-west fractional quarter of section thirty, (30,) in township fifteen (15) south of the base line in range twenty-eight (28) west of the fifth principal meridian, containing two hundred and one and 52-100 acres, (201 52-100;) the same being a portion of the swamp and overflowed lands selected by the state of Arkansas as inuring to the said state under the provisions of an act of the congress of the United States of America, entitled 'An act to enable the state of Arkansas and other states to reclaim the "swamp lands" within their limits,' approved 28th of September, 1850, and which still remains unapproved and unpatented to the state of Arkansas by the general government. Now, therefore, I, W. P. Campbell, commissioner of state lands in and for the state of Arkansas, in pursuance of the provisions of an act of the general assembly entitled 'An act to authorize the sale of swamp lands in certain cases,' approved 18th March, 1879, and for the consideration of two hundred and one dollars and fifty-two cents, (\$201.52,) this day paid to the treasurer of the state of Arkansas, being the amount in full for the purchase money for said land, the receipt for the same being now on file in my office, do hereby, for and in behalf of the state of Arkansas, grant, bargain, sell, and convey to the said Joseph F. and John C. Kirby, and to their heirs and assigns forever, all the right, title, interest, and claim the state of Arkansas has in and to the above-described land, together with all the appurtenances and hereditaments thereunto belonging, to have and to hold the same as now held by the said state, unto the said Joseph F. and John C. Kirby, and to their heirs and assigns forever: provided, however, that if the land above described and conveyed is of a character not comprehended in the act of congress granting the swamp and overflowed lands to the state of Arkansas, then and in that case the said Joseph F. and John C. Kirby shall have no claim or demand on the state of Arkansas for recoupment or otherwise.

"In testimony whereof, I, W. P. Campbell, commissioner of state lands for the state of Arkansas, have hereunto set my hand, and caused the seal of this office to be affixed at the city of Little Rock, on this 25th day of September, 1883. [Seal.] W. P. CAMPBELL, Commissioner of State Lands."

It will be observed that the deed from the commissioner of state lands to the plaintiffs recites that the lands described therein are "a portion of the swamp and overflowed lands selected by the state" under the swamp-land grant "which still remains unapproved and unpatented to the state," and that the deed is made "in pursuance of the provisions" of the act approved March 18, 1879. That act reads as follows:

"Section 1. That all lands which have been and which may hereafter be selected by any authorized agent of the state to make selections of swamp and overflowed lands be, and the same shall hereafter be, subject to sale on the following conditions, whether the same has ever been approved and patented to the state by the general government or not:

"Sec. 2. That pre-emptors and settlers on the selected and unconfirmed swamp lands of the state, and their legal representatives or assigns, shall have a preference right to purchase such lands by making satisfactory proof to the commissioner of state lands of their rights as such pre-emptors and settlers.

"Sec. 3. That any person not a pre-emptor or settler, who shall apply to purchase any of such lands, shall make and file with the commissioner of state lands an affidavit stating that the land applied for has no improvement on it, and that no person is residing upon it, or claims it by virtue of any pre-emption certificate issued by authority of law, to the best of his or her knowledge and belief, which affidavit shall be attested by the county or circuit clerk, or by some notary public of the state, or by the commissioner of state lands, and shall be filed in the state land-office.

"Sec. 4. That on proper application being filed with the commissioner of state lands for the purchase of any of the selected and unconfirmed swamp lands of the state, and full payment therefor being made to him, he shall execute to the purchaser or purchasers thereof a quitclaim deed therefor conveying all the right, title, and interest of the state in and to the land so sold."

It will be observed that the power of the commissioner of state lands to sell under this act is limited to "lands which have been and which may hereafter be selected by any authorized agent of the state to make selections of swamp and overflowed lands;" and it is recited in the deed that the land in controversy had been so selected. On the 14th of December, 1875, the general assembly of the state passed an act, the preamble of which reads as follows:

"Whereas, under the provisions of the act of congress approved September 28, 1850, entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' a large amount of lands were selected which were afterwards disposed of by the United States; and whereas, upon proper proof that any lands so selected came within the provisions of the grant aforesaid, the United States government will refund to the state, in case of cash entry, the amount of purchase money, and an equivalent in lands for the tracts located with military, county warrants, or script; therefore," etc.

This act provides for the appointment of "an agent whose duty it shall be to procure the necessary proof in each and every case of the kind above recited, and make a final settlement with the United States government on behalf of the state." The seventh section of this act confirms the titles of the purchasers to all swamp lands purchased from the United States after the passage of the swamp-land grant, in these words:

"Sec. 7. That all titles to lands embraced in this act are hereby ratified and confirmed, and made as valid as if deeded or patented by the state of Arkansas."

If the land in controversy was swamp land, the title to which vested in the state under the swamp-land grant, the state, by this act, relinquished and transferred her title thereto to the railroad company, who purchased it from the United States. The plaintiffs, perceiving this to

be the effect of the act, if the land was "selected" swamp land, now say that the recitals in their deed that the land is "a portion of the swamp and overflowed land selected by the state," and that the deed is made "in pursuance of the provisions of" the act approved March 18, 1879, are mistakes, and ask the court to reject them in the consideration of the case. But the plaintiffs cannot reject the recitals in their deed. In their complaint they rest their right to recover on this deed, which is made a part of the complaint. There is no suggestion in the complaint that the recitals in the deed are false, or that the plaintiffs claim title to the land on any other or different grounds than those recited in their deed. The recitals conform to the plaintiffs' application to purchase. The recitals in the grants or patents of the state "are deemed to be made upon suggestion of the grantee." *Carver v. Jackson*, 4 Pet. 87. The recital constitutes a part of the title. It is as much a muniment of title as any covenant therein running with the land. *Penrose v. Griffith*, 4 Bin. 231. The acceptance of a deed by a grantee makes its recitals evidence against him, (*Improvement Co. v. McCreary*, 58 Pa. St. 304,) and parol evidence is inadmissible to contradict or vary material recitals. Whenever the recitals of a patent nullify its granting clause, the grant fails. *Smelting Co. v. Kemp*, 104 U. S. 644. By the law of this state the recitals in the deeds made by the commissioner of state lands are to be taken as *prima facie* true. *Chrisman v. Jones*, 31 Ark. 609; *Hendry v. Willis*, 33 Ark. 833. The plaintiffs are bound by the recitals in their deed, and these recitals, under the proof, and the act of 1875, are fatal to the plaintiffs' case. The provisions of an earlier act are equally fatal to the plaintiffs' title. By the fifth section of an act approved 11th of January, 1851, it was enacted—

"That the board of swamp-land commissioners are hereby empowered to demand of and receive from the proper accounting officers of the United States indemnity at the rate of one dollar and twenty-five cents per acre for any swamp and overflowed lands within this state which have been disposed of or sold by the United States since the 28th of September, 1850, or which hereafter may be sold or disposed of by the United States."

It will be seen this act is not limited in its operation to "selected" swamp lands. In construing this act the supreme court of the state, in *Branch v. Mitchell*, 24 Ark. 446, say:

"The provisions of the fifth section of the act of the 11th of January, 1851, must be construed to be a consent on the part of the state to receive from the United States the purchase money paid to the latter for all such of the swamp lands as the state could rightfully relinquish, and not for any which any person might obtain a right to, as against the state, before the purchase of the same by another from the United States."

At the time the railroad company purchased the land from the United States the plaintiffs had made no settlement or improvement upon it, and had acquired no pre-emption right to it under the laws of the state, and, under the acts of the legislature cited, could not do so after its sale by the United States; and it does not appear that they ever made any effort to do so. One of the plaintiffs testifies that in 1873 he purchased

the Garrett improvement on four forties, and that seven or eight acres of the improved land was on the forty-acre tract in controversy, and that he remained in possession of the improvements from the fall of 1873 to the spring of 1874, when he was ousted of the possession of three of the forties by suit, and that he thereupon abandoned his improvement, and whatever possession he had on the tract in controversy in this case, though no suit had been brought against him for this tract. From the spring of 1874 down to the present time the railroad company and its grantees have had actual, exclusive, notorious, and adverse possession of the land, and during that time, and long before the plaintiffs obtained their deed from the commissioner of state lands, had placed improvements on the land, valued at \$150,000. The grant of the swamp lands to the state by the act of congress of September 28, 1850, passed the title from its date; and after that time the United States could not make a sale of such lands that would divest the rights of the state under that act. But where the United States sold such lands subsequent to the grant, it was competent for the state to confirm the title of the purchaser from the United States, and that was done by the acts approved January 11, 1851, and December 14, 1875. By these acts the state's title to all swamp lands sold by the United States after the 28th of September, 1850, is vested in the purchasers of such lands from the United States, except in cases where such lands had been sold by the state, or persons had acquired a pre-emption or other vested rights to them under the laws of the state prior to their sale by the United States. It has been the constant and uniform policy of the state, and the United States, to avoid confusion and conflict in the title to swamp lands, growing out of the delay in their selection and confirmation, and their sale, in the mean time, by the United States. It was in pursuance of this policy that the acts of the legislature of 1851 and 1875 were passed. The clearly-defined policy of the state has been from the beginning not to contest the title of those who purchased lands from the United States to which the state claimed title under the swamp-land grant, but to confirm the title of such purchasers, and look to the United States for indemnity. This policy finds expression in numerous acts besides those that have been cited. See Acts 1885, p. 71; Acts 1887, p. 102; Acts 1889, pp. 67, 164. The legislation by congress on this subject is in harmony with that of this state. An act of congress on March 2, 1855, provides that patents shall issue to purchasers "of the public lands claimed as swamp lands," and "that upon due proof by the authorized agent of the state or states, before the commissioner of the general land-office, that any of the lands purchased were swamp lands the purchase money shall be paid over to said state or states." And by the act approved March 3, 1857, it is declared that the act of 1855 "shall be, and is hereby, continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage."

The plaintiffs' deed is invalid for other reasons. It is quite immaterial what act of the legislature the commissioner of state lands had in view when he made the deed. On the undisputed facts in the case, he

had no authority to make it under any act. The powers of the commissioner to sell swamp lands are regulated and defined by law. He cannot sell the lands of the state at his pleasure. He is but the servant of the law, and, if he departs from its requirements, his acts are nullities. His power to sell under the act approved December 14, 1875, was limited by the words of the act to persons "who shall heretofore have taken or filed, under existing laws, a pre-emption to or upon any of the swamp lands of this state, or who shall have settled upon, improved, or cultivated said swamp lands." Under this act no one but a settler or pre-emptor on the land could purchase. The plaintiffs were neither. For more than nine years next before the commissioner made the deed to the plaintiffs, the defendants, and those under whom they claim, had been in the actual and exclusive possession of the land, making extensive and valuable improvements upon it. The actual occupancy of the land by the defendants was a bar to the plaintiffs making any settlement on the land that would give them a pre-emption right. "A settlement cannot be made upon public lands already occupied. As against existing occupants the settlement of another is insufficient to establish a pre-emption right." *Quinby v. Conlan*, 104 U. S. 423. The settlement or improvement which entitles one to the preference right of entry must be an actual *bona fide* settlement, and the improvement must be an existing and substantial one, which has not been abandoned. *McIvor v. Williams*, 24 Ark. 33; *Cusselberry v. Fletcher*, 27 Ark. 385; *Bohall v. Dilla*, 114 U. S. 47, 5 Sup. Ct. Rep. 782. The commissioner cannot sell under the act of March 18, 1879, unless the land is a parcel of "the selected and unconfirmed swamp lands of the state," and the purchaser proves by affidavits that he is a "pre-emptor or settler" on the land, or that the land "has no improvements on it, and that no person is residing upon it or claims it by virtue of any pre-emption certificate issued by authority of law." The land was not "selected and unconfirmed" swamp land; the plaintiffs were not pre-emptors or settlers upon it; and other persons were in the actual possession of the land, claiming it, and had made extensive and valuable improvements upon it. The laws and regulations of the land department of the state require that the existence of the facts essential to authorize the commissioner to sell swamp lands under the act of 1879 shall be made to appear by affidavits. No such affidavits were made or filed. The only affidavits filed were to the effect that the land was swamp land. Two other papers were filed: one an application to purchase the land under the act of March 18, 1879, not signed by the plaintiffs, but by persons styling themselves "agents," etc., and not sworn to by any one, and stating no facts. The other paper is not sworn to by any one, is not signed by the plaintiffs, but by their attorneys, and states that the plaintiffs purchased an improvement on the land, and went into possession of it in September, 1873; but it fails to state how long the possession continued, or that they were in possession at the date of the purchase. On the trial, as before stated, one of the plaintiffs testified that their possession terminated in the spring of 1874. Proof, in the mode required by law, of the fact or facts es-

sential to enable an applicant to enter swamp land is a condition precedent to the power of the commissioner to sell. No such proof was made or attempted. If such proof had been made, however informal or false in fact, the commissioner would have had jurisdiction to act in the premises. It is not a case of defective forms, or disputed facts; but one of a total absence of substance. There was no proof offered in any form or shape that the facts then existed that would authorize the commissioner to sell the land under either of said acts. The facts precluded any such proof, and there was no attempt to make it. In *Rice v. Harrell*, 24 Ark. 409, the court say:

"The land-agent permitted Harrell to enter the land in controversy by pre-emption, without the declaration and affidavits required by law, that he had an improvement thereon, etc. The sale so made was unauthorized by law. The statute provides: 'That the land-agents shall have full power and authority to sell any of the swamp and overflowed lands; but in making such sales shall be governed by the rules, provisions, and regulations now in force, and hereafter provided, or which may exist by law at the time of such sale.' Act January 12, 1853, § 7; Act December 30, 1856, § 2. The making and filing of the proper declaration and affidavits in the office of the land-agent, within the time limited, were legal prerequisites to a valid sale of the land by pre-emption. Without them the land-agent had no legal power to make such sale. As remarked by this court in *Cheatham v. Phillips*, 23 Ark. 87, the swamp lands belonged to the state. The title to them is not in the land-agent. They derive their power to sell them from the statutes, and have to follow their requirements in order to make valid sales."

On the uncontradicted facts in the case the commissioner had no power to execute the deed, and it would seem this may be shown in an action at law. *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, and cases cited. Notwithstanding the recital in the deed to the contrary, the land was never selected, designated, or certified as swamp land by any officer or agent of the United States or the state. This is conceded by the plaintiffs, who ask that the recital in the deed to the contrary may be rejected. When this is done, the plaintiffs' title rests on a quitclaim deed from the commissioner for whatever right or title, if any, the state acquired to the land under the swamp-land grant. Whether the state acquired any right to the land under that grant is left for future determination. As between such a deed and a patent previously issued by the United States, the patent must prevail. There is no presumption that all the public lands that belonged to the United States on the 28th of September, 1850, were swamp and overflowed lands. In the absence of proof, the contrary presumption must obtain. The grant to the state was of the swamp and overflowed lands. They had to be identified. To perfect the title of the state, or one claiming under her, to land as swamp land, it must be shown to have been such at the date of the grant, in some of the modes prescribed by law and the regulations of the land department, or, in cases where it is admissible, by parole evidence on the trial. *Railroad Co. v. Smith*, 9 Wall. 95; *Buena Vista Co. v. Railroad Co.*, 112 U. S. 165, 5 Sup. Ct. Rep. 84; *Wright v. Roseberry*, 121 U. S. 488, 7 Sup. Ct. Rep. 985; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228.

Waiving consideration of the question of the competency of parol proof of the quality of the land, in this case, its sufficiency will be considered. On this issue, as presented in this case, the burden of proof is on plaintiffs. To find this issue in the plaintiffs' favor the court must be "clearly satisfied by full proof of the disputed fact that the lands in controversy were swamp and overflowed lands at the date of the act of congress of September 28, 1850." *Buena Vista Co. v. Railroad Co.*, 112 U. S. 176, 5 Sup. Ct. Rep. 90. "Donations of the public domain for any purpose are never to be presumed. Those who claim against the government under legislative grants must show clear title." *Rice v. Railroad Co.*, 110 U. S. 698, 4 Sup. Ct. Rep. 178. It is an issue not to be determined in the affirmative upon doubtful and disputed testimony. On this issue the plaintiffs introduced five and the defendants three witnesses. It would serve no useful purpose to set out their testimony. The plaintiffs' witnesses give it as their opinion that the greater portion of the 40 acres was swamp and overflowed land, and the defendants' witnesses, with equal means of knowledge, are of the contrary opinion. In 1850 that country was sparsely settled, and most of the lands were in their natural state. There was no special landmark on this tract to attract attention to it, or distinguish it from the vast domain of wild lands surrounding it. None of the witnesses resided on or near the land, or had any interest in it. Not one of them knew where the lines or corners were until 1883, when they were pointed out to them by the plaintiffs, preparatory to their becoming witnesses in this case. Their attention was never called to this tract, any more than to any other 40-acre tract of wild land in that region. Their knowledge of it was acquired chiefly, if not solely, by occasionally traveling along a country road which ran on or near its western boundary. From such imperfect data they express the opinion, 35 years afterwards, that not more than 10 or 12 acres of the 40 was then dry land, and that the balance was swampy and overflowed. The integrity and veracity of the witnesses is not questioned, but they never possessed sufficient, accurate, and exact knowledge of this land to enable them to testify persuasively on this subject. They had no interest in the land, did not know its boundaries, and never went upon it and examined it with a view of determining how much of it was swamp and how much dry land, until more than a third of a century after the grant. Whatever knowledge they had of the condition of the land in 1850 was acquired in the most casual and perfunctory way. It may be said in this case, as was said by the supreme court of the United States in an analogous case:

"Those who could testify from actual knowledge are perhaps all dead. The population of that time has all passed away, and the memories of any who may be living must be very imperfect."

The rule adopted by the courts as to the character of the evidence necessary to maintain the affirmative of this issue is the same as that adopted and acted upon by the commissioner of the general land-office from the date of the grant. In his instructions to the surveyor general of Arkansas, dated December 21, 1853, and April 8, 1854, the com-

missioner says "that the witnesses must testify that they have examined the lines and corners of the lands in relation to which they testify," and "that they have examined the surface of the land and the marks or designations on the corner-posts and trees, and that from such examination they have ascertained and know that the greater part of each forty-acre lot of the body of land in relation to which they testify is wet and unfit for cultivation." In a letter of instructions, dated June 5, 1860, addressed to the register and receiver at Little Rock, he says:

"Testimony now, after the lapse of nine years, to be available, must be explicit, resting upon personal and exact knowledge of the locations claimed, and must relate to each quarter quarter section, or other equivalent legal subdivision."

The following is a part of the preamble to an act of the legislature approved March 17, 1885:

"Whereas, more than thirty-four years have now elapsed since such date, (28th September, 1850,) and but few persons are now alive who can testify to the character of such land as it appeared on the 28th day of September, 1850."

This is a legislative recognition of the difficulty of finding living witnesses to testify intelligently on this subject. The testimony must relate to the condition of the land at the date of the grant. "From divers natural and artificial causes the surface of the earth is continually changing, and lands which were wet, overflowed, and unfit for cultivation in 1850 may now be high and arable; and so *vice versa*." *Hendry v. Willis*, 33 Ark. 837. The most satisfactory evidence in relation to the quality of the land remains to be noticed. The statutes of the United States provide that "every surveyor shall note in his field-book * * * all water-courses over which the line he runs may pass; and also the quality of the land." Rev. St. U. S. § 2395, subd. 7. The field-notes of the survey of this land are in evidence. The survey was made in April, 1841,—a season of the year when, if the land was wet and swampy, that fact would be apparent,—but the field-notes do not show it to be other than dry land at that time. The clear implication from the field-notes is that it was arable land. The value of the field-notes as evidence was settled by the supreme court of the United States in the case of *U. S. v. Low*, 16 Pet. 166, where the court say:

"The official return of the surveyor general has accorded to it the force of a deposition. So we held in the case of *U. S. v. Breward*, 16 Pet. 147, and *U. S. v. Hanson*, Id. 196, to which we refer."

They rank as the deposition of a surveyor, charged under oath with the duty of noting on the spot, and at the time he makes the survey, the quality of the land. Soon after the passage of the act making the grant the commissioner of the general land-office advised the surveyor general of the state that, "in all cases where the plats and field-notes represent the lands as swampy, or subject to such overflow as to render them unfit for cultivation, they belong to the state under the law, and will be so certified." And by several acts of the general assembly of this state (Acts 1885, p. 71; Acts 1887, p. 102; Acts 1889, p. 67) the state agrees in the adjustment of her swamp-land claims against the United States "to

accept as final and conclusive in determining the character of such lands the original field-notes of the official survey," where they show conclusively the character of the land. Additional proof that the land was not swamp land is found in the fact that it was never selected as such by the state agents. In the preamble to an act approved March 17, 1885, it is recited that "by section 15 of 'An act for the reclaiming of swamp and overflowed lands donated to the state by the United States,' approved January 6, 1851, the state elected to select such lands by placing locating agents in the field, whose duty it was to survey and examine such lands and report their action to the governor of the state, who furnished the lists describing such selections to the United States authorities." The fifteenth section of the act referred to in this preamble required the board of swamp-land commissioners to "proceed immediately to ascertain the swamp and overflowed land granted to the state by the act of congress," and empowered them to appoint one person in each county to aid them in the work. By an act approved 30th of December, 1856, the board of swamp-land commissioners was abolished, but the act made provision for completing the selection of swamp lands. The fifth section of the act provided that "there shall be appointed by the governor one selecting agent in each county in this state where there may be any unselected swamp and overflowed land, whose duty it shall be to select all the unreported lands lying within his county, and falling within the terms of the act of congress." These agents were appointed, and furnished with the requisite instructions and blanks. In his report to the governor, dated October 1, 1858, the swamp-land secretary for the state says:

"Under the fifth section of the swamp-land act, approved December, 1856, one selecting agent for each county in the state was appointed by your excellency to select all the unreported swamp lands inuring to the state under the act of congress, * * * and there are now regularly appointed agents for the purpose above indicated in every county * * *" in which there are swamp lands.

In the same report the secretary says:

"The work of selecting the remainder of the swamp and overflowed lands is still progressing in some of the counties, and the agents have been instructed to prosecute it as speedily as possible, until every acre in their respective counties shall have been selected and reported."

The same officer, in his report to the governor, dated October 1, 1860, states that the selections had been made, and "the lists returned," by the selecting agents for certain counties, and among them Lafayette, the county in which the land in controversy then lay. It is not shown that the state has selected or made any claim to any other lands in that county under the swamp-land grant since that time. The agent who made the selections resided in the county, and was charged with the duty of selecting all the swamp lands in it. His official duty, as well as the fees he received for his services, would impel him to include in his selections all lands coming within the purview of the grant, and it is highly probable that he did so. It is a maxim of the law that a public officer

is presumed to have fulfilled every requisite which the discharge of his duty demands, (*Russell v. Beebe*, Hemp. 704,) and this maxim is applicable to the state agent, and it will be presumed that he selected and reported all the swamp lands in the county in accordance with his official duty; and after the lapse of 30 years, and on the facts of this case, this presumption would seem to be conclusive. *U. S. v. Beebe*, 127 U. S. 338, 8 Sup. Ct. Rep. 1083; 9 Ops. Atty. Gen. 204. But if it were swamp land it would avail the plaintiffs nothing; because, as has been shown, if it was swamp land, the state's title to it was vested in the purchaser from the United States by the acts of 1851 and 1875. The only parties, on the facts of this case, whose interests can possibly be affected by the determination of this issue are the state and the United States. If it was swamp land, the United States would be under obligation to pay to the state the purchase money it received from the railroad company for the land. It would have no other effect.

In the preparation of this opinion the court has consulted some public documents, embracing official reports and correspondence of public officers of the state and the United States, relating to the swamp lands of the state, and published by authority, that were not formally introduced in evidence. This practice has the sanction of the supreme court of the United States. *U. S. v. Teschmaker*, 22 How. 405; *Romero v. U. S.*, 1 Wall. 742; *Watkins v. Holman*, 16 Pet. 56; *Bryan v. Forsyth*, 19 How. 338; *Gregg v. Forsyth*, 24 How. 179. The conclusions reached on other points in the case make it unnecessary to consider the effect on the plaintiff's deed of the act of congress of March 12, 1860, (12 St. 3,) which required that all selections of swamp lands to be made thereafter from lands already surveyed should be made within two years from the adjournment of the legislature of the state at its next session after the date of the act. In reference to this act see: Letter of the commissioner of the general land-office to the register and receiver at Little Rock, June 5, 1860; report of swamp-land secretary of Arkansas, October 1, 1860; report of commissioner of state lands, October 15, 1878; *Buena Vista Co. v. Railroad Co.*, 112 U. S. 174, 5 Sup. Ct. Rep. 84; *Wright v. Roseberry*, 121 U. S. 511, 7 Sup. Ct. Rep. 985.

HAWKINS POINT LIGHT-HOUSE CASE.

CHAPPELL v. WATERWORTH.

(*Circuit Court, D. Maryland.* June 21, 1889.)

1. NAVIGABLE WATERS—SUBMERGED SOIL—RIGHTS OF UNITED STATES.

In ejectment for the site of a light-house in Patapsco river, erected by the United States as a necessary aid to navigation, the plaintiff's case was that he held a grant from the state of Maryland of the submerged soil upon which the structure stood, and that it had not been condemned, nor any compensation paid or tendered for it, and that he had also, as riparian owner of the neigh-

boring shore, the right to improve out into the river over the light-house site. *Held*, that the private interest in the submerged soil at the bottom of the river which had been granted to the plaintiff, was subject to the paramount right of the public to use the river for navigation, and of the United States, in the regulation of commerce, to erect thereon such aids to navigation as were reasonably necessary; and that the plaintiff's right to improve out into the river, until actually availed of, was subject to the right of the United States to use the soil under the water in aid of navigation without the plaintiff's consent, and without compensation.

2. SAME—EMINENT DOMAIN—COMPENSATION.

Held, also, that the United States in constructing, by authority of congress, a necessary light-house upon soil under the water of the river, was exercising a right in aid of the public right of navigation, to which the plaintiff's private ownership in the submerged soil was necessarily subservient, and that by such use the United States was not taking private property, within the meaning of the fifth amendment of the federal constitution.

(*Syllabus by the Court.*)

At Law. Ejectment.

John P. Poe and F. P. Stevens, for plaintiff.

Thomas G. Hayes, U. S. Dist. Atty., by direction of the attorney general, appeared for defendant; and on behalf of the defendant, and of the United States, filed the following brief:

"This is an action of ejectment brought by the plaintiff against the defendant to recover the possession of the site of Hawkins Point Light-House, situated in the Patapsco river, the same being one of the range lights of Brewerton channel. The defendant is the keeper of said light-house, he having been appointed in conformity with the acts of congress by the light-house board. The suit was instituted in the circuit court for Anne Arundel county, and under the provisions of the act of March 3, 1887, c. 373, was removed to the circuit court of the United States for the district of Maryland. The plaintiff claims title to the fast land adjacent to that part of the Patapsco river where the light-house is located, through a grant from the state of Maryland to his grantor, J. M. Johnson, in March, 1859. He also asserts title to the submerged land on which is located the light-house from the same grantor, who received a patent from the state of Maryland for it in the year 1861. The plaintiff also relies on his riparian rights under the act Md. 1862, c. 129. Code 1888, art. 54, §§ 44-46. The site involved in this suit is thus described in the defendant's plea: 'That portion of said submerged land used as a site for the Hawkins Point Light Station, and embracing so much of said submerged land as is necessary to hold and support nine iron piles, eighteen inches in diameter, on which piles, at the distance of twelve feet above mean high tide, the wooden structure of the said light-house is placed. The said wooden structure resting upon said piles is a square area twenty-seven feet square. The center pile of said nine piles is at the center of the said square superstructure, and is situated at a point distant * * * from the ordinary high-water mark of the adjacent shore 210 feet, more or less.' All the rest of the land described in the declaration the defendant, for himself and on behalf of the United States, denies being in possession of, and files a formal disclaimer of any right or title to the same. The light-house in question was erected on its present site in 1868 by the light-house board, in pursuance of the acts of congress. There was no condemnation nor compensation paid to any one for said site. It ever since has been in the possession of the United States, and used as one of the lights to aid in the navigation of Brewerton channel, in the Patapsco river; the said river being one of the public navigable rivers of the United States, and within the limits of the state of Maryland.

"The defendant, on behalf of himself and the United States, contends that the right of possession of the site in question is in the United States. His position as to this claim is as follows: The title to the land at the bottom of the navigable rivers of the United States, it is admitted, is in the state through whose territory these waters flow. This title of the state to these lands and waters is, however, subject to the public easement of navigation and fishery, or, perhaps, more accurately stated, the state's title is in trust for these public uses. This title of the state is exactly the same kind of title which was held by Great Britain before the Revolution, which title was subject to this easement when in the king of England. By conquest the states became the owners of these submerged lands at the bottom of the navigable waters, subject to this easement or trust. The states under the national compact surrendered or relinquished to the federal government the regulation and enforcement of this easement or trust as to commerce and navigation. Lands at the bottom of the navigable waters of the United States are therefore, as to their use for commerce and navigation, public property, and not private property, and are so taken and considered, when required by the United States for these purposes. The title to these lands in the state being subject to this easement or trust, enforceable by the United States under the constitution, which empowers congress to regulate foreign and interstate commerce, the grantees of the state take a title to these lands subject to the same limitations and public uses. In aid of commerce or navigation, the United States has therefore the right to use the bottom of navigable rivers for the construction of a light-house,—an aid to navigation. This right of the United States to use these lands for purposes of commerce is paramount to any right of the state or its grantees under the title of the state to these lands and waters. This user by the United States of these lands and waters, which are public, and not private, property, for the purposes aforesaid, can be exercised by the United States without condemnation or payment of any consideration either to the state or its grantees.

"*Authority of Congress to Build Light-Houses.* The light-house board, of which the secretary of the treasury is *ex officio* president, is, by congress, charged with the location, construction, and general management of all light-houses. The light-house board constructed Hawkins Point Light-House in 1868, under an act of congress which appropriates 'for the establishment of beacon lights to mark Brewerton channel, Patapsco river, thirty thousand dollars.' Section 4658, Rev. St.; Act July 28, 1866, (14 St. at Large, 313.)

"*Title of State to Submerged Lands.* The title of the state to the land at the bottom of the navigable rivers within its limits is quite different from the title it holds to its uplands forming part of its public territory. The former is held, together with the water which covers them, by the state, in its capacity as a sovereign, for the public use and enjoyment of all its citizens. There is attached to this title a trust, to-wit, for the use and benefit of all its citizens in navigation and fishery. The state cannot divest its title of this trust. A grant by the state of such lands conveys a title subject to this trust. The title of the state to its uplands forming its public territory is an absolute and unqualified fee. The state's title to the lands submerged by the waters of the navigable rivers is exactly the same as was the title of the king to these lands before the Revolution. These lands belonged to the king of Great Britain as a part of the *jura regalia* of the crown. They were held as a royal prerogative for the benefit of the people at large. The same kind of title devolved on the state after the Revolution, subject to the rights surrendered by the states to the United States under the constitution. The right to regulate commerce between the states, foreign nations, and the Indian tribes, was, by article 1, § 8, of the constitution, surrendered by the states to the federal government, and by the same instrument this right is made exclusive, plenary, and paramount. This title to submerged lands has been frequently passed on by the

courts, both federal and state. In the case of *Martin v. Waddell* the supreme court of the United States elaborately discussed the character of these titles. Chief Justice TANEY, in delivering the opinion of the court in that case, said: 'For when the revolution took place the people of each state became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government.' 16 Pet. 410. In another case the supreme court of the United States, by Mr. Chief Justice WARRE, in defining the title of Virginia to the beds of her navigable rivers, said: 'The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States.' *McCready v. Virginia*, 94 U. S. 391. In Maryland the same doctrine has been held by its court of appeals. In *Bay v. Day*, Judge COCHRAN says: 'The common-law distinction between navigable waters, and rivers or streams not navigable, is founded on the difference of the rights to which they are respectively subject; the entire property of the former being vested in the public, while the latter belong to riparian proprietors, although in some cases subject to a qualified public use. Rivers or streams within the ebb and flow of tide, to high-water mark, belong to the public, and in that sense are navigable waters; all the land below high-water mark being as much a part of the *jus publicum* as the stream itself.' 22 Md. 537. The same law is announced in an early case, (1821,) as to Lord Baltimore's title to submerged lands. *Browne v. Kennedy*, 5 Har. & J. 203.

"*The Right of the United States to Take Submerged Land for the Site of a Light-House without Condemnation or Compensation.* It is submitted that the following general propositions are true, and are firmly established by the judicial decisions of the federal courts: (1) The ownership of the state in the soil under navigable waters is subservient to the public right of navigation, the regulation of which as to certain commerce has been surrendered by the states to the United States. This soil cannot be used either by the state or its grantees so as to interfere with this right, the regulation of which, as vested in the United States, is exclusive, plenary, and paramount. (2) This public right is an easement on the title of the state and its grantees in these lands, enforceable by the United States, and for the enjoyment of such easement such erections may be made by the United States as are necessary for the beneficial use of the easement in question. (3) These submerged lands, with the waters, are public property, and not private property, and, when the United States needs any of these lands for purposes of commerce or navigation, it can take them without condemnation, or compensation either to the state or its grantees.

"These propositions are supported by numerous decisions of the supreme court and circuit courts of the United States, as well as by the opinions of the attorney generals of the United States. The following is a list of the most important of such cases and opinions: 15 Op. Attys. Gen. 50, Mr. Pierrepont; 16 Op. Attys. Gen. 535, Mr. Devens; *Gibbons v. Ogden*, 9 Wheat. 190; *Martin v. Waddell*, 16 Pet. 410, 413; *Pollard v. Hagan*, 3 How. 230; *Giñman v. Philadelphia*, 3 Wall. 713; *South Carolina v. Georgia*, 93 U. S. 4; *McCready v. Virginia*, 94 U. S. 391; *Telegraph Co. v. Telegraph Co.*, 96 U. S. 1; *Boom Co. v. Patterson*, 98 U. S. 403; *Mobile Co. v. Kimball*, 102 U. S. 691; *Hoboken v. Railroad Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643; *Bridge Co. v. Hatch*, 125 U. S. 12, 8 Sup. Ct. Rep. 811; *Stockton v. Railroad Co.*, 32 Fed. Rep. 19; *Illinois v. Railroad Co.*, 33 Fed. Rep. 730. The states surrendered to the United States the entire control over commerce with foreign nations, between the states, and with the Indian tribes. Article 1, § 8, Const. U. S. The power of congress to regulate commerce was stated by

Mr. Chief Justice MARSHALL to include the power to regulate navigation. *Gibbons v. Ogden*, 9 Wheat. 190. The power to establish light-houses and buoys and beacons is held to be embraced in the commercial power of congress. Mr. Justice FIELD said: 'Buoys and beacons are important aids, and sometimes are essential, to the safe navigation of vessels, in indicating the channel to be followed at the entrance of harbors and in rivers, and their establishment by congress is undoubtedly within its commercial power.' *Mobile Co. v. Kimball*, 102 U. S. 691. The question as to the right of the United States to use the bottom of navigable rivers for various structures has frequently arisen in late years in the supreme court of the United States, and that court invariably has sustained the paramount right of the United States to use the bottom of these rivers for any purpose affecting commerce, even against the protest of the state, which it was conceded held the legal title. In the recent case of *Boom Co. v. Patterson*, a question arose as to the respective rights of the state of Minnesota and the United States to the use of the bottom of the Mississippi river for a log boom. The construction of these log booms, as set forth in the case, consisted of building piers on the bottom of the river, and then connecting these piers by boom sticks, forming a pen in which the logs were floated and stored,—a kind of log warehouse. The question arose in the condemnation of an island owned by Patterson by the company for a log boom, the company claiming that Patterson was only entitled to the value of the island as land without considering its availability for a boom, as no one else could use it for that purpose, as under their charter from Minnesota they had the exclusive privilege. The supreme court rejected this view, and in stating that the right of the company was not exclusive, because the United States could grant the same privilege to another, Mr. Justice FIELD said: 'Moreover, the United States, having paramount control over the river, may grant such license if the state should refuse one.' 98 U. S. 403. If the United States, against the consent of a state, can grant a license to build a log warehouse on the bottom of the Mississippi river, can it be doubted that nine piles can be driven by the United States in the Patapsco river to support a light-house to direct navigators in navigating Brewerton channel, against the consent of the grantee of the state?

"In another case the supreme court, in commenting on the title of New Jersey and its grantees to the submerged land in front of the city of Hoboken, by Mr. Justice MATTHEWS said: 'Over these lands it [N. J.] had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the constitution upon congress to regulate foreign and interstate commerce.' *Hoboken v. Railroad Co.*, 124 U. S. 656, 8 Sup. Ct. Rep. 643. Mr. Justice BRADLEY, speaking for the supreme court, in commenting upon the respective powers of the state and United States over the navigable waters, and the erection and removal of structures on the bottom of these rivers, said: 'And although, until congress acts, the states have the plenary power supposed, yet, when congress chooses to act, it is not concluded by anything that the states or that individuals, by its authority or acquiescence, have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose.' *Bridge Co. v. Hatch*, 125 U. S. 12, 8 Sup. Ct. Rep. 811. In 1875 a question arose as to the right of the United States to locate in the bed of the Saginaw river two range lights without first obtaining the title to the sites. The secretary of the treasury requested the opinion of Mr. Pierrepont, the attorney general, on the question. On September 20, 1875, he replied: 'I would respectfully submit that, in my judgment, the United States have the right to erect range lights in the waters of the Saginaw river without reference to

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the ownership of the adjacent lots or any permission from riparian proprietors. * * * The state of Michigan has a right of eminent domain over the soil under its navigable rivers, and it has been held that this soil was not at all granted to the United States, but reserved to the state; but the latest decisions of the supreme tribunal reiterate that the state sovereignty over the beds of navigable streams is only for municipal purposes, never to be so used as to affect the exercise of any national right of eminent domain or jurisdiction. To amount to an exercise of this national right of eminent domain might require some unequivocal expression of such a purpose, like a law expressly authorizing the placing of range lights at the entrance of Saginaw river.' 15 Op. Attys. Gen. 50.

"In 1880, under an act of congress appropriating money to improve Oakland harbor, in California, under the approval of the secretary of war, it became necessary to erect training walls in the bed of a navigable estuary below high-water mark. A question arose as to the necessity of the United States to obtain a title to that portion of the bed of this estuary which might be needed for the training walls. The secretary of war asked the opinion of Mr. Charles Devens, then attorney general. He replied: 'The title to the lands which the United States proposes to use for the purpose of structures for the improvement of the harbor below high-water mark is derived from the state. But the state itself does not possess any right, either by virtue of its sovereignty or its ownership, which could in any way control the right of the United States, conferred by the constitution, to regulate commerce. This right includes the right to regulate navigation, and hence to regulate and improve navigable waters; and this it may do by the erection of such structures as it deems necessary for the purpose, no matter what the effect may be upon the subordinate rights of the owners of the soil covered by such navigable waters. The bed of the estuary in question being the bed of a navigable stream or a sheet of water, to the use of the harbor made by which training walls and other structures are essential, they may be used as appropriately as culverts, drains, or embankments may be for the purpose of the construction and proper enjoyment of a public road. * * * In direct answer to your inquiry, I am of opinion that the United States has a legal right to use the bed of the estuary in question for the purpose of said improvement by the erection of training walls or any other appropriate structure, and that the owners of the soil can make no complaint of such use.' 16 Op. Attys. Gen. 536. In 1874-75 congress appropriated \$120,000 for the improvement of the harbor of Savannah, Ga., and directed that this amount should be expended under the direction of the secretary of war. Above the city of Savannah the Savannah river is divided by Hutchinson island into a northern and southern channel, the northern channel being within the territorial limits of South Carolina. The secretary of war decided that the harbor of Savannah would be improved by the closing of the northern channel; the increased depth of water and the scouring effect of a more rapid current in the channel would improve the harbor of Savannah. The secretary of war, therefore, directed that the northern channel should be closed by a dam. The state of South Carolina, in *South Carolina v. Georgia*, endeavored to prevent the closing of the northern channel, and filed a bill in equity in the supreme court of the United States against the state of Georgia, and made the secretary of war and United States engineers engaged in the work co-defendants. The bill was filed to obtain an injunction to prevent the obstruction or interruption of the navigation of the Savannah river. The supreme court refused the relief sought, holding that the power of the United States over the navigable waters of the United States for the purposes of commerce and navigation was plenary, paramount, and exclusive; that the power granted by the commercial clause of the constitution to the United State was as full and as complete as that possessed by the states

over their navigable waters before the adoption of the constitution. The court in that case expressly held that the United States may build light-houses upon the submerged lands of the navigable rivers. Its exact language is: 'It may build light-houses in the bed of the stream.' The state of South Carolina in this case also denied that congress had given any authority to the secretary of war to close the northern channel, inasmuch as there was no express law directing him to do so, but that the only authority for the act was to be found in the law appropriating the amount for the improvement of the harbor of Savannah. The supreme court held that this was ample power, and that no other authority was necessary. The court, in its opinion, reviews the extent of the power of congress over the beds and waters of navigable rivers for the purpose of commerce and navigation. Mr. Justice STRONG said; 'Prior to the adoption of the federal constitution, the states of South Carolina and Georgia together had complete dominion over the navigation of the Savannah river. By mutual agreement they might have regulated it as they pleased. It was in their power to prescribe, not merely on what conditions commerce might be conducted upon the stream, but also how the river might be navigated, and whether it might be navigated at all. * * * They had plenary authority to make improvements in the bed of the river, to divert the water from one channel to another, and to plant obstructions therein at their will. This will not be denied; but the power to "regulate commerce," conferred by the constitution upon congress, is that which previously existed in the states, as was said in *Gilman v. Philadelphia*, 3 Wall. 724: "Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable rivers of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by congress."' In the same case, in referring to the power of congress to place obstructions to navigation in the bed of navigable rivers, the court said: 'If it were, every structure erected in the bed of the river, whether in the channel or not, would be an obstruction. It might be a light-house erected on a submerged sand bank, or a jetty pushed out into the stream to narrow the water-way, and increase the depth of water and the direction and the force of the current. * * * The impediments to navigation caused by such structures are, it is true, in one sense, obstructions to navigation; but, so far as they tend to facilitate commerce, it is not claimed that they are unlawful. * * * It is not, however, to be conceded that congress has no power to order obstructions to be placed in the navigable waters of the United States. * * * It may build light-houses in the bed of the stream. It may construct jetties.'

"The navigable waters of the United States, with their beds, for the purpose of commerce and navigation, being the 'public property of the nation,' when any portion of this property is required by the United States for its uses in aid of navigation there is no condemnation necessary. It is only necessary for congress to 'order' the taking of the part needed for the specified use. An appropriation act naming the river or harbor to be improved and appropriating the necessary money is sufficient. In *South Carolina v. Georgia*, on the question as to what was the required authority from congress to close the northern channel, Mr. Justice STRONG said: 'The plaintiff next contends that, if congress has the power to authorize the construction of the work in contemplation and in progress, whereby the water will be diverted from the northern into the southern channel of the river, no such authority has been given. With this we cannot concur. By an act of congress of June 23, 1874, (18 St. at Large, 204,) an appropriation was made of \$50,000, to be expended under the direction of the secretary of war, for the repairs, preservation, and completion of certain public works, and, *inter alia*, "for the im-

provement of the harbor of Savannah." The act of March 3, 1875, (18 St. at Large, 459,) made an additional appropriation of \$70,000 "for the improvement of the harbor of Savannah, Georgia." It is true that neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the secretary of war, and the mode adopted, under his supervision, plainly tends to the improvement contemplated.' 93 U. S. 4.

"In another case the supreme court was called upon to define the power of congress over the navigable rivers of the United States for the purposes of commerce and navigation. The question arose in the case of *Telegraph Co. v. Telegraph Co.* Congress, by act of 24th July, 1886, gave to all telegraph companies who complied with the requirements of the act the right to run their lines 'through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States, which have been, or may hereafter be, declared such by act of congress, and over, under, or across the navigable streams or waters of the United States.' In construing this section of the act, the supreme court held that the dominion of the United States over the navigable waters for the purpose of commerce is the same as it is over the public domain. Mr. Chief Justice WAITE, in delivering the opinion of the court, said: 'It is insisted, however, that the statute extends only to such military and post roads as are upon the public domain; but this, we think, is not so. The language is, "through and over any portion of the public domain of the United States, * * * and over, under, or across the navigable streams or waters of the United States." There is nothing to indicate an intention of limiting the effect of the words employed, and they are therefore to be given their natural and ordinary signification. Read in this way, the grant evidently extends to the public domain, the military and post roads, and the navigable waters of the United States. These are all within the domain of the national government, to the extent of the national powers, and are therefore subject to legitimate congressional regulation. No question arises as to the authority of congress to provide for the appropriation of private property to the uses of the telegraph, for no such attempt has been made. The use of public property alone is granted.' 96 U. S. 1.

"If congress has the power to grant to a telegraph company the use of the bed of a navigable river for its poles to support its wires running 'over' and 'across' said streams, or the bed of these rivers to support its cable or wires as they pass 'under' these rivers, can it be doubted that congress can empower the light-house board to use the beds of navigable rivers for the purpose of placing in them the iron posts or poles to support the superstructure of a light-house? In a very recent case this very question has arisen, as to the character of the title of the state to the bottom of the navigable rivers as against the United States, when needed, taken, or granted by the United States for the purposes of commerce and navigation. The question arose in the circuit court of the United States for the district of New Jersey in *Stockton v. Railroad Co.* This railroad company in constructing its bridge, under a grant from congress, across the Arthur kill, a navigable water-way running between the states of New Jersey and New York, had taken the bottom of this stream below high-water mark on the New Jersey side for its central and western pier, without condemnation or grant from the state of New Jersey. This state resisted this taking by the company, claiming that it was private property belonging to the state, and that congress had no power to grant its use to a railroad company. It was otherwise held by the court, and in an elaborate and able opinion it was decided that it was not private property, and that the title of the state was in trust for the purposes of commerce and navigation, and that the United States had the right, under the commercial clause

of the constitution, to take it or grant it for this purpose. This decision sustained the taking of the river bottom for the pier of a bridge, which had nothing to do with the navigation of the river, but upon the contrary might be and was an obstruction to its navigation; but how much more apparent, therefore, must be the right of the United States to use the beds of navigable streams for a light-house, the sole purpose of the light being to directly aid commerce and navigation. In delivering the opinion of the court Mr. Justice BRADLEY said: 'The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the king of Great Britain as part of the *jura regalia* of the crown, and devolved to the state by right of conquest. The information does not state, however, what is equally true, that after the conquest the said lands were held by the state as they were by the king, in trust for the public uses of navigation and fishery, and the erection thereon of wharves, piers, light-houses, beacons, and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris*; in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell-fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people, but this did not alter the character of the title.

* * * Such being the character of the state's ownership of the land under water,—an ownership held, not for the purpose of emolument, but for public use, especially the public use of navigation and commerce,—the question arises whether it is a kind of property susceptible of pecuniary compensation, within the meaning of the constitution. The fifth amendment provides only that private property shall not be taken without compensation, making no reference to public property. * * * It is not so considered when sea walls, piers, wing-dams, and other structures are erected for the purpose of aiding commerce by improving and preserving the navigation. * * * It matters little whether the United States had or has not the theoretical ownership and dominion in the waters or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. * * * We think that the power to regulate commerce between the states extends not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of congress, may be necessary or expedient.' 32 Fed. Rep. 19.

"The title of the state of Maryland to the soil beneath the waters of navigable rivers and the waters of these rivers within her territorial limits, for municipal purposes as well as for fisheries, is not for one moment questioned or denied by the United States. The claim of the United States is that this title of the state and its grantees to these lands is subject to a paramount public easement of navigation, the beneficial enjoyment of which is in the people of the United States, and the enforcement and regulation of which has been delegated to the national government, and therefore, for the enjoyment of such easement, such erections may be made by the United States on the soil at the bottom of these rivers as are necessary for the beneficial use of the easement in question. The United States does not claim an absolute title to this land under these rivers, but simply an easement for the public uses of commerce and navigation. Nor does the United States claim by virtue of the easement civil or criminal jurisdiction over any portion of these submerged lands when taken for a light-house, under this power conferred to enforce and regulate the easement in question. If the United States desires to have the absolute title as well as a cession of jurisdiction over these sites, the state alone can give it. But as to the power and right of the United States to use these beds of the navigable rivers for aids to commerce and navigation, with-

out absolute title or cession of jurisdiction, the easement in question, under the grant of the power by the states to the United States to regulate commerce, is ample. The taking of these lands by the United States for the purposes aforesaid is the exercise of the power of eminent domain delegated to the federal government, the thing taken being public property subject to public uses. The claim of the United States, as against the plaintiff in this suit, may be stated in this proposition: The ownership of the state in the soil beneath the navigable rivers within its territorial limits is subservient to the public right of navigation, and cannot be used in any way so as to derogate from and interfere with such right. The grantees of the state take subject to this right, and any grant by the state to a person so as to be detrimental to this public right is void.

"The correctness of this view of the character of the title of the state is confirmed by the opinions of the supreme court in many cases. Mr. Justice SWAYNE said: 'The right of eminent domain over the shores and the soil under the navigable waters for all municipal purposes belongs exclusively to the states within their respective territorial jurisdiction, and they, and they only, have the constitutional power to exercise it. * * * But in the hands of the states this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the constitution, for, although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on shore, but municipal power, subject to the constitution of the United States, and the laws which shall have been made in pursuance thereof.' *Gilman v. Philadelphia*, 3 Wall. 713; *Pollard v. Hagan*, 3 How. 230.

"The state of Maryland impliedly in her laws concedes the paramount character of this easement as in the United States, and that the state has no power to impair it by her own laws. Her title to the submerged lands, it seems, she admits is not for emolument or sale for moneyed consideration to the United States. She has therefore by a public law agreed to convey both the title and to cede jurisdiction 'to the land covered by the navigable waters within the limits of the state, and on which a light-house * * * or other aids to navigation has been built, or is about to be built,' upon the request of the United States, and without any consideration. The state recognizing the existence of this paramount easement in the United States, and that her title to any part of the submerged lands in the navigable rivers in her limits is subject to this servitude, which could be exercised by the United States at any time for the purposes of commerce or navigation without her consent, very wisely decided by a general law to give to the United States both the title and jurisdiction over such portions of submerged land upon which light-houses had been or might be erected. It may be conceded that the easement, although ample to justify the use by the United States of these lands without the consent of the state, did not give title and jurisdiction to the United States over these lands, and the state, recognizing that her title with this servitude annexed was of no value, willingly consented to a gift of title and jurisdiction. Act Md. 1874, c. 193." Code 1888, art. 96, § 2.

MORRIS, J. The brief filed by the learned district attorney correctly states the case made by the pleadings, and his full citations from decisions of the supreme court applicable to the question raised make it unnecessary to quote them in this opinion.

The plaintiff by this action of ejectment seeks to dispossess the United States of a light-house built by the United States light-house board in the year 1868, under authority of congress. It is erected upon piles in

the waters of the Patapsco river, where the tide ebbs and flows, at the distance of about 210 feet from the shore, and it is one of the range lights of the main channel of the river, known as the "Brewerton Channel," which is the only approach for vessels of large draught to the port of Baltimore. In this channel the natural depth of the water-way is about 16 feet. It has been deepened to over 27 feet for the purpose of admitting large ocean steamers, and it is kept dredged out, buoyed, and lighted by the constant supervision of the proper United States authorities with appropriations made by congress. It is conceded that the Hawkins Point light, as now located, is required for the safe navigation of the channel by ships engaged in foreign commerce. It covers an area of only 27 feet square. The plaintiff has acquired by grant, and now owns, all the title and right in the upland, and the shore opposite this light-house, and in the bed of the river covered by this structure which the state could grant away, and has the riparian rights specially conferred by the Maryland act of 1862, c. 129, by which it was enacted that "the proprietor of land bounding on any navigable waters of this state is hereby declared to be entitled to the exclusive right of making improvements into the waters in front of his said land. Such improvements, and other accretions as above provided for, shall pass to the successive owners of the land to which they are attached as incident to their respective estates. But no such improvement shall be so made as to interfere with the navigation of the stream of water into which said improvement is made." In fact, the plaintiff never has availed of this privilege of improving out into the water covered by the light-house, but the right to do so is a valuable riparian right, not to be arbitrarily or capriciously destroyed. *Yates v. Milwaukee*, 10 Wall. 504. It is, however, a privilege which must be exercised subject to the right of the public to use the river for the great primary and paramount purpose of navigation, and for furnishing the usual and necessary aids to navigation.

The ruling in *Yates v. Milwaukee* was that when under legislative permission, or in accordance with his privilege as a riparian owner, the owner of land bounding on a navigable stream has actually made his improvement, and by such improvement that portion of the stream so improved or reclaimed has ceased to be part of the navigable water, and is appropriated to private use, it can then only be taken to improve navigation upon proper compensation being made, as for any other strictly private property. Such was the effect of the mandate of the supreme court in that case in reversing the decree below. But while the submerged land remains a part of the bed of the river it is not private property, in the sense of the fifth amendment to the federal constitution. As was declared in *Gilman v. Philadelphia*, 3 Wall. 725, the navigable waters "are the public property of the nation, and subject to all the requisite legislation by congress." In the hands of the state or of the state's grantee the bed of a navigable river remains subject to an easement of navigation, which the general government can lawfully enforce, improve, and protect. It is by no means true that any dealing with a navigable stream which impairs the value of the rights of riparian owners

gives them a claim for compensation. The contrary doctrine, that, in order to develop the greatest public utility of a water-way, private convenience must often suffer without compensation, has been sanctioned by repeated decisions of the supreme court. The following are cases all involving that proposition: *The Blackbird Creek Case*, 2 Pet. 245; *Gilman v. Philadelphia*, 3 Wall. 713; *Pound v. Turck*, 95 U. S. 459; *Wisconsin v. Duluth*, 96 U. S. 379; *South Carolina v. Georgia*, 93 U. S. 4.

If it were made apparent to congress that any extension of the plaintiff's present shore line into the river tended to impair the navigability of the stream, or its use as a highway of commerce, congress could authorize the agents of the United States to establish the present shore as the line beyond which no structures of any kind could be extended, and the plaintiff would have no claim for compensation. If the plaintiff could thus lawfully be prevented from appropriating to his private use any part of the submerged land lying in front of his shore-line, and the whole of it be kept subservient to the easement of navigation, how can it be successfully claimed that he must be paid for the small portion covered by the light-house 200 feet from the shore, which has been taken for a use as strictly necessary to safe navigation as the improved channel itself? The court of appeals of Maryland, whenever called upon to declare the nature of the title of the state and its grantees in the land at the bottom of navigable streams, has uniformly held that the soil below high-water mark was as much a part of the *jus publicum* as the stream itself. *Day v. Day*, 22 Md. 537. And in the leading Maryland case of *Browne v. Kennedy*, 5 Har. & J. 203, (decided in 1821,) discussing the nature of the property in the soil covered by navigable rivers in Maryland, it was said:

"It is very certain that by the common law the right [to the soil] was in the king of England, and it seems equally clear that he had the capacity to dispose of it *sub modo*. Whatever doubts are entertained on the subject, they probably have arisen from inattention to the distinction between the power of granting an exclusive privilege, in violation or restraint of a common piscarial right or other common right, as that of navigation, and the power of granting the soil *aqua cooperta*, subject to the common user. The subject has, *de communi jure*, an interest in a navigable stream, such as the right of fishing and of navigating, which cannot be abridged or restrained by any charter or grant of the soil or fishery, since *Magna Charta*, at least. But the property in the soil may be transferred by grant, subject, however, to the *jus publicum*, which cannot be prejudiced by the *jus privatum* acquired under the grant."

The same doctrine has been recently enforced, with regard to the character of the ownership of New Jersey in the lands under the navigable waters of that state, by Mr. Justice BRADLEY in *Stockton v. Railroad Co.*, 32 Fed. Rep. 19. It appears, therefore, that the private interest granted to the plaintiff in the soil in question was of necessity granted to him subject to the use which the United States is now making of it in aid of navigation, and that the special plea to plaintiff's action of ejectment sets up a perfect defense to the action. The plaintiff's replication to the defendant's special plea simply avers that, when pos-

session of the submerged land was taken by the United States as in the plea alleged, the plaintiff held title to it under the grants from the state, and still holds said title, and that he has never been paid or tendered any compensation therefor. This, in my opinion, is no answer to the plea, and the defendant's demurrer to it is sustained. The plaintiff electing to stand on his replication, judgment will be entered for the defendant.

FIRST NAT. BANK OF SALEM v. SALEM CAPITAL FLOUR-MILLS CO. *et al.*

(Circuit Court, D. Oregon. June 17, 1889.)

1. TRUSTS—SALE IN TRUST.

A sale of property "in trust," *held*, under the circumstances, not to be a sale in trust to pay the debts of the vendor.

2. VENDOR AND VENDEE—VENDOR'S LIEN—ASSIGNMENT—SUBROGATION.

A grantor's lien on the premises conveyed, for the purchase price, is a personal privilege, not assignable with the debt; nor can the creditor of the grantor be subrogated to the same.

3. CORPORATIONS—PURCHASE OF THEIR OWN STOCK.

In the absence of any statute to the contrary, a corporation may purchase and dispose of its own stock, provided the same is done in good faith, without intent to injure the creditors thereof, and they are not injured thereby.

4. SAME—DEEDS—ATTORNEY IN FACT.

An attorney of a corporation must execute a deed in the name of his principal, but under his own hand and seal.

(*Syllabus by the Court.*)

Suit to Foreclose the Lien of a Mortgage.

Tilmon Ford, for plaintiff.

William B. Gilbert, for defendant Stuart.

John M. Bower, for defendants Kelly and McDonald.

DEADY, J. This suit is brought by the First National Bank of Salem, hereafter called herein the "Salem Bank," to enforce the lien of a mortgage given by the Salem (Oregon) Capital Flour-Mills Company, hereafter called herein the "Scotch Company," to secure the payment of its note for \$30,000.

William Stuart, who held a prior mortgage on the same property, executed by the City of Salem Company, hereafter called herein the "Oregon Company," to secure the payment of \$71,940, with interest, was made defendant. He appeared, and filed a cross-bill, in which he admitted the claim of the plaintiff, and asked to have the lien of his mortgage enforced.

Joseph Kelly and R. McDonald were also made defendants, the former being a British subject, and the latter a citizen of Rhode Island, on the ground that they pretend to have some interest in the property, as the judgment creditors of the Oregon Company.

The case was before the court on a demurrer of the defendants Kelly and McDonald to the cross-bill of the defendant Stuart, when the demurrer was overruled. 31 Fed. Rep. 580.

Thereafter the defendant Stuart died, and the cross-bill was revived in the name of Hugh Lyon, Alexander Stuart, and others, the executors of the will of the deceased.

In the fullness of time the case was put at issue and heard on the amended bill, the cross-bill, and the revivor thereof, the answers of the defendants Kelly and McDonald, the replications thereto, and the testimony taken before an examiner.

From these it appears that on and before August 2, 1883, the Oregon Company was and still is a corporation formed under the laws of Oregon, with its principal place of business at Salem; that on said day said corporation in pursuance of a resolution of its directors made and delivered its promissory note to the defendant William Stuart, a British subject, and a resident of Scotland, for the sum of \$71,940, payable on August 1, 1888, with interest at 9 per centum per annum, payable half yearly, for which interest 10 additional notes were given at the same time, and made payable accordingly, with interest thereon at 10 per centum per annum after maturity; and at the same time, and in pursuance of the like authority, said corporation duly executed and delivered to said Stuart, as a security for the payment of said principal and interest, a mortgage on its real property, situate in and about Salem, Marion county, Or., including its flour-mills and Santiam water privileges; and also a mortgage on some village lots and parcels of land in Polk county, Or.

The resolutions of the directors, providing for the making of these notes and the execution of these mortgages, state that "it is considered to the best interests of the corporation to buy in and obtain 654 shares of its own stock, now held by the following persons," naming them, 15 in number; that "it is necessary to raise upon its [the corporation's] credit \$71,940, to pay for said stock;" and they authorize and direct "the president and secretary" of the corporation to borrow that amount from the defendant Stuart, and give him its notes and mortgages therefor, as was done.

The actual circumstances out of which this transaction arose are as follows: The capital stock of the corporation consisted of 2,000 shares of the par value of \$100 each, of which it does not appear how many was ever issued. William Reid was a large shareholder in the corporation, and the president and manager of the same from its formation. The owners of the 654 shares of the stock became dissatisfied with his management, and determined to sell out or buy a controlling interest in the corporation. At this juncture, about May 1, 1883, the defendant Stuart, who was also a large shareholder, arrived in Oregon from Scotland, and after canvassing the subject it was agreed, on June 2d, between himself, Reid, and others holding a majority of the stock, that the "discontents" should be bought out on account of the corporation at \$110 a share, payable on August 2d following. But, when the parties came to close the bargain, the sellers refused to take the obligation of the president and

secretary of the corporation for the money, but insisted on having the personal guaranty of the defendant Stuart. This he at first flatly refused, but after much persuasion and serious hesitation he consented; the president assuring him that before the day of payment came around the shares could and would be re-sold in this market for the amount, and the obligation thereby discharged.

Soon after Mr. Stuart returned to Scotland, but the shares were not sold, and he was compelled to advance the money to pay the debt. The corporation kept the shares, and gave him the notes and mortgages as aforesaid.

On March 24, 1844, the directors of the Oregon Company resolved to dispose of all their real property, as well as the wheat, flour, and grain sacks on hand, to the defendants Stuart and James Tait, also of Scotland, or their assignees, upon payment of the actual cost price of the same, "as soon as said price could be ascertained, or within a reasonable time thereafter; the president and secretary to execute and deliver the proper conveyances for that purpose at the time of payment of said sum so to be ascertained."

Afterwards, on April 17, 1884, said directors affirmed this resolution of sale in favor of James Macdonald, of Scotland, as purchaser, at the suggestion of said Stuart and Tait, that he would take the property in trust for the Scotch Company, then being formed by themselves and others under the British Company's act of 1862; and, further, that said Macdonald, either by himself or agents, should have the right to inspect the books, papers, and accounts of the Oregon Company, for the purpose of ascertaining the first cost of its property.

On April 28, 1884, at a meeting of the stockholders of the Oregon Company, at which 1,001 shares were present and voting, there being 1,179 then issued, the resolutions passed at the directors' meetings of March 24 and April 17, 1884, authorizing the sale of the property of the corporation to James Macdonald, were unanimously ratified and confirmed, and the prior mortgage of the same to the defendant Stuart was also "confirmed, ratified, and approved."

Thereafter, on June 6, 1884, at a meeting of the directors of the company, the real property of the corporation was scheduled and valued at \$230,694.68, and the personal property, less "the book debts and accounts," which were not sold, at \$164,023.36, in all \$394,718.04; and at a meeting of said directors, held on July 8, 1884, at which were present James Tait, director, and Alexander Stuart, agent, of the Scotch Company, it was resolved, that inasmuch as said agent does not admit the correctness of the cost of certain items of the property as stated in said schedule, and it has been agreed between the directors of the Oregon Company and the said agent and director of the Scotch Company that said items shall be referred for final adjustment to a committee of two persons from each company, at Edinburgh, William Reid, and William Stuart to act for the Oregon Company; that, on payment by said agent of \$70,054.63 on account of said purchase, the president and secretary do make the necessary conveyances of the property, subject to

the adjustment to be made by said committee, and to the payment of the mortgage of the defendant Stuart.

On July 10, 1884, the Oregon Company, by its deed, duly executed by William Reid, its president, and William N. Ladue, its secretary, conveyed the property in question to James Macdonald, of Edinburgh, Scotland, "in trust" for any corporation that might be organized to take and hold the same. The deed purports to be made in pursuance of the resolutions passed at the meetings of the directors held on March 25 and April 17, 1884, and the resolution passed at the meeting of stockholders held on April 25, 1884, and for the consideration of \$220,000, the receipt whereof is thereby acknowledged.

On August 12, 1884, a meeting of the stockholders of the Oregon Company was held, at which 1,022 shares of the stock were voted, there being then 1,201 issued, when the action of the directors at the meeting of July 8, 1884, in the matter of the adjustment of the cost of certain items in the schedule of the property of the corporation, and the execution of the deed to James Macdonald by the president and secretary, were unanimously ratified and approved.

On December 16, 1884, said James Macdonald duly conveyed the property to the Scotch Company. The deed recites that the property was purchased for the Scotch Company, and conveyed temporarily to Macdonald "as its trustee, the consideration for the same having moved wholly from the said" Scotch Company, and that it is the object of the conveyance to transfer "the legal title" to the same to the Scotch Company and its assigns.

On February ———, 1887, the Scotch Company duly executed its mortgage to the defendant Stuart, on a tract of land near Salem, containing five acres, more or less, and particularly described in the amended cross-bill as a further security for the loan theretofore made by said Stuart to the Oregon Company; it having been the intention of the parties thereto that such property should be included in the mortgage from said company to said Stuart, from which it was omitted by inadvertence.

On November 17, 1886, the Scotch Company, being in the possession of the property aforesaid, duly executed and delivered its mortgage upon the same to the plaintiff, the First National Bank of Salem, Or., and a citizen of said state, by Robert Livingstone, of Portland, therein, its attorney in fact, in pursuance and by authority of a power of attorney to him duly executed by said company on September 2, 1886, to secure the payment of its note of even date therewith for the sum of \$30,000, and payable one day after date to the order of said bank, with interest at 10 per centum per annum, subject, however, to the prior lien of the mortgage thereon, theretofore executed by the Oregon Company to the defendant Stuart, to secure the payment of \$71,940, with interest, the payment of which the mortgagor declares it has assumed. This note was given for prior advances made to the Scotch Company by the Salem Bank, with the approval of the bank examiner.

On August 14, 1885, the directors of the Oregon Company, William Reid, A. Shaw, and S. M. Elliott voting in the affirmative, and William

N. Ladue in the negative, passed a resolution stating that the corporation was indebted to the Oregon & Washington Mortgage Savings Bank of Oregon, a corporation formed under the laws of Oregon, and called herein the "M. & S. Bank," in various sums theretofore advanced by the latter, that then exceeded \$33,000, and directing the president, William Reid, and the directors Shaw and Elliott, to make and deliver to said M. & S. bank, on behalf of the Oregon Company, one promissory note for \$20,000, and another for \$12,000, payable in three days after date.

At this time, and before and since, William Reid was a large stockholder in, and the president and manager of, the M. & S. Bank. The notes were given as directed, the one for \$20,000 on August 14th, and the one for \$12,000 on the 17th of the same month, and some time after their maturity the former was transferred to the defendant McDonald, and the latter to the defendant Kelly, without, so far as appears, any consideration therefor.

On August 25, 1885, Kelly commenced an action on the note held by him in the circuit court of the state for the county of Multnomah, in which, on April 3, 1886, he obtained a judgment against the Oregon Company for the sum of \$12,771.50, principal, attorney's fee, and costs, with interest on the principal from August 17, 1885, at the rate of 9 per centum a year.

On October 18, 1886, McDonald commenced an action in the same court on the note held by him, in which, on December 6, 1886, he obtained a judgment against the Oregon Company for the sum of \$14,369.22, principal, attorney's fee and costs, with interest on \$14,071.60 of the same from date. Both judgments were duly docketed in the lien dockets of the circuit courts of Multnomah and Marion counties, prior to December 25, 1886, and executions issued on the same, and returned *nulla bona*.

The defendants, Kelly and McDonald stand in the shoes of the M. & S. bank, whom they simply represent.

They claim that their demands are a lien on this property prior in time and superior in right to that of the Salem Bank or the defendant Stuart, on the following grounds:

1. That the conveyance to Macdonald of July 10, 1884, was in trust that he or his grantee would pay the existing debts of the Oregon Company, and thereby "the property was impressed with a trust" to pay the same.

There is not a syllable of evidence in the case to support this claim. On the contrary, it is clear that the conveyance to James Macdonald was made "in trust" only, that he would in due time convey the property to the Scotch Company, which was then being formed for the purpose of owning it, by the persons who negotiated the purchase.

It appears probable that at the time of the sale the Oregon Company was in debt to the M. & S. Bank for advances, and doubtless it was expected that the former would pay the same, with the proceeds of the sale of its property to the Scotch Company. But the amount of the indebtedness has never been ascertained, and the agent of the Scotch Com-

pany was prevented by the manager of M. & S. Bank from taking a copy of the account from the books of the same for the purpose of examination.

By the terms of the conveyance the Scotch Company assumed the payment of the Stuart debt, then amounting to over \$78,000, and at the delivery of the same it appears that the agent of the company paid over in cash \$77,134.20, which was largely applied by the manager on the claim of his bank; and, although the resolution of the corporation authorizing the sale directed that the deed should be delivered on the payment of the consideration, yet the parties, being unable to agree on the value of certain items of the properties embraced in the conveyance, and valued in the schedule at \$10,431, the deed was delivered, with the understanding that when the balance was ascertained by the joint committee of the two companies that was to meet at Edinburgh in a short time, it would be paid.

Before the committee met, however, there was a considerable loss on a shipment of flour which appears to have been afloat at the time of the delivery of the deed. The committee of the Scotch Company insisted that this flour was not on hand at the time of the purchase, having been heretofore shipped against advances drawn thereon largely in excess of the proceeds of its sale, and therefore the loss must fall on the Oregon Company. The committee of the latter company, William Reid, claimed that the flour, by the terms of sale, passed to the Scotch Company, and that it was liable for its then value, less the advance, and must stand the loss; and, because the committee of the Scotch Company would not accede to this proposition, he refused to further attend the meetings of the committee, and left this and the other disputed items unsettled, as they still remain, so far as appears.

In the annual report of the president and directors of the Oregon Company to the stockholders, dated October 5, 1885, it is stated that nine months before the corporation, under the advice of the president, had offered to the Scotch Company, by way of compromise, to bear \$20,000 of the loss, which was believed to be over one-half thereof, and that the latter company, not having accepted the proposition, it was withdrawn by the directors on August 14, 1885, and a friendly suit commenced in this court "to determine the various matters in dispute between the two companies." How much, if anything, is still due to the Oregon Company from the Scotch Company it is impossible to say on this evidence. In the balance-sheet of the latter for June 30, 1886, among the liabilities then existing there is this item: "City of Salem Company, balance purchase price of properties, \$39,360.11."

There was a contemporaneous agreement between the Scotch Company and the larger portion, if not all, the shareholders of the Oregon Company, that their shares should be exchanged at their actual value for shares of the former at par, which, so far as carried into effect, would discharge the indebtedness of the former to the latter, and was so intended and understood at the time of the sale.

In admitting that the Scotch Company is indebted to the Oregon Com-

pany, the M. & S. Bank is merely an unsecured creditor of the latter company and has no lien or privilege on the property sold by its debtor to the Scotch Company. The M. & S. Bank was only an unsecured creditor when its debtor sold this property to the Scotch Company, which took the same without any liability, express or implied, to pay any of the grantor's debts, except the one due Stuart, that was already a charge on the land.

And if the debt of the M. & S. Bank had even been assumed by the Scotch Company, the mere fact that it was prior in point of time to the debt of the Salem Bank would not give it any right to priority of payment. In the absence of a bankrupt law or statute to the contrary, a debtor may prefer one creditor to another, at his pleasure.

If the Scotch Company is indebted to the Oregon Company, a creditor of the latter may by proper proceedings subject such indebtedness to the satisfaction of his claim, but he has no right in the property of the former as against the lien creditors thereof.

2. Assuming that some portion of the purchase price is still unpaid, the Oregon Company has a grantor's lien on the property for the amount, to which the defendants Kelly and McDonald are entitled in equity to be subrogated to the extent of their demands against the grantor.

The existence of such a lien is admitted in this state. *Road Co. v. Crocker*, 6 Sawy. 574, 4 Fed. Rep. 577; *Gee v. McMillan*, 14 Or. 268, 12 Pac. Rep. 417; 3 Pom. Eq. Jur. §§ 1249, 1250. But assuming that the Oregon Company has a grantor's lien on the property for unpaid purchase money, the weight of opinion in the United States is that such lien is personal to the grantor, and incapable of being transferred, either by direct assignment or equitable subrogation. 3 Pom. Eq. Jur. § 1254; *Baum v. Grigsby*, 21 Cal. 173.

In the latter case Mr. Chief Justice FIELD, speaking for the court, says of a grantor's lien:

"It is simply a right to resort to the property upon a failure of payment by the vendee. It does not arise from any agreement of the parties, but is the creature of equity, and is established solely for the security of the vendor. It is founded upon the natural justice of allowing a party to reach the property which he has transferred to satisfy the debt which constitutes the consideration of the transfer. It is therefore the personal privilege of the vendor. The assignee of a note given for the purchase money stands in a very different position. He has not parted with the property which he seeks to reach in consideration of the note he has received. He has never held the property and has therefore no special claims upon equity to subject it to sale for his benefit. The particular equity of the vendor in this respect cannot, in the nature of things, be asserted by another."

The M. & S. Bank is not even the assignee of a debt alleged to be due the Oregon Company from its grantee. In England and a few of the states of the Union, such an assignee may enforce the grantor's equity. But it does not appear that a mere creditor of such grantor can be subrogated to this right in any of the United States. 3 Pom. Eq. Jur. § 1254.

3. The mortgage to Stuart is void, because the indebtedness it was given to secure arose in fact out of a purchase by the Oregon Company of its own stock from Stuart.

The rule appears to be well settled in the United States that a corporation may, unless prohibited by statute, purchase its own stock, or take it in pledge or mortgage. *Bank v. Bruce*, 17 N. Y. 510; *Taylor v. Exporting Co.*, 6 Ohio, 176; *In re Insurance Co.*, 3 Biss. 452; *Bank v. Transportation Co.*, 18 Vt. 138; *Clapp v. Peterson*, 104 Ill. 26; *Dupee v. Water Power Co.*, 114 Mass. 37; *Cook, Stocks*, §§ 311, 312.

In the case cited from 104 Ill. the rule is stated qualifiedly as follows:

"Corporations may purchase their own stock in exchange for money or other property, and hold, reissue, or retire the same, provided such act is had in entire good faith, is an exchange of equal value, and is free from all fraud, actual or constructive; this implying that the corporation is neither insolvent nor in process of dissolution," and that the rights of creditors are not thereby injuriously affected. In the case cited from 114 Mass. the court says: "In the absence of legislative provision to the contrary, a corporation may hold and sell its own stock, and may receive it in pledge or in payment in the lawful exercise of its corporate powers."

As a matter of fact, the transaction in question was not a purchase of the stock by Stuart, and a resale by him to the corporation. It was a purchase of the stock by the corporation through its directors, with intent to reissue the same, and a guaranty of payment of the purchase price to the sellers, by Stuart. The subsequent note and mortgage was given to Stuart, in consideration of the amount he had to pay on his guaranty. At the date of the purchase, the corporation appears to have been solvent. It was much more than able to pay its debts. The stock was sold above par, and the motive in selling was not so much to get rid of it, or the property and business which it represented, as a settled dissatisfaction with the management of William Reid. As evidence of this it appears that the discontents offered "to sell or buy,"—to take the stock of Reid and his associates at the same figure.

The only creditor that the corporation appears to have had at the time was the M. & S. Bank, and its president and manager was a party to this transaction, and urgent and active in its accomplishment. The purchase of the stock did not injuriously affect the interest of this creditor, nor was it so intended. It was made in good faith, to acquire the control of a valuable property free from the dissensions arising from the personal distrusts and antipathies of a dissatisfied faction of the stockholders.

Neither, in my judgment, is a purchase of stock by a corporation, even when made under circumstances or for purposes that make it voidable, generally and absolutely void, but only as against those who are injured by it, and in some proper and timely proceeding seek redress against it.

The defendants Kelly and McDonald claim to be the assignees of the M. & S. Bank, which was a creditor of the Oregon Company at the time of the purchase of the stock, but they do not allege or prove any circumstance that tends to show that the purchase was made in bad faith towards their assignor, or with intent to injure it, or that it was thereby injured.

That the stock of the Oregon Company afterwards depreciated in value on account of losses sustained on shipments of flour, or that the debtor

of the corporation, the Scotch Company, thereafter became insolvent from like causes, does not affect the character of the transaction, or the rights of the parties thereto.

And even admitting that the Oregon Company was insolvent at the date of the mortgage, the situation of the parties was simply this: Stuart was a creditor of the corporation for money advanced for it, and the M. & S. Bank was nothing more. There being no statute to the contrary. The corporation had a right to prefer the one to the other, which it did, by giving Stuart security on its property.

4. It is not shown that the Scotch Company authorized "the making" of the mortgage to the Salem Bank, or that the seal of the corporation was affixed thereto; and said mortgage was given for a pre-existing debt, with knowledge that the mortgagor owed the Oregon Company, the debtor of the defendants, \$86,892.04.

Livingstone, the agent of the Scotch Company, had a power of attorney under its seal, authorizing him to deal with this property as he saw proper, and this was sufficient authority for the execution of this mortgage. The mortgage does not profess to be the act of the corporation in person, so to speak. It is the deed of its attorney, a natural person, and is therefore well executed when signed and sealed by the latter. The seal of the corporation is affixed to its deed, the power of attorney, on which the validity of the mortgage ultimately rests.

The M. & S. Bank never had any interest in or lien on this property, nor even any pecuniary demand against the Scotch Company, and therefore it is altogether immaterial that the plaintiff's mortgage was given for a pre-existing debt, with knowledge of an existing demand of the M. & S. Bank against the Oregon Company.

But for the earnest manner in which these latter objections to this mortgage are urged, they would not have been deemed worthy of consideration.

And, lastly, if the Oregon Company was a defendant in this suit, it could not by means of an answer, and without a cross-bill, assert the claim made here by Kelly and McDonald, that it had a grantor's lien on this property, or that the Scotch Company took the same in trust, or "impressed" with a trust, to pay the debts of the former. An answer is a means of defense, and not attack. It is a shield, and not a weapon. Resort must be had to a cross-bill in such case. Langd. Eq. Pl. § 115 *et seq.*

There must be a finding that the Scotch Company is indebted to the plaintiff in the sum of \$30,000, with interest from November 17, 1886; and to the defendant Stuart in the sum of \$71,940, with interest from August 2, 1884; and that the mortgages given by the Oregon and Scotch Company, as set forth in the amended and cross-bill herein, to secure the payment of said indebtedness, are valid first liens on the property therein described in the order of their execution; and that the same be sold by the master of this court, and the proceeds applied to the satisfaction of the same, with the costs and disbursements of this suit.

FABRIC FIRE HOSE Co. v. BIBB MANUF'G Co.

(Circuit Court, S. D. New York. June 5, 1889.)

PLEADING—ANSWER—MOTION TO STRIKE OUT.

In an action for the price of corporate stock sold by plaintiff to defendant the defense that plaintiff agreed to deliver stock of a certain kind, which he has not done and cannot do, may be made under a general denial, and a paragraph of the answer setting up those facts will be stricken out.

At Law. On motion to strike out.

Alfred Ely, for plaintiff.

D. M. Porter, for defendant.

LACOMBE, J. The plaintiff moves to strike out the second paragraph of defendant's answer to the amended complaint as irrelevant, false, and sham, or that said paragraph be made more definite and certain by stating and alleging therein the date when the special statute referred to in such paragraph was enacted and approved, together with the title to the said act. Upon the hearing an amendment making such paragraph more definite and certain, by inserting such date and title, was ordered, and the answer amended in open court. The plaintiff also moves that the third paragraph of defendant's said answer be stricken out as irrelevant, hypothetical, and sham. Such paragraph is as follows:

"Third. For a third defense the defendant avers, upon information and belief, that if the contract alleged to have been made between the parties to this action was made by and entered into between them, that it was and is a part of the alleged contract that the plaintiff should deliver to the defendant stock fully paid up and stock upon which this defendant could not in any way be liable except for the wages of employes, and that at the time the alleged contract is alleged to have been entered into the plaintiff was not and has not at any time since been able to deliver any such stock to this defendant, but has made default and has thereby broken its contract."

The motion to strike out this paragraph is granted. Upon the argument, defendant's counsel insisted that without it he could not avail of the defense that the plaintiff had not correctly set forth the alleged contract whose making even was contested by the defendant. There seems to be no ground for any such apprehension. Plaintiff can recover only *secundum allegata et probata*. It must show the making of a contract such as it has set forth in the amended complaint, and fulfillment of such contract (or readiness to fulfill) upon its part. If the contract between the parties provided for the delivery of full paid-up stock, that fact will appear when the contract is proved; and if the stock which plaintiff has tendered is not the kind of stock which the contract provided for, such tender will not be a compliance with its terms. Under the general denial, therefore, which puts in issue the making of the contract and its fulfillment by plaintiff, the defendant can avail of the defense set out in the third paragraph, if there be such a defense, quite as well as if the same were expressly pleaded.

In re MURNANE et al.

(Circuit Court, S. D. New York. April 18, 1889.)

IMMIGRATION—BOARD OF COMMISSIONERS—DELEGATION OF POWERS.

The board of commissioners of emigration, who by act Cong. Aug. 3, 1882, are required to examine into the condition of immigrants, cannot delegate to a committee the power to determine whether such immigrants shall be permitted to land.

Habeas Corpus for the release of detained immigrants.

Alfred Steckler, for petitioners.

Kelly & Macrae, for Board of Emigration Commissioners.

Abram J. Rose, Asst. U. S. Atty., for Collector.

LACOMBE, J., (*orally*.) The return presented by the commissioners of emigration in this case was prepared so as to state a legal conclusion, it being contended in their behalf that the action of the Castle Garden committee, to whom by resolution they have undertaken to delegate their powers, is of the same legal effect as would be the action of the commissioners themselves. Their counsel, however, in open court, concedes that, except so far as said Castle Garden committee has taken action in regard to these immigrants, there has been no action had by the board of commissioners of emigration. That board, in fact, have not had a meeting since the arrival of relators, on April 10th. The next regular meeting day will be April 25th. Attention has been called to the decision of Judge Brown in *Re Bracmadfar*, 37 Fed. Rep. 774. There, however, the present point was neither raised nor argued, and the suggestion at the close of the memorandum is wholly *obiter*. The second section of the act of August 3, 1882, requires the determination as to the condition of immigrants to be had by the board of commissioners. For the purpose of enabling and assisting them to make such examination, they are authorized, either individually or through persons whom they may appoint, to go on board any ship or vessel bringing immigrants to this port, but this permission is not to be construed as authorizing them to delegate to any persons other than themselves the important functions—*quasi* judicial in their character—which are by that act confided to them. Of course, a reasonable time should be allowed the commissioners of emigration to examine into the facts, which they may gather either by their own observation as a body, or by their individual exertions, or from the reports made to them by the agents they may employ. It is hard to say in advance what in each particular instance should be considered a reasonable time, but in view of the fact that their action in this particular case has been framed to meet the suggestion contained in the case above cited, and that a meeting of the commissioners at which action can be had will take place within a week, and that their agents have already reported to them adversely to the application of the relators in this case, a delay until the

day after such meeting of the commissioners will not be unreasonable. The relators will therefore be remanded, and further proceedings upon this writ suspended, until the 26th of April, at 11 A. M.

UNITED STATES *v.* ALLEN *et al.*

(District Court, E. D. Virginia. June 15, 1889.)

CUSTOMS DUTIES—EXPORT BONDS—BREACH.

Act Cong. June 9, 1880, (21 St. at Large, 167,) provides that exported articles shall be entered on the outward manifest of the ship taking them abroad, but is silent as to who shall perform that duty. *Held*, that where goods are consigned to the collector of customs at the port of shipment, to be by him shipped abroad, and he gives a personal receipt therefor, reciting that "the said merchandise was duly inspected and marked at this port, and laden on board the foreign-bound steamer W., * * * and that said vessel and cargo were duly cleared from this port," the exporters had a right to presume that the goods had been entered on the ship's outward manifest, and the fact that they had not been so entered was not a breach of the export bond. The fact that in the collector's receipt, which was on a printed form, the clause expressing the entry of the goods on the outward manifest is struck out, is immaterial when such receipt is not given until after the vessel has cleared.

At Law. Debt by the United States against Allen & Ginter.

J. C. Gibson, U. S. Dist. Atty., and *Jas. Lyons*, Asst. U. S. Dist. Atty., for plaintiffs.

Legh R. Page, for defendants.

HUGHES, J. The United States sues Allen & Ginter, tobacco manufacturers of Richmond, Va., for the penalty of an export tobacco bond. This penalty, \$53, is double the amount of \$26.50 which would have been chargeable on the tobacco if it had been sold for consumption in the United States. The tobacco which was the subject of the bond having been intended for exportation, and actually exported, no tax could be laid upon it by the government of the United States; clause 5 of section 9 of the first article of the constitution, providing that "no tax or duty shall be laid on articles exported from any state." All the provisions of the law and regulations of the treasury department of the United States were complied with by the defendants in shipping the tobacco in regard to which they are now sued, both in transmitting it from their factories in Richmond by Coast Line steamer to New York, and shipping it thence to Antwerp, Holland, except one, which will be mentioned in the sequel. In the bond on which the defendants are sued they stipulated in its penal clause that the collector of internal revenue at Richmond should receive, within 45 days from the 3d of September, 1887, the detailed report from the proper inspector of customs required by regulations, and a certificate from the collector of customs at the port of New York, that the tobacco intended to be exported had been received by him, and that the tobacco had been duly laden aboard

of a foreign-bound vessel, named in the certificate, and that the said tobacco had been entered on the outward manifest of said vessel, and that said vessel and cargo had been duly cleared from said port of New York. There was still another stipulation in the printed form of the bond which the defendants signed, which was immaterial and which needs no consideration.

The proofs in the case, embodied in a statement of agreed facts drawn up by counsel on either side and in correspondence filed in the cause, show that all the undertakings of defendants were fulfilled, except only that the tobacco thus exported had not been entered on the outward manifest of the foreign-bound steamer which took it from New York to Antwerp.

For this omission to enter the tobacco on such outward manifest the government claims the penalty of the bond, and brings this suit to enforce its payment. Inasmuch as the constitution of the United States forbids the exaction of a tax or duty upon any article of domestic production exported from any state, and it is admitted or proved that this tobacco was exported and was landed in Antwerp, it would seem that, if the money sued for be in any part of it a tax levied on the tobacco, there can be no recovery in this suit. The suit can only be maintained on the theory that it is brought for a penalty which the United States have a right to impose for the violation of regulations deemed necessary to the protection of the revenue, and to prevent frauds on the revenue laws. It is not pretended or proved on behalf of the plaintiffs that the omission of the defendants to see to the entering of this tobacco on the outward manifest of the departing steamer was fraudulent. It is clear, from correspondence filed in the cause, that the omission was a piece of inadvertence on the part of persons in New York, and that the defendants did not feel it incumbent upon themselves to attend personally to such a detail in the routine of the shipment from that port. If so, penalties and forfeitures being odious to the law, no loss having accrued to the government, the tobacco having actually gone abroad, there would seem to be sound equitable, as well as constitutional, objection to a recovery by the plaintiffs in this suit. But the suit is brought for the purpose, more than any other, of testing the question whether it is the duty of the exporting manufacturer or that of the customs officer at the shipping port to see that the article exported is entered on the outward manifest of the ship carrying it abroad. Originally the exporter was required to produce proof of the landing of the exported article in a foreign port within a period specified in his bond. But afterwards, for greater convenience, this requirement was withdrawn, and the exporter was made to stipulate, among other things, that the exported article should be entered on the outward manifest of the ship taking it abroad. This provision was enacted in section 1, act June 9, 1880, (21 St. at Large, 167.) That act is silent as to the person whose duty it shall be to cause the entry to be made on the outward manifest. But the method prescribed for such shipments, and the forms devised by the treasury department for regulating them, seem to me to imply

that the person having custody of the article at the port at the time of shipping, being the only person who can ship it, should see to its entry on the outward manifest; especially in cases where the article to be exported is manufactured at a place other than the port of shipment, and is forwarded to the port for the purpose under permit and regulations of the treasury department. The tobacco which is the origin of this suit having been manufactured in Richmond, was forwarded hence to the collector of customs in New York, who, after receiving it there, duly certified that it had been received by himself. It was in his custody from the time it landed in New York. It was constructively in his custody as consignee from the time it left Richmond. It was not only *custodia legis* during this time and until it was cleared on board the foreign-bound ship at New York, but in that city it was in the actual custody of the collector of the port. In his certificate of the 17th day of September, 1887, this officer recites "that there was received by me at this port" tobacco, etc., marked, etc.; "that the said merchandise was duly inspected and marked at this port, and laden on board the foreign-bound steamer Waesland, under supervision of a proper officer; and that said vessel and cargo were duly cleared from this port for the port of Antwerp on the 6th September, 1887."

Every person familiar with the business of shipping merchandise would say that the custodian at the shipping port of the article intended to be shipped, having custody until the article is put aboard and entered as part of the cargo of the ship which is to carry it away, is the only person who can rightfully and regularly have it entered on the ship's manifest, and attend to the proper details of the shipment; and when the collector of the port of New York certified that the tobacco of defendants had been received by him, had been properly inspected and marked and laden, and duly cleared upon the Waesland, the owner of the article in Richmond had a right to presume that the article had, in order to its due clearance, been entered on the ship's outward manifest, the more especially as the act of June 9, 1880, is silent as to who should perform that duty. It is true that in the New York collector's certificate, which has been quoted from, made on a printed form supplied by the treasury department, he omitted to certify particularly that the tobacco had been entered on the outward manifest of the Waesland. In point of fact he drew his pen through the line of the form expressing that fact. It is true that the defendants became aware of that omission when the certificate came to be read by them after its arrival in Richmond in due course of mail. But the Waesland had been cleared from New York on the 6th September, and the certificate was not signed, by the collector of New York until the 17th of that month, 11 days after the clearance and after the Waesland had been out at sea. The defendants then had no power to correct an omission for which they were not responsible, and which seems to me resulted from the oversight of the plaintiffs' own officer.

This is an action at law, and but for the stipulation of counsel, by which all questions of fact as well as law were submitted to the court,

the issue of fact would have gone to a jury. I am very certain that no jury of the land would find for the plaintiffs on the facts in this case; and, even if such a verdict were possible, I am decidedly of opinion that the plaintiffs ought not to recover on the merits. I was first inclined to think that there had been a technical breach of the bond, for which merely nominal damages should be accorded, but subsequent reflection satisfies me that the defendants have substantially complied with the law, and judgment must be rendered in their favor.

SLAIGHT v. HEDDEN.

(*Circuit Court, E. D. New York. November 14, 1888.*)

CUSTOMS DUTIES — RIGHTS OF IMPORTERS — EXCLUDING AGENT FROM PUBLIC STORES.

Though the owner or importer of cigars from a foreign country may by his agent lawfully affix and cancel the internal revenue stamps required by section 3402 of the Revised Statutes to be affixed and canceled while such cigars are in the custody of the proper custom-house officers, yet the collector of the port may in the exercise of a sound discretion exclude such an agent from resorting to the public stores for that purpose; and, in the absence of legislation by congress or regulation by the treasury department, no action accrues thereby to the agent thus excluded.

At Law. On motion to dismiss.

This was an action against Edward L. Hedden, formerly the collector of the port of New York, to recover damages for having as such collector excluded the plaintiff from the public stores, which the plaintiff sought to enter for the purpose of affixing and canceling internal revenue stamps upon certain cigars imported from a foreign country by certain importers who had employed the plaintiff to affix and cancel such stamps. The plaintiff alleged that on or about July 1, 1885, he was employed for the term of four years by certain importers of cigars to affix and cancel the internal revenue stamps required by law to be affixed and canceled on all cigars, etc., which might be imported by them, or any of them, during the four following years, for which service the said importers had promised to pay the plaintiff 20 cents for every thousand cigars imported by them, and stamped and canceled by the plaintiff, and that such employment was worth to the plaintiff \$6,000 per year; and that on May 1, 1886, the defendant, then being collector of the port of New York, willfully and maliciously, with intent to injure the plaintiff, and to deprive him of the benefits arising from said contract, refused to allow him access to the cigars imported by his employers, or to enter the room of the public stores where the said cigars were for the purpose of having said stamps affixed and canceled, and hindered the plaintiff from carrying out his contract with his said employers, to the plaintiff's damage in the sum of \$24,000. The defendant denied these allegations. It appeared that during the incumbency of a former collector a regulation had been adopted

requiring that when owners or importers desired to have the internal revenue stamps required by law affixed and canceled upon cigars imported by them while such cigars remained in the public stores such agent must be a person approved of by the collector, and that no more than one such agent would be permitted to resort to the public stores. After the controversy herein arose, the secretary of the treasury abrogated this regulation, and communicated that fact to the defendant by letter dated July 13, 1886. At the close of the plaintiff's case, the defendant's attorney moved for a dismissal, and the direction of a verdict for defendant.

Benjamin F. Tracy, for plaintiff.

Mark D. Wilber, U. S. Atty., for defendant.

LACOMBE, J., (*after stating the facts as above.*) This case naturally divides into two periods,—the one prior, the other subsequent, to the departmental letter of July 13, 1886. Under section 3402 of the Revised Statutes it is plain that the importers had the right, and that it was their duty, to affix the stamps to these boxes of cigars, tobacco, and snuff. All that the statute expressly conceded to the importer was the right himself to attend and affix the stamps. It may be contended that he should be allowed to perform acts of this kind by an agent. Conceding that, however, it seems to be also a fair interpretation of this section (in connection with the other sections creating the office of collector) to construe it as warranting the adoption of such reasonable regulations touching the admission of agents to the premises of the custom-house as the collector may see fit to approve of. Now, it seems to me an entirely reasonable regulation of that character for any collector to say, where the importer or owner does not choose himself to come and stamp his own goods, but selects an agent, that the agent thus selected must be one who is satisfactory both to the collector and to the importer. Such appears to have been the regulation of the collectors at this port prior to Collector Hedden's appearance on the scene, because we find that Mr. Slight had an express permit from the preceding collector, and we may reasonably infer that without such permit he would not have been allowed admission to the room. Collector Hedden certainly adopted the rule that, where importers undertake to affix these stamps by agents, the agents thus admitted to the public stores should be satisfactory to him as well as to the importer or owner. In the absence of express legislation on the subject, either by congress or his superior officer, that seems to have been a perfectly reasonable regulation, and one which it was within the collector's power to make. On July 13, 1886, however, the matter being called to the attention of the secretary of the treasury, this letter (of July 13, 1886) was sent.

Conceding that the rule laid down in that letter worked practically a repeal of the regulation theretofore prescribed by the collector of the port, and put the case upon a different footing, there are still difficulties in the way of the plaintiff's recovery, which I do not think he has as yet overcome. In the first place, it may be a matter of question (which I shall not undertake to pass upon now) as to whether any one other than the

owner or importer himself would be entitled to sue the collector for the exclusion from the custom-house of the agent he sent there. Waiving that question altogether, it appears by the evidence that subsequent to the revocation of his permit, a change occurred touching the employment of Col. Slaight. Some who prior to that time were his employers, and whose names were signed to the paper, which certified his agency to the collector, had since that time discontinued the employment. Now, despite the regulation or the order of the secretary of the treasury, Mr. Hedden was still entitled to be satisfied that Mr. Slaight, at the time of the subsequent application, did have an authorization to act for them from one or more importers, and, as it is conceded that the old authorization was defective in part, it was right and proper that he should do what his counsel undertook to do,—procure a new authorization, and present that. The earliest period at which that seems to have been presented to the collector—assuming that the transmission of it by the letter of July 22d was a sufficient presentation—was July 22d. That reduces the period for recovery—assuming there can be a recovery—to that subsequent to July 22d. For that period there is no proof of damages. All that there is here is a statement of the plaintiff that his compensation was proportioned to the total quantities of importations,—the total number of packages, or the total number of stamps. The statute shows us the number of stamps which should be put on each package. We have further testimony that between May 1, 1886, and May 1, 1888, such and so many stamps were affixed. There is no such segregation of the period as will show the number of stamps used or affixed between July 22d, or even July 13th, and the date of Collector Hedden's retirement. In view of the fact that it is in evidence on the plaintiff's own testimony that not all the importers of cigars and tobacco into this port were employing him subsequent to the letter of July 13, 1886, I fail to see that he has made proof sufficient to claim any damages. The motion of the defendant for a dismissal of the case, and the directing of a verdict for the defendant without putting in any proof, is granted. Plaintiff excepts.

REISS *et al.* v. MAGONE.

(Circuit Court, S. D. New York. May 21, 1889.)

1. CUSTOMS DUTIES—ASSESSMENT—QUANTITY.

Duties are to be paid only upon the actual quantity of merchandise which is imported into this country and enters into its commerce, and not upon the original quantity thereof bought and shipped.

2. SAME—INCREASED VALUE BY SHRINKAGE.

Where, however, an importation has shrunk in weight from evaporation or other like cause, and such shrinkage has added a percentage of value, so that the actual quantity thereof which arrives is in its then condition worth more per pound in the markets of the country from which it came than the original quantity thereof bought and shipped was worth per pound, the actual

quantity should in fairness be appraised at its increased value per pound, and duty assessed upon the value thereof so appraised, although the invoice describes the original quantity as worth less per pound.

3. SAME.

But, to warrant such an assessment of duty, the appraiser must first find that the actual quantity was worth per pound such a sum as would warrant the particular amount of duties assessed.

4. SAME—CLASSIFICATION—SARDELLES.

Since the passage of the tariff act of March 3, 1883, fish caught in foreign waters, salted or pickled, and imported in ankers which have each a capacity of about 80 pounds or less, and not in barrels or half barrels, which have each a capacity, respectively, of about 200 and 100 pounds, which were generally bought and sold by the trade of this country dealing therein at and prior to March 3, 1883, under the denomination of "anchovies" or "sardines," are dutiable at the rate of 40 per centum *ad valorem* under the provision for "anchovies and sardines, when imported in any other form" than packed in oil or otherwise in tin boxes, contained in Schedule G of that act; but those that were then generally bought and sold by that trade under the denomination of "sardelles" are dutiable at 50 cents per hundred pounds under the provision for "foreign-caught fish, imported otherwise than in barrels or half barrels, whether * * * salted or pickled, not specially enumerated or provided for in this act," contained in the same schedule.

At Law.

The plaintiffs in 1886 imported from Amsterdam and Rotterdam certain fish, and in 1887 from Marseilles certain Castile-soap. The Castile-soap as invoiced was classified for duty at the rate of 20 per centum *ad valorem* under the provision for Castile-soap contained in Schedule A of the tariff act of March 3, 1883, (Heyl, New, 8.) Against the exaction of duty upon the Castile-soap as invoiced, the plaintiffs duly protested; claiming that duty should only be exacted thereon after making deduction or allowance for shortage of weight. The fish were invoiced as "sardelle," and were classified for duty at the rate of 40 per centum *ad valorem* as "anchovies," under the provision for "anchovies and sardines," "when imported in any other form" than packed in oil or otherwise, in tin boxes, etc., contained in Schedule G of the same tariff act, (Heyl, New, 281.) Against the classification of these fish as anchovies, and the exaction of duty thereon at the rate of 40 per centum *ad valorem*, the plaintiffs duly protested; claiming that these fish were dutiable at the rate of 50 cents per 100 pounds as "foreign-caught fish, imported otherwise than in barrels or half barrels, whether * * * salted or pickled, not specially enumerated or provided for in this act," under the provision therefor contained in the same schedule, (Heyl, New, 280.) Thereafter the plaintiffs duly appealed, and brought suit to recover the duty exacted on the difference between the invoice quantity of the Castile-soap and the actual quantity thereof as landed, and on the difference between the duty at the rate of 40 per centum *ad valorem* exacted on the fish and duty at the rate of 50 cents per 100 pounds as claimed by them.

Upon the trial it appeared that the Castile-soap on the voyage of its importation from Marseilles to this country had shrunk in weight, by evaporation or other like cause, so that the actual quantity thereof landed, as returned by the government weigher, was less than the purchased quantity as invoiced and shipped at Marseilles; but that the appraiser had taken the value per pound at its invoice value, and that duty had been

exacted on the invoice, and shipped quantity at its invoice value per pound as entered by the plaintiffs, instead of on the actual quantity landed at its invoice value per pound, as claimed by them after the government weigher had made his return. But it did not appear that the foreign market value of the Castile-soap when landed had been so enhanced that there had been no diminution of the total entered value of the invoice thereof in the principal markets of the country from which it was imported, notwithstanding its shrinkage in weight. The evidence of the plaintiffs' witnesses tended to show, as to the fish in suit, that they are called in Holland "anjois," and in Germany "sardellen;" that they are caught only off the coast of Holland, while anchovies are caught off the coasts of Norway, France, Italy, and other places in the Mediterranean sea; that the fish in suit are a different species of fish from anchovies as well as from sardines; that the fish in suit are thick and round and white, except when they are old, and then they are of a rusty color, and are imported into this country with their heads off, put up in brine made of salt and water, in wooden packages in the shape of barrels, called ankers, half, quarter, eighth, and tenth ankers; that ankers are of about 80 pounds capacity, or less, while a barrel and a half barrel are of about 200 and 100 pounds capacity, respectively; that anchovies are a flat fish, and in that respect, like sardines, have black backs, are smaller, shorter, and less fat than the fish in suit, and are imported into this country with the heads on, and generally put up in spices and vinegar or hops; that the fish in suit are of much more value than anchovies; that the fish in suit are almost entirely sold to the German trade in this country, and at and prior to the passage of the act of March 3, 1883, were generally bought and sold in this country under the denomination of "sardelles." The evidence of the defendant's witnesses, on the other hand, tended to show that the fish in suit were then and there generally bought and sold under the denomination of "anchovies." Both sides having rested, the defendant's counsel moved the court to direct the jury to find for the defendant as to the soap; citing section 2900, Rev. St. U. S., and article 604 of treasury regulations issued July 1, 1884, and *Kimball v. Collector*, 10 Wall. 436. The plaintiffs' counsel, in opposition, cited section 2921, Rev. St. U. S.; *Marriott v. Brune*, 9 How. 619; *U. S. v. Southmayd*, Id. 637; *Lawrence v. Caswell*, 13 How. 488; and *Austin v. Peaslee*, 10 Month. Law Rep. (N. S.) 443; *Balfour v. Sullivan*, 8 Sawy. 648, 17 Fed. Rep. 231; and *Weaver v. Saltonstall*, 38 Fed. Rep. 493. This motion the court denied, and the plaintiffs' counsel thereupon moved the court to direct the jury to find in favor of the plaintiffs as to the soap.

Albert Comstock and Everit Brown, for plaintiffs.

Stephen A. Walker, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (orally.) The importer has to pay duty only upon what he imports. If his importation weighs 100 pounds when it leaves the other side, and 80 pounds only when it comes here, he pays on the 80

pounds which enters into the commerce of this country, and not upon the 100 pounds he bought on the other side. It may happen, however, that the shrinkage in weight has added a percentage of value, and that the 80 pounds which arrives is in its then condition worth more per pound in the markets of the country from which it came than the original 100 pounds was worth per pound. To illustrate, there may be a difference in the foreign market between 80 per cent. soap and 60 per cent. soap. If what reaches this country is in fact 80 per cent. soap, it should in fairness be appraised at its value as 80 per cent. soap in the foreign markets at the time of exportation, although the invoice may describe it as 60 per cent. soap at a lower value. But of course duty should be assessed only upon the amount actually imported. Such a method of appraisement seems to be in accordance with the provisions of the statute. In order, however, to warrant such an assessment of duty, the appraiser must first find that the 80 pounds imported was worth per pound such a sum as would warrant the particular amount of duty assessed. In this case there is no evidence that the appraiser has so found, and, on the contrary, the evidence is that the per pound value of the article imported was the same as that stated in the invoice, which would make the per pound value of the 80 pounds no greater than the per pound value of the 100 pounds. In view of the state of the evidence, therefore, I shall, as to the soap, instruct the jury that their verdict must be for the plaintiffs.

The only question of fact for the jury, therefore, is whether the fish covered by the other entries are dutiable under the 280th or the 281st paragraph of the tariff act of 1883. These fish are caught in foreign waters. They are salted or pickled. They are imported here in ankers weighing about 80 pounds or less, and not in barrels, which weigh about 200 pounds, or in half barrels, which weigh 100 pounds. So far they are within the description of the 280th paragraph,—“foreign-caught fish, imported otherwise than in barrels or in half barrels, whether fresh, smoked, dried, salted, or pickled.” That is where the plaintiffs claim that they should be classified, and they fall within that description, unless they are found specially enumerated or provided for elsewhere in the tariff act. The only other place where it is contended that they are specifically provided for is in the next paragraph, which lays a duty upon anchovies and sardines packed in oil or otherwise, and imported either in boxes or in any other form. The only question, then, for you to determine is whether or not these articles are anchovies or sardines. If you find them to be anchovies or sardines, your verdict must be for the defendant; otherwise your verdict must be for the plaintiffs. These tariff acts are intended, of course, for the community at large, and mainly for that part of the community which deal in the articles covered by the tariff acts. Therefore, in determining the meaning of the words used by congress, it is appropriate to go to the particular trade which handles the article and deals in it, and learn from those in that trade how the particular article is known in the trade and commerce of this country. For that reason witnesses in the trade have been called to the stand by the plaintiffs

and the defendant, and you have heard their evidence. Taking into consideration what they have told you with regard to the trade understanding touching these particular articles (Exhibit S-L) imported by the plaintiffs, it is for you to determine whether they are sardines or anchovies or not. If you find that they are sardines or anchovies, your verdict must be for the defendant; otherwise your verdict must be for the plaintiffs. Upon that question the burden of proof is upon the plaintiffs, for the case comes into court after a finding by the collector that they are sardines or anchovies, and that finding, which makes out a *prima facie* case, is to be overthrown by the plaintiffs by a fair preponderance of proof.

The jury rendered a verdict for the plaintiffs.

NIX *et al.* v. HEDDEN.

(Circuit Court, S. D. New York. May 14, 1889.)

1. CUSTOMS DUTIES—CONSTRUCTION OF STATUTES.

Where the words in a statute imposing duties on imported merchandise are not technical, their interpretation is a matter of law for the court. Following *Marvel v. Merritt*, 116 U. S. 11, 6 Sup. Ct. Rep. 207.

2. SAME.

The legislature must be presumed to have chosen language with regard to those for whom it is designed to constitute a rule of commerce, viz. the community at large. Following *Arthur v. Morrison*, 96 U. S. 108.

3. SAME—PRESUMPTIONS.

In the absence of proof that words have a different acceptation in other parts of the country from that which they have in the district where the court is sitting, it will be assumed that the use of the words is the same throughout the community at large.

4. SAME—CLASSIFICATION—TOMATOES.

In the common and popular acceptation of the words, the term "vegetables" includes "tomatoes," and the term "fruits" does not.

5. SAME.

Tomatoes imported from Bermuda are not free of duty by virtue of the provision in the free list for "fruits, green, ripe, or dried," but are dutiable at 10 per cent. under the provision in Schedule G of the tariff act of March 3, 1883, for "vegetables in their natural state."

At Law.

This was an action against a former collector of the port of New York to recover duties alleged to have been improperly exacted. The plaintiffs in the spring of 1886 imported tomatoes from the island of Bermuda. The collector classified them as "vegetables in their natural state," and assessed them for duty at 10 per cent. under the provision therefor in Schedule G of the tariff act of March 3, 1883. The importer protested, and claimed that by virtue of the provision in the free-list of the same act for "fruits, green, ripe, or dried," they were exempt from duty. This suit was brought to recover the duties exacted. Upon the trial the

plaintiffs, having adduced the testimony of various importers and dealers to the effect that the words "fruits" and "vegetables" had no other or different meaning in trade and commerce from their ordinary and popular meaning, and having put in evidence the definition of the terms "fruit," "vegetables," and "tomatoes" from Webster's, Worcester's, and the Imperial Dictionaries, rested their case. The defendant put in evidence from Webster's Dictionary the definitions of the terms "beans," "peas," "cucumbers," "peppers," "egg-plant," and "squash," and then moved for the direction of a verdict in his favor on the ground that, according to the common and popular meanings of the terms "fruits" and "vegetables," tomatoes belonged to the latter, and not to the former, class.

Comstock & Brown and Stephen G. Clarke, for plaintiffs.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) In *Marvel v. Merritt*, 116 U. S. 11, 6 Sup. Ct. Rep. 207, the principle is laid down that where the words used in a tariff act are not technical, either as having a special sense by commercial usage, or as having a scientific meaning different from their common meaning, they are the words of common speech, and as such their interpretation is within the judicial knowledge, and therefore matter of law. That case was one touching minerals, and the same rule must apply to vegetables. In *Arthur v. Morrison*, 96 U. S. 108, the proposition is laid down that when the legislature adopts such language to define and promulgate their action the just conclusion must be that they not only themselves comprehend the meaning of the language, but choose it with regard to those for whom it is designed to constitute a rule of commerce, namely, the community at large. The community at large, of course, are the people of the United States. In the absence, however, of any evidence tending to show a different acceptance of words elsewhere than what we find in the community residing in this particular district, or of any knowledge on the part of the court that there is such different acceptance, it will be assumed that the use of the words is the same throughout the community at large. With regard to this particular community, the word "vegetable," in its popular and received meaning, is used to cover a class of articles which includes tomatoes, and the word "fruit," irrespective of what the dictionaries may lay down as to its botanical or technical meaning, is not in common speech used to cover tomatoes. For these reasons I shall direct a verdict in favor of the defendant.

The jury found a verdict for the defendant as directed by the court.

ZINSSER *et al.* v. KREMER.

(Circuit Court, D. New Jersey. June, 1889.)

1. PATENTS—CARBONATING BEER—INVENTION.

Reissued letters patent No. 9,129, granted March 23, 1880, the claim of which was "the process of charging beer and other liquids of a similar nature with carbonic acid, by dropping into and through the liquid lumps of bicarbonate of soda, or of other alkali, thereby causing the acid discharged from the lumps to pass through the entire column of liquid," the process consisting of compressing lumps of bicarbonate of soda or other alkali so that they would drop to the bottom of the vessel containing the liquid, instead of being thrown on top of the liquid in powdered form, as theretofore, thus causing waste, are not void for want of invention.

2. SAME—PRIOR USE.

In a suit for infringement, where defendant's evidence of "prior use" is met by as much evidence to the contrary, and defendant's evidence shows that the prior use was strictly secret, the defense of "prior use" is not sustained.

3. SAME—INFRINGEMENT.

The use of artificially compressed lumps of bicarbonate of soda for the purpose mentioned in complainant's claim is an infringement of their patent though the lumps are not compressed with the aid of cement which is referred to in complainants' specifications as an available aid for that purpose, but which is not mentioned in the claim.

In Equity. On bill for infringement of patent.

Arthur v. Briesen, for complainants.

Joseph M. Deuel, for defendant.

BUTLER, J. This suit is for infringement of re-issued letters patent No. 9,129, granted to the plaintiffs March 23, 1880, "for a new and useful improvement in treating beer and other liquids." The claim is stated as follows:

"The process of charging beer and other liquids of a similar nature with carbonic acid, by dropping into and through the liquid lumps of bicarbonate of soda, or of other alkali, thereby causing the acid discharged from the lumps to pass through the entire column of liquid, substantially as specified."

The specifications are as follows:

"This invention consists in treating beer and other liquids of a similar nature with lumps of bicarbonate of soda or other alkali, said lumps being compacted by means of a suitable cement, so that they are heavy enough to at once drop through the liquid to be treated, upon the bottom of the vessel containing the liquid. The carbonic acid evolved from said lumps is thus compelled to permeate the entire column of liquid above it, and at the same time to give up the requisite quantity of alkaline matter. Together with the lumps of bicarbonates of alkali may be used lumps of tartaric or other suitable acid, compacted in the same manner as the lumps of bicarbonate of alkali, as the amount of carbonic acid evolved from the latter can be easily controlled. It is a common practice with brewers and others to use bicarbonate of soda, either alone or together with tartaric acid, in the manufacture of beer, sparkling wines, and other effervescent liquids, for the purpose of increasing the life of such liquid. The mode of applying such article or articles—by brewers, for instance—is to apply about one ounce of the bicarbonate of soda to each quarter-barrel with a tablespoon, the bicarbonate being in the form of a

powder. The powders on being thrown into the barrel of beer, will at first float on the surface of the liquid, and immediately evolve carbonic acid, a large portion of which is lost, together with the beer which is thrown out by the action of the acid before the barrel can be closed by a bung. Besides this, the operation of filling barrels is carried on in a great hurry, and a large quantity of the bicarbonate of soda handled with a spoon is spilled over the barrel, and wasted. Like effects occur in the use of tartaric acid in crystals when applied together with powdered bicarbonate of soda. These disadvantages we have obviated by preparing the bicarbonate of soda or of other alkali and the acid in solid lumps of such weight that the lumps at once drop through the liquid upon the bottom of the vessel, and give off the carbonic acid to the entire column of liquid, and not only, as heretofore, to the upper stratum. These lumps we produce by mixing powdered bicarbonate of alkali with a suitable cement, such as a solution of dextrine, and then compressing the same in molds of suitable size and shape. Lumps of acid are made in like manner. The advantage of using the bicarbonate of alkali, either alone or in connection with acid in this shape, is perceptible at once. The lumps being in compact form, when dropped into a barrel filled with beer, ale, or other liquid, will at once sink to the bottom, and the carbonic acid evolved from them is forced to stay in the liquid. The barrel can be easily closed by a bung without losing a particle of carbonic acid or of beer, and the said lumps can be introduced into the barrel without any waste. Besides this, the weight or size of our lumps is so gauged that each barrel will receive the exact quantity of bicarbonate of alkali and of acid required, and that the liquid in a number of barrels, after having been treated with the bicarbonate of alkali, with or without acid, will be of uniform quality."

The answer attacks the patent for want of inventive novelty, for defective specifications and claims, and because of prior use. It also denies infringement. The inventive novelty claimed consists in passing compacted lumps of bicarbonate of soda or other alkali, through beer and similar liquids, in casks, and depositing the same at the bottom, where it will slowly dissolve, and the carbonic acid evolved be distributed equally throughout the liquid. The treatment of beer and other liquids with bicarbonate of soda was not new. It was in common use, and had been for a long time. The method employed, however, was that of dropping powdered bicarbonate on top. This was attended with serious disadvantages. The liquid was not thoroughly permeated, and the powder, floating on top, instantly evolved acid in quantities so large as to cause overflow before the casks could be closed. The patentee sought for means to obviate these disadvantages. He saw that if the bicarbonate could be deposited at the bottom of the liquid, and its dissolution retarded, the entire contents of the cask would be equally treated, and the loss from overflow be avoided. He further saw that if the bicarbonate could be compressed into solid lumps it would pass to the bottom when dropped, and the dissolution also be retarded. Experimenting with this method, he found the result beneficial and satisfactory. Thereupon he applied for and obtained the patent. The novelty thus exhibited seems quite sufficient to sustain his claim. It is true that nothing more is done than charging the liquid with carbonic acid gas, and this has been done before. But he does it in a different way, and with different results, producing a better article more econom-

ically, avoiding all waste. The same objection was made to the Crane patent, for an improvement in the manufacture of iron. It covered a hot-blast with anthracite coal. A hot-blast with bituminous coal was old; and a cold-blast with anthracite was old. The patentee simply introduced into the existing process a hot-blast with anthracite. The change was very slight, but the result was highly beneficial, and the patent, after a severe contest, was sustained, (*Crane v. Price*, 1 Webst. Pat. Cas. 375,) has withstood the test of criticism and time, and is as good authority to-day as when first published. Hall's patent, for a new process of manufacturing lace, is similar in character. It covered the use of gas-flame for singeing off the superfluous fibers of thread. Flames of other substances had been employed a long time. By the use of gas-flame, however, the fibers were more effectually removed, and the lace given a smoother and finer finish. This patent encountered the same objection,—want of novelty,—but was sustained in *Hall v. Jarvis*, Id. 100, which is still quoted with approval. The reports show many similar cases. Probably no one has considered this subject with greater care than Judge Curtis, who says, (Curt. Pat. 7, 8:)

"We have just seen that, in order to make a new process or method of working or producing an effect or result in matter the subject of a patent in England, a somewhat liberal construction of the term 'manufacture' became necessary, by which an improvement in the art or process of making or doing a thing, was made constructively to be represented by the term which ordinarily would mean only the thing itself, when made or done. It was doubtless to avoid the necessity for this kind of construction that the framers of our legislation selected a term which, *proprio vigore*, would embrace those inventions, where the particular machinery or apparatus, or the particular substance employed, would not constitute the discovery so much as a newly-invented mode or process of applying them, in respect to the order, or position, or relations in which they are used. * * * This difficulty is avoided by the use of the term 'art,' which was intended to embrace those inventions where the particular apparatus or materials employed may not be the essence of the discovery, but where that essence consists in using apparatus or materials in new processes, methods, or relations, so as to constitute a new mode of obtaining an old result, or a mode of attaining a new result."

And again, at page 15, he sums up the cases as follows:

"It will be seen that the comprehensive proposition laid down by the supreme court * * * embraces the cases where the process itself presents the advantages of the change from the old to the new, or where the article manufactured presents such advantages, or where they appear both in the process itself and the result of using the process. Thus, if the article made be either new or better, having different or superior properties, the advantages are presented by the thing itself. * * * If the article, as made by the new process, is of as good or better quality, and cheaper, the advantage of cheapness is gained by a more economical process than the old one, and the improvement appears in the process, while the article made by it may or may not be new; that is to say, may or may not possess other new properties than cheapness."

The line dividing invention from non-invention is very dim, and cases lying near it often present great difficulty. In deciding them judges have occasionally used expressions which seem extravagant, and

calculated to mislead. Some of them would almost justify a doubt whether a majority of patents issued are valid, and others whether any of them are invalid. The decisions, however, are generally harmonious. We think it may safely be said that wherever a change in the method of making an article of manufacture produces a different and beneficial result, although the difference consists only in improving or cheapening the article, and the change and its advantages had not been seen or made by others (than the patentee) interested in seeing and making it, there is sufficient evidence of invention to sustain a process patent. Here the effect of the change is to improve, and also to cheapen. The respondent admits the advantages by adopting the change. Much reliance is placed by him on *Dreyfus v. Searle*, 124 U. S. 60, 8 Sup. Ct. Rep. 390. On first blush this reliance may seem justified. Closer examination, however, will show that it is not. The patent there was "for an improved process of imparting age to wine," by introducing heat directly to the wine by means of metallic pipes passing through the casks, instead of the former method of applying heat to the cask simply, by placing them in ovens. While the specifications assert that this change saves time and fuel, and has other advantages, the case as reported, does not show this. It does show, however, that precisely the same method of heating water and high wines (to evolve alcoholic vapor in the latter) had been employed prior to the patent. The court finds these facts, and says: "There was no patentable invention in applying to the heating of wine or other liquid from the inside of the cask, the apparatus which had been previously used to heat another liquid in the same manner." With such finding of facts the case could not have been decided otherwise. It would be very unsafe to conclude from what is said respecting the process that the case would have been so decided without the facts referred to, and with proof of positive and material advantage from this method of applying heat.

We do not find anything to support the allegation of "defective specification and claim." Nor is the allegation of "prior use" sustained. There is some evidence that lumps of bicarbonate of soda were used at Brunjes & Linneworth's brewery before the complainants' invention; but it is met by as much, if not more, evidence to the contrary. With the burden of proof on the respondent this would be fatal, if nothing else stood in his way. In addition, however, is the important fact (proved by his own witnesses) that the use was strictly secret. Such a use is not important. *Gayler v. Wilder*, 10 How. 477; *Adams v. Edwards*, 1 Fish. Pat. Cas. 1.

Do the proofs show infringement? The respondent used lumps of bicarbonate of soda, as these complainants do, artificially compressed, so as to form a solid mass, without employing cement. This we believe to be an infringement. The employment of cement in forming the complainants' lumps is not a part of the patented process, and is not mentioned in the claim. It is referred to in the specification as an available aid in solidifying the bicarbonate; it has no other office. The lumps of bicarbonate alone are important in the process. It may be more con-

venient, require less time and less pressure, to use cement in forming them. The powder itself, however, if slightly moistened, or sufficiently compressed, will fill the role of a cement, as Dr. Sloane states. What the complainants discovered and secured by their patent is the use of artificially compressed lumps of bicarbonate of soda or other alkali in the manner and for the purpose described in the claim. What the respondent has done is an infringement upon the right thus secured. A decree will therefore be entered sustaining the bill.

THE A. W. THOMPSON.

COLAHAN *v.* THE IDLEWILD.

(District Court, S. D. New York. June 5, 1889.)

1. COLLISION—STEAM AND SAIL—TACKING.

Where a steamer has shaped her course to keep out of the way of a sailing vessel on the wind, the latter is bound to beat out her tack.

2. SAME.

The steamer *I.*, going west in Long Island sound, and rounding Throgg's point, saw the schooner *A. W. T.* beating west on her starboard tack towards the south-westward, and when within a half or three quarters of a mile of her shaped her course to pass astern of the schooner. The latter soon after tacked to the northward across the steamer's course, and collision ensued. There was nothing to prevent the schooner's continuing her former course at least a quarter of a mile further to the southward. *Held*, that the schooner was in fault for not beating out her tack, as in effect required by rule 24. The steamer was also in fault for not observing her tacking, and not keeping out of the way, as she might have done, notwithstanding the schooner's fault.

3. SAME—DEATH BY WRONGFUL ACT—CONTRIBUTORY NEGLIGENCE.

The captain was personally in charge of the navigation of the schooner, and was killed by the collision. In an action brought by his administratrix for loss of life under the statute of the state of New York authorizing suit where the deceased might have maintained an action if living, *held*, that whether or not a maritime cause of action, cognizable in an admiralty court, could be created by state legislation, this action would not lie, except under the conditions imposed by the statute; and inasmuch as by the state law contributory negligence would bar the action in the state courts, the libel for the captain's death could not be maintained in admiralty.

In Admiralty.

Edwin G. Davis, for libellant.

Butler, Stillman & Hubbard, and *Wm. Mynderse*, for claimants.

BROWN, J. On the 19th of March, 1887, as the libellant's schooner *A. W. Thompson* was beating to the westward in Long Island sound, against the wind from W. N. W., she was run into by the steam-boat *Idlewild*, also going west, about a mile this side of Throgg's Neck, off Whitestone docks, and about a half a mile from shore. The vessels met nearly at right angles. The master, who was at the wheel, was killed by the falling spars, and his body picked up from the water. The above

suits are brought by his administratrix to recover in one suit, under the statute of this state, for the loss of life, and in the other for the loss and damages to the vessel and cargo, on the ground that the collision was the fault of the Idlewild. The Idlewild was on her accustomed route, and there is no reason to suppose that she was materially off her course. This fixes with tolerable certainty the distance of the place of collision from shore, and both sides agree that it was abreast of Whitestone docks. As the steamer was going at the rate of about 15 knots with the tide, it could not have been more than from 4 to 5 minutes from the time when the schooner was first seen when the steamer was rounding Throgg's Neck, until the collision. When first seen she was sailing S. W. towards the Long Island shore on her starboard tack. After the Idlewild had got around Throgg's Neck, and headed westerly on her usual course, she had the schooner on her port hand, going southward, and further away from the line of the Idlewild's course. The situation was, therefore, one of absolute freedom from danger, as the steamer's course took her astern of the schooner. Thereafter the pilot's attention was for a short time diverted from the schooner, and the second pilot was engaged in making up the log; so that when their attention was next directed to the schooner, it was observed that she had come about upon her port tack, and was sailing to the northward directly across the steamer's course, about 500 feet distant, and about two points on the steamer's port bow. The steamer's engines were immediately reversed full speed, and her helm put hard a-starboard, to endeavor to go under her stern, but collision ensued. There was abundant water for the schooner for more than a quarter of a mile further to the southward. There were no other vessels in the way, and there were no circumstances that within rule 24 (new article 23) interfered with her continuing on her previous starboard tack. Her change to the port tack must have been made within less than three minutes of the collision, and within less than 300 yards of the steamer's course, and after the steamer's course was shaped so as to clear her. Such a change was a plain violation of the spirit of old rules 20 and 23, (new articles 17 and 22,) and of the unquestioned rule that requires sailing vessels in the near presence of other vessels bound to keep out of the way, to beat out their tacks, when there are no exigencies of navigation to prevent it. *The Empire State*, 1 Ben. 57, 61; *The W. C. Redfield*, 4 Ben. 227, 229; *The Clara Davidson*, 24 Fed. Rep. 763; *The Bridgeport*, 6 Blatchf. 3, *The R. R. Higgins*, 1 Low. 290; *The Isle of Pines*, 24 Fed. Rep. 498, affirmed on appeal. The Idlewild also must be held to blame for not maintaining a proper lookout. Had this been done the schooner would have been observed when she first tacked, and the steamer would have had no difficulty in keeping out of the way by going either to the northward or to the southward of her. This fact, however, does not free the schooner from blame. There were no other vessels that required watching. The steamer had a right to assume that the schooner would keep on her former starboard tack. There was no danger from her whatever so long as she preserved that course. The steamer was thereby misled as to the schooner's intentions. When the latter tacked, she adopted a maneuver

that was certain to result in collision, unless the steamer at once adopted new measures to avoid it. Both, therefore, were guilty of fault directly contributing to the collision,—the schooner in not beating out her tack, and thereby misleading the steamer; the steamer, for not maintaining a constant lookout, which the law and the policy of navigation require shall be rigidly enforced. For the damages to vessel and cargo the libellant is, therefore, entitled to half damages.

As respects the claim for the loss of life, I do not find it necessary to consider the question reserved in the cases of *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, and *The Alaska*, 130 U. S. 201, 9 Sup. Ct. Rep. 461,—whether a libel *in rem* will lie for a loss of life through negligence under a statute like that of New York, which gives an action for damages not exceeding \$5,000 and interest, to be recovered by the personal representatives, in a case like this, where the negligence and the death arose upon navigable waters within the limits of the state. Nor is it necessary to consider whether an act of negligence which by the maritime law of this country, as declared by the supreme court, constitutes no maritime tort as respects the libellant or any survivors of the deceased, can under the United States constitution be made a maritime tort cognizable in the admiralty by state legislation; or whether, if an action *in personam* were maintainable in the admiralty under such statutes, on the ground that the negligence was thereby made a maritime tort as respects the libellant, the remedy for such a tort in the courts of admiralty might not be *in rem* also, in accordance with the ordinary course of remedies under the maritime law of this country. *Holmes v. Railway Co.*, 5 Fed. Rep. 81; *The Garland*, Id. 924; *The Clatsop Chief*, 8 Fed. Rep. 163; *The E. B. Ward*, 17 Fed. Rep. 456; *The Manhasset*, 18 Fed. Rep. 920; *The Sylvan Glen*, 9 Fed. Rep. 335; *The Cephalonia*, 29 Fed. Rep. 334; *Butler v. Steam-Ship Co.*, 130 U. S. —, 9 Sup. Ct. Rep. 612, 619. The action rests entirely upon the state statute. Any defense, therefore, that would bar recovery in the state courts, with reference to which the statute must be deemed enacted, must be held equally good in the admiralty. Besides this, the very language of the New York statute contains the proviso that the wrongful act, neglect, or default shall be “such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof.” Laws N. Y. 1847, p. 575, c. 450; 4 Edm. St. 526; 7 Edm. St. 591. As the action rests upon the statute it cannot lie except under the conditions which the statute imposes. *The Edith*, 94 U. S. 518. The well-settled law of this state at the time the statute was passed, and now, forbids a recovery of damages by a plaintiff chargeable with contributory negligence. In this case the master was at the wheel, and in command. He was personally chargeable with the negligence for which I have held the schooner liable. It therefore follows that the action for loss of life must be dismissed. Decrees may be taken accordingly.

CHURCHILL *et al.* v. THE ALTENOWER.ADAM *et al.* v. THE ONTARIO.

(Circuit Court, E. D. Louisiana. June 13, 1889.)

1. COLLISION—STEAMER AND VESSEL AT ANCHOR.

The bark O. was anchored in the South pass of the Mississippi river, about a mile above the jetties, close to the eastern bank, in the usual and proper place for vessels anchoring in the pass. She lay with helm lashed and bare masts. The steamer A. was coming down the pass in the middle of the channel, and when one-fourth of a mile above the O. the A's steering apparatus became deranged, because a nut worked off from one of the buckle screws attaching the starboard rudder chain. She became unmanageable and sheered towards the O. Her engines were reversed, and she was backed, but her headway was not lessened, and she struck the O's bow, causing damage to both vessels. The A. was furnished with an additional and after-steering gear, ready to be used, and taking but a moment to be put in gear for use, provided a man was standing by to put in the necessary pin. On this occasion no one was by, and, although it was connected before the collision, it was too late to have any effect. *Held*, that the A. was in fault, because her steering gear was not properly secured, watched, or inspected, and because she did not keep her after steering gear in readiness for instant use; and that the O. was not in fault.

2. SAME—DUTY OF VESSEL AT ANCHOR.

As the A. approached the O. the master and others on board the A. called out to the O. to pay out her cable so as to drop astern, out of the way, but there was no watch on the O. to take such steps. The A. was nearly straight with the O., and the A's pilot, who was in charge of her navigation, gave no order to the O. to pay out cable, but was sailing the A. to pass the O. as she lay, and on the supposition that the latter should not move. Under the evidence it was doubtful whether dropping astern by the O. would have avoided the collision, or would have made it more certain and damaging. *Held* that, although the O. was in fault in not having an anchor watch, this did not contribute to the collision.

In Admiralty.

James McConnell, for libelants.

Joseph P. Hornor, for claimants and cross-libelants.

Before LAMAR, Justice, and PARDEE, J.

FINDINGS OF FACT.

PER CURIAM. These causes came on to be heard on the libel, cross-libel, answers, record, and evidence, and were argued; whereupon the court doth find the following facts:

First. The Ontario, a British bark of ——— tons burden, and 170 feet in length, on her first voyage to the port of New Orleans, being in ballast and seeking a cargo, arrived at the mouth of the South pass of the Mississippi river on Friday, February 11, 1881; was towed in through the jetties and into South pass under the guidance of a bar pilot, and was by him placed and anchored, with a single anchor and chain, in said pass, about a mile above the jetties, close to, and broad-side with, the eastern bank, not less than 500 yards above the light-house, and below the island at the head of the pass, in the usual and proper place for all vessels anchoring in the pass, and as required by the rules

and regulations established by the South Pass Jetty Company, and then in force under authority from the secretary of war, pursuant to the provisions of the act of congress approved June 1, 1874. Other vessels were anchored along the eastern bank, above and below the Ontario.

Second. After coming to anchor, as above stated, the Ontario lay with helm lashed and masts bare of sails; and remained so anchored until the next day, between the hours of 2 and 3 o'clock P. M., when she was run into by the British steam-ship Altenower, and so severely damaged on the port bow and side, just at and below the water-line, that she had, after being towed to the port of New Orleans, to be put in dock and repaired. The damage to both vessels was caused mainly by the anchor of the steam-ship Altenower, which, falling between the vessels as they collided, crushed in and tore asunder the wood-work of the hull of the Ontario, on her port bow and side.

Third. At the time of the collision the Ontario was well manned, officered, and equipped. The crew were all off watch, and were all below, except the steward, who was on deck, but not on duty. The captain had gone ashore to the telegraph station, situated at the head or inner end of the jetties, in order to communicate by telegraph with, and receive instructions from, the agents of the owners of the bark in New Orleans. The wife and three children of the captain of the Ontario were on board that vessel.

Fourth. At the time of the collision, the weather was sunlight, clear, and fair. South pass, above the jetties, is a narrow pass about 10 miles long, from 29½ to 37 feet deep, and, at the place where the Ontario was anchored, 680 feet wide. The current was about three to four miles per hour. The wind was down the pass. The navigation of the pass is not dangerous, except to vessels drawing nearly the water of the shoalest parts of the channel, and is not dangerous to vessels at anchor along the eastern shore, except from the liability of large steam-ships going down the pass to sheer in shoal water, or to meet with accident to the steering apparatus, as in the case of the Altenower. Opposite where the Ontario was anchored the channel runs closer to the west side than to the east side of the pass.

Fifth. The damage to the Ontario resulting from the collision was the sum of \$7,194.72.

Sixth. The Altenower was a British iron propeller steam-ship of— tons burthen, and 340 feet in length, on voyage from New Orleans to Liverpool, and, at the time of the collision, was descending the South pass, about the middle of the channel, at the rate of between eight and nine knots an hour, and, when about one-quarter of a mile above where the Ontario lay, the steering apparatus in use on the Altenower became deranged, because a nut worked off from one of the buckle screws attaching the starboard rudder chain, i. e., a nut fell off from the bolt that connected or held the chains by which the tiller of the steam-ship Altenower was operated, causing the steam-ship to sheer to port and become unmanageable; and ordinary attention and care was not used in securing the nut to prevent its falling off. As it was neither riveted

or pinned on, nor properly watched or inspected, the nut was liable to work off with the movements of the chain.

Seventh. The Altenower was furnished with an additional and after steering gear, ready to be used in case of need, and taking but a moment to put it in gear for use, provided a man was standing by to put in the necessary pin. On this occasion no one was by or near the said steering gear, and, although it was connected before the collision, it was not connected until after unnecessary delay, and until it was too late to affect the collision.

Eighth. As the Altenower sheered to port, and did not mind her helm, her engines were reversed, and she was backed, but her headway with the current was not lessened so but what she made towards the bow of the Ontario, which she soon struck with great force, inflicting the damage aforesaid, and damaging herself in the sum of \$18,316.05.

Ninth. As the Altenower approached the Ontario, the master of the Altenower and others on board of her called out to the Ontario to light or pay out her cable, so as to drop astern, out of the way; but there was no watch on the Ontario to take any such step, and this hail of persons on the Altenower was disregarded. At this time the Altenower was nearly straight with the Ontario, and the pilot in charge of the navigation of the Altenower gave no order to the Ontario to pay out cable, but was managing and sailing the Altenower to pass by the Ontario as she lay, and on the expectation and supposition that the latter should not move; and, under the evidence in the case, it is uncertain and doubtful whether the dropping astern at this time by the Ontario would have avoided the collision, or would have contributed to make it more certain and damaging. The court, therefore, finds as a fact that, although the Ontario was in fault in not having an anchor watch at the time and in the place where she was anchored, yet that this fault did not, under the evidence in this case, contribute to the collision, and that, so far as said collision is concerned, the Ontario was not in fault.

Tenth. There is and was, near the mouth of the Mississippi river, a safe anchorage out of the track of vessels, where ships awaiting orders, or otherwise detained, can safely lie, *i. e.*, at the head of the passes, about 10 miles above where the Ontario was anchored, or outside of the jetties in East bay or West bay.

Eleventh. The failure of the Altenower to properly secure the nut described in the sixth finding was the immediate cause of the collision, and the failure to have a watch over the after steering gear contributed to the collision.

And the court finds, as conclusions of law:

First. That the Altenower was in fault, in that her steering gear in use was not properly secured, watched, or inspected; and because, when sailing through such a long, narrow, and shoal channel as the South pass she did not keep her after steering gear in readiness for instant use in case of emergency.

Second. That the Ontario was not in fault so far as the collision aforesaid was concerned.

Third. The libel filed by George and John Churchill against the steam-ship Altenower should be maintained, and that said libelants should have and recover from the claimants in this case, and their sureties on the release bond of the steam-ship Altenower, the sum of \$7,194.72, with interest thereon at 5 per cent. from the 12th day of February, 1881, and all cost of suit.

Fourth. That the cross-libel filed herein by John Birney Adam, Alexander Chiras Adam, and Thomas Adam, Jr., owners of the steam-ship Altenower, against the bark Ontario, should be dismissed, with costs.

Fifth. The following decree should be entered in the case: Considering the aforesaid findings of facts and conclusions of law, the court doth order, adjudge, and decree that George and John Churchill, owners of the bark Ontario, libelants herein, do have and recover from the steam-ship Altenower the sum of \$7,194.72, with 5 per cent. interest thereon from February 12, 1881, till paid, and all costs of suit. And whereas, said steam-ship Altenower was seized on the libel in this case, but was released and restored to her owners on giving bond and security to respond in damages, it is further ordered, adjudged, and decreed that John Birney Adam, Alexander Chiras Adam, and Thomas Adam, Jr., owners of said steam-ship Altenower, and claimants herein, and Bradish Johnson and Victor J. Meyer, their sureties on said release bond, be condemned *in solido* to pay the foregoing judgment: provided, however, that the said Victor Meyer and the said Bradish Johnson shall be held liable under the judgment only in the sum of \$7,500 each. It is further ordered, adjudged, and decreed that the cross-libel of John Birney Adam, Thomas Adam, Jr., and Alexander Chiras Adam, filed herein, be dismissed, with costs. Execution may issue upon this judgment and decree after 10 days from filing hereof.

SWEENEY *et al.* v. THOMPSON *et al.*

(Circuit Court, E. D. Louisiana. June 24, 1889.)

1. GENERAL AVERAGE—BOND—SEAWORTHINESS OF VESSEL.

In a libel on a general average bond, the evidence of libelant was that the steam-boat ran over some concealed obstruction which carried away her wheel, and broke her rudders and shaft, so that she became helpless, and had to be towed to a port, put in dry-dock, and repaired. The respondents contended that the steam-boat was unseaworthy at the time of the disaster, and the inquiry was confined to the question whether or not the shaft of the steam-boat was seaworthy. The evidence of the engineer, firemen, second mate, and master and others, who were on duty, was that the steamer collided with some unknown obstruction, and this was corroborated by persons who examined her after she was in dry dock, and found bruises on her hull. Respondent's witnesses testified that they had examined the boat, and found no bruises on the hull, but there was no direct testimony contradicting the engineer, fireman, master, and others. *Held*, that the preponderance of evidence was in favor of libelant.

2. SAME—EVIDENCE OF SEAWORTHINESS.

The shaft, when it broke, gave way suddenly, as if from a sudden application of exterior force, and it appeared that when it broke the iron was fibrous, showed no crystallization, and had the appearance of a sudden break, rather than that of a slow and gradual giving way. The proof was that, when a shaft gives way from natural wear, the process is gradual, and shows itself on the outside by a crack, and by the working loose of the wedges which tighten the flanges around the shaft, and that notice of such giving way is always conveyed to the engineer and master by a wobbling of the wheel affecting the machinery. An inspection of the boat shortly before the accident showed no signs of defect, and the wedges had not worked loose, and there was no wobbling of the wheel. It was conceded that the shaft had a welding defect at the place of fracture, but the testimony showed that the solid part of the shaft at the point of fracture had two and one-half times the strength required for balancing the strain required of it to perform its work. *Held*, that the evidence showed that the shaft was seaworthy.

3. SAME—BASIS OF AVERAGE.

The evidence showed that the steam-boat had lost her motive power, and was in a leaky condition, not in any port or harbor, and could only reshipe, if at all, on transient boats. *Held*, that ship and cargo were in peril, and the expense of towing her to port formed the basis of a general average.

4. SAME.

The fact that the port of refuge and the port of destination were the same makes no difference.

In Admiralty Libel on a general average bond. On appeal from district court.

W. B. Howe and *J. R. Beckwith*, for libelants.

Percy Roberts, for respondents.

PARDEE, J. The libel in this case is one *in personam* on a general average bond. Among the suitable allegations to such suit, the libel propounds that—

"Soon after, said steam-boat proceeded on her voyage to New Orleans with said cotton and other lots of cotton and cargo aboard, when afterwards, on the 12th of February, 1888, in coming out of Old river, her usual and proper course, she suddenly ran over some unknown obstruction or object concealed beneath the water in the usual channel, which carried away her wheel, and broke the rudders, beside doing serious damage to her machinery, and causing her hull to leak very badly, and she was left in a disabled and helpless condition; that it became necessary, in order to save said steam-boat and her cargo from total loss and destruction, to have her towed to New Orleans by another steam-boat, the John H. Hanna, a distance of some ——— miles, and said steam-boat Corona was leaking so badly that it was absolutely necessary to keep all the boat's pumps at work from the time of the accident until her cargo was discharged and she was placed in the dry-dock for necessary repairs."

The answer admits a large portion of the facts propounded in the libel to be true. As to others, it neither admits nor denies, for want of information on the subject, but requests full and legal proof thereof, and then denies liability because of the said average bond, or for any other cause growing out of the facts alleged in said libel—

"For the causes and reasons following, to-wit: That said steamer Corona at the time she received the said cotton of respondents on board, and during her said subsequent voyage, was not staunch and strong, and was not in condition to safely receive and transport said cotton, as was implied in holding herself out as a common carrier, and so receiving said cotton for carriage,

but, on the contrary, that the said steamer was, when she received said cotton and during her said subsequent voyage, in an unseaworthy condition; and that her said disabled condition, and the said alleged necessity of being towed to the port of New Orleans, and all of the alleged costs, expenses, and sacrifices, were caused by the unseaworthy condition of the steamer, and particularly by the fact that the shaft of the engine of said steamer was defective, and wholly insufficient to withstand the labor and strain devolving upon it in the ordinary course of the voyage she was then engaged in,—thereby rendering said steamer unseaworthy, and liable for all the costs, expenses, and sacrifices alleged in said libel.”

The issue thus made by the libel and answer is as to the seaworthiness of the Corona at the time of the disaster alleged. To this issue the evidence in the case has been wholly directed, and on it the case has been tried in the district court, and argued in this court; and not only has the issue up to this time been confined to the question of seaworthiness, but it has been particularly confined to the single question as to whether or not the shaft of the Corona was seaworthy. In the briefs filed in the case, one or two other questions affecting the liability of the defendants have been suggested and argued.

On the question of seaworthiness, the following facts appear from the evidence:

First. That at the time of the disaster by which the Corona lost her wheel the boat collided with some unknown obstruction in the river. This appears by the evidence of the engineer, fireman, second mate, and master, all on duty at the time, and by the evidence of the carpenter, stevedore, and mate, officers of the boat, who were observers of the disaster. It is not opposed by any evidence on the part of any person on the boat; it is only contradicted by theories and experiences of experts. The fact is corroborated by the independent fact shown by the testimony of several witnesses, who examined the vessel after going into the dry-dock with regard to the injuries the hull of the boat received. From two of these witnesses I quote:

Oris I. McClellan says he is in the dry-dock business. Has been for the last 13 years. His dock is the Ocean dry-dock, in which the Corona was placed after the accident under investigation. “Examined her after she was in the dock. On her starboard bow there was a mark of bruises, as if she had been struck by some object that extended several feet in the back from the bow, and it was a large spot, I should judge about three feet square, and there was a little break away from it running under the boat. One of the balance rudders—the balance part of the rudder—was broken in the end, and split up to such an extent that it necessitated the putting in of a new piece, and the strengthening of the stock. This rudder extends forward under the stern of the boat, forward of the wheel. It was that part of the rudder which would naturally be struck by any object that struck the bow of the boat, and run under the boat.” In concluding his testimony he says:

“I should infer she struck some object in the river, which struck her in the bow, glanced under her, then struck the rudder, then rose up and tore this wheel out, catching on the shaft of the wheel, and tore it out. I should judge

it came up between the hull of the boat and the wheel. When it got from underneath the boat, its buoyancy naturally got it up under the wheel, and broke it off."

Victor Junior swears that he is foreman of the Ocean dry-dock. Has been in the business for 14 years. He examined the Corona when it was placed in the dock. Says:

"All the marks that I saw on the Corona when she came in were on the starboard side. We were on the deck of the dock, and when she came up out of the water far enough we saw it, and it was bruised. It looked at first like a scratch, but when it got up it was a great bruise on the starboard side. One of her rudders was damaged."

There are three other witnesses who testify for the libelants that the bruises on the Corona (as sworn to by McClellan and Junior) existed as claimed.

The respondent produces four witnesses, who testify that they examined the hull of the Corona when she was in the dry-dock, and found no evidence of any late bruises or collision on the hull, but none of them swear as to injury to the rudder.

In the record is the report of a survey on the Corona, held on February 16th, after the accident, at New Orleans, by D. H. Connors, then inspector for the New Orleans Board of Underwriters, and O. F. Vallette, ship-builder, in which it is certified as follows: "After careful examination, we find the shaft broken, cylinder timbers, plumber-blocks, and cams and rudder on port side broken, and when in dock we found four planks on starboard side forward broken." Some weight must be given to this certificate, although Connors' evidence in the record is not very satisfactory as to any actual examination made by him, and Octave Vallette (presumably the ship-builder O. F. Vallette) is one of the four witnesses of the respondent testifying that on examination of the Corona in dock they found no evidence of any late bruises or collision. Connors, in his original examination as a witness, testifies to marks and bruises on the hull, and to the removal of three or four planks, but said: "There were no marks of an impact with anything." When recalled, he testified that the broken planks and the pieces thereof showed evidence of a collision, and to the question, "Could you observe on the bottom of that boat, taking into consideration these bruised planks, anything else that the boat had gone over some obstruction of some kind?" answered, "Well, yes; there was a crease as if she had passed diagonally across to port."

Considering all the evidence on the matter of bruises on the hull of the Corona in its bearing on the question of collision by the Corona with some obstruction at the time of the accident, the preponderance is largely on the side of the libelants. As a general rule, witnesses who do see outweigh witnesses who do not see. It was impossible, it seems to me, for Mr. McClellan and his foreman to be mistaken, under the circumstances, in a matter of this kind.

Second. The shaft of the Corona when it broke gave way suddenly, as if from a sudden application of exterior force. It appears that where

the shaft broke the iron was fibrous, showed no crystalization, and had the appearance of a sudden break, rather than that of a slow and gradual giving way. The proof is that, where a shaft gives way from natural wear and giving out, the process is gradual, and invariably shows itself on the outside by a crack, and by the working loose of the wedges which tighten the flanges around the shaft. The evidence also shows that notice of such gradual giving way of a shaft is always conveyed to the engineer and master by a wobbling or irregular motion of the wheel affecting the machinery. So far as this particular shaft was concerned, the evidence is to the effect that an inspection shortly before showed no signs whatever of defect; that the wedges had not worked loose; and that no notice whatever was given to the engineer of any deflection in the shaft by any wobbling of the wheel or peculiarity in the engines. To this showing on the part of the libelants the respondents have naught to offer but the theory and experience of alleged experts.

Third. While it is a conceded fact that in the shaft of the Corona there was a welding defect at the place of the fracture, yet it is mathematically established in the case that, notwithstanding this welding defect, the solid part of the shaft, which was suddenly broken at the time her wheel was lost, at the point of fracture had nearly two and a half times the strength required by well-recognized formulæ for balancing the computed torsion and strain required of it to perform its ordinary duty in the navigation of the Corona. In this the mechanical engineers, who have testified in the case on both sides, substantially agree. Upon these facts, the conclusion is inevitable that the shaft of the Corona at the time of the disaster in question was seaworthy; that is, was sufficiently staunch and strong to withstand the ordinary perils of navigation. There is in the case a field for conjecture well opened up by the testimony of experts, and by the learned and ingenious argument of proctor for respondents. However, it is a field in which no certainty is to be attained, and into which the court does not feel called to enter. The whole case depends entirely upon the construction and effect to be given to the evidence. The district judge considered it, and seems to have had no difficulty in determining in favor of fact, as against the argumentative case presented by the respondent. His conclusion and judgment are entitled to great weight.

Since the original submission of the case, the pleadings have been somewhat amended, new evidence taken, and it is now claimed that, if the court shall find that the Corona was seaworthy, yet the libelants ought not to recover, because, although the disaster was caused by a collision with some obstruction in the river, yet, as the leaks of the Corona were soon under control, and the boat itself was brought to shore and tied up, the cargo was in no danger, and could easily have been re-shipped, and that, therefore, the towing expenses of the ship and cargo to New Orleans could not be the basis of a general average. I have read the additional evidence, and have examined the numerous cases cited in the briefs, and have consulted the text-books; and, considering it all, I have no trouble in concluding, on the case as made by the evidence

herein, that as the Corona had entirely lost her motive power, and was in a leaky condition, not in any port or harbor of refuge, and could only reship, if at all, on transient boats, as a whole, ship and cargo were in peril, and extraordinary services and expenditures were necessary for the common safety of ship and cargo; and as these services were rendered, and these expenditures were made, the case is properly one of general average. That the port of refuge and the port of destination were the same makes no material difference. Where it is possible to save the ship as well as the cargo, it is doubtful if the master should be criticised for not separating them, even if he have an opportunity. If he does separate them under such circumstances, the ship does not thereby lose her claim for general average. In the present case the evidence does not show that any reshipment ought to have been made, or could have been made without largely increased expenses. Let a decree be entered for the libelants as prayed for in the libel.

THE CIAMPA EMILIA.

MORAN *et al.* v. THE CIAMPA EMILIA.

(District Court, S. D. New York. May 29, 1889.)

TOWAGE—COUNTER-CLAIM FOR DAMAGES—ADMIRALTY—PRACTICE.

Since, in a suit for towage, the defendant, who has a counter claim for damages for negligent performance of the contract, in excess of the libelant's claim, cannot recover his full damages by *answer*, but only by *cross-libel*, and as he cannot split up his cross-demand, but must try it in the cross-suit, he is entitled to have the libel and cross-libel heard together, if brought in the same court. If brought in different courts, judgment on the libel for towage should be stayed until reasonable opportunity had for the trial of the larger counter-claim in the cross-action.

In Admiralty. Libel for towage.

Hyland & Zabriskie, for libelant.

Wing, Shoudy & Putnam, for claimants.

BROWN, J. The libelant sues for \$250, the agreed price for towing the ship Ciampa Emilia from New York to Philadelphia, in November, 1888. On the trip the Ciampa was damaged in an amount much beyond the contract price, through the alleged negligence of the libelant's tug. The answer admits the agreement to pay \$250; but it alleges a contract to tow safely, the non-performance and violation of that contract, the consequent damage, and the pendency of a suit in the Eastern district, brought by the claimants against the libelant's tug *in rem*, to recover damages much in excess of the price of the towage. The claimants in the suit last named having bonded the vessel and given security for the damages claimed in the Eastern district, now move for judgment here

upon the pleadings and on the above facts. In libels on contracts for towage or for transportation, damages may be recouped in the same action to the extent of the contract price; but, if the carrier has caused damage in excess of the contract price, the claimant can only recover the excess by an independent libel. In *Nichols v. Tremlett*, 1 Spr. 367, it is said, moreover, that since he cannot split up his demand, and litigate the same question twice, if the owner "voluntarily submits his claim for damages to the court in the suit for freight to extinguish the libelant's claim, he cannot afterwards maintain a suit for the excess." *Kennedy v. Dodge*, 1 Ben. 311. In *Bradstreet v. Heron*, Abb. Adm. 209, BETTS, J., says, in regard to a negligent damage of the carrier, that the owner of the goods is "entitled to withhold the freight, either by way of recoupment of damage or upon the ground that the libelant cannot maintain an action on the contract without showing that its requisitions have been fully complied with on his own part." It is now the settled practice, however, upon delivery of all the articles, though damaged, to allow the freight upon compensation for the damage, either by way of recoupment or by way of cross-libel, according to the amount of damages. Whatever may have formerly been the practice in common-law actions, it is manifest, upon principles of natural justice, that an owner of property which has been damaged in a larger sum than the freight or towage price ought not to be required to pay moneys to the wrong-doer while the latter is owing him a larger sum for damages in the same transaction. Under the Code of Civil Procedure in this state, and in many others that allow a counterclaim to be set up in the answer, both demands are adjusted in a single suit. As the practice in the admiralty, however, requires independent libels, the court, which proceeds upon equitable principles, should secure the same result, so far as the proper regulation of the practice will permit, viz., by trying the two causes together, as it may do, where both suits are in the same court; or, if they are in different courts, by staying the entry or execution of a decree in the one suit until there is reasonable opportunity for the other to be heard. *The Tubal Cain*, 9 Fed. Rep. 834. As the larger suit for damages is pending in the Eastern district, no decree should be entered here until the right of the present claimants to damages is adjudicated there. Both claims proceed from the same transaction. The present libelant is not entitled to be paid his towage, except upon making at the same time compensation for the damages inflicted. He is not equitably entitled to call for the claimants' money for freight, and turn the latter over to the bond or stipulation given in the other suit, in which by litigation he may postpone recovery for a considerable period, and at last possibly involve the claimant in an entire loss through the failure of the security given. An order may be taken providing for the entry of a final decree for the amount of the towage, with interest and costs, upon the determination of the suit in the Eastern district; the amount thereof to be paid upon satisfaction on the part of the libelant of any decree therein recovered against him.

CLARK v. THE RUTH.

(District Court, D. New Jersey. May 25, 1889.)

PILOTS—WAGES—WEIGHT OF EVIDENCE.

Where the sole question arising upon a libel by a pilot for wages is as to when the charterers informed the libelant that he was to look to one of the charterers individually for payment, and the two charterers directly contradict the libelant, there being no other testimony on that point, the witnesses being equally worthy of credit, the weight of evidence is against the libelant.

In Admiralty. Libel for wages.

Anson B. Stewart, for libelant.

Bedle, Muirheid & McGee, for respondent.

WALES, J. The libelant sues to recover a balance of wages alleged to be due to him for two months' services as a pilot on board the *Ruth*. The contest is whether he has a lien on the vessel, or must look for payment to the person who employed him. He says that he was employed by Lamson, who acted as master, but that he did not sign any shipping articles, and that he rendered the services sued for. The defense is that he undertook the employment on a special contract, and on the personal credit of Lamson,—one of the charterers of the boat,—and without the knowledge of the owners. The testimony is made up of positive and contradicting assertions. The libelant admits that he knew before going on the boat the character of the business she was to be engaged in, but that he was ignorant of the precise terms of the agreement between Lamson and Leslie, who had jointly chartered her, until some time afterwards. Lamson and Leslie both swear that before the libelant engaged as pilot, he was made fully acquainted with everything concerning the business, and that he was to receive his pay from Lamson. They also say that he was incompetent, and of no use as a pilot, except that the presence of a licensed pilot on board was required by law. The boat was unsuccessful, and her charterers ran in debt. The question of fact is narrowed to the single one as to the time when the libelant was informed of the terms of the agreement between Lamson and Leslie, and that he was to look to Lamson for his wages; and on this point, the parties to the contract, including Leslie, being the only witnesses, and all being entitled to equal credit, the weight of the evidence is against the libelant, and his libel must therefore be dismissed.

FLEITAS v. MELLEN *et al.*

(Circuit Court, E. D. Louisiana. June 12, 1889.)

1. HUSBAND AND WIFE—MORTGAGE BY HUSBAND TO WIFE—DISCHARGE IN BANKRUPTCY.

Under a marriage contract, the wife took a mortgage for money, being a part of her paraphernal estate, received by her husband at the time of marriage. The mortgage was recorded, and afterwards the husband was discharged as a bankrupt, but the wife had no connection with the bankruptcy proceedings. After his discharge the husband acquired the land in controversy, which he mortgaged to defendant. Afterwards the wife obtained judgment of separation of property against the husband for the amount of her mortgage, and seized and sold the land, purchased it herself at the sheriff's sale, and sued to prevent defendant from enforcing his mortgage. *Held*, that the lien of the wife's mortgage, so far as it applied to the husband's after-acquired land, was acquitted by his discharge in bankruptcy.

2. BANKRUPTCY—WHO MAY PLEAD DISCHARGE.

In such case the bankrupt's discharge might properly be urged by the defendant.

In Equity. On bill for injunction.

J. R. Beckwith, for complainant.

T. J. Semmes, for defendants.

BILLINGS, J. This is a case presenting the question whether a debt which the husband owed to the wife for a portion of her paraphernal estate, received by him at the time of marriage, was, so far as relates to a lien upon his after-acquired real estate, acquitted by a discharge in bankruptcy. On the 6th day of February, 1868, the complainant, then Mary Corinne Warren, was married to Francis B. Fleitas. The marriage and residence of the parties to the marriage were within this state. There was a marriage contract, by which, as well as by the law of Louisiana, the wife had a mortgage upon the husband's property for the sum of \$20,000 of her money received by him at the time of the marriage. Subsequently, September 20, 1870, when the constitution of the state had abolished tacit mortgages, this mortgage was duly recorded in the parish where the property in dispute in this case is situated. Some time in the year 1877 the husband, Francis B. Fleitas, was discharged as a bankrupt. It does not appear that the complainant, by any act of hers, connected herself with the proceedings in the bankruptcy of her husband. Subsequently to the discharge, the husband, Fleitas, acquired the two plantations, which are the subject-matter of this suit. In 1884 he executed a mortgage upon them known as the Richardson mortgage, to which the complainant is not a party. In 1887, September 10th, the complainant obtained a judgment of separation of property against her husband, Francis B. Fleitas, for this amount \$20,000 of the wife's paraphernal property, with a declared privilege, and seized and sold the property, the two plantations in dispute, purchased them herself at the sheriff's sale, and now files this, her bill, to prevent the defendants from enforcing the Richardson mortgage against the property so purchased by her. Thus is the question pre-

sented, whether the husband's discharge in bankruptcy included and operated upon the wife's debt, so far as relates to any lien upon after-acquired land.

An attempt was made on the part of the respondents to show that there had been an erasure of the wife's mortgage. But no authority was shown for the erasure from any court of competent jurisdiction, nor was there any proof that the complainant had been a party to any such proceeding, and therefore the sole question is as to the effect of the discharge.

It is urged by the complainant that it is not competent for any one, save the bankrupt, to plead his discharge. The right to plead the discharge, so far as relates to a mere judgment establishing indebtedness, is undoubtedly in the bankrupt alone. As is urged in the brief filed by the complainant's solicitors, this plea is, in this respect, like that of infancy and the statute of frauds. The reason is that, though the discharge of a debtor extinguishes the legal obligation for payment, the moral obligation to pay still rests upon the debtor, and no one can elect for him to disregard that obligation. This has relation solely to the right of a creditor to recover a personal judgment for a debt against a discharged bankrupt. But the claim of the complainant, when viewed as based solely upon a personal judgment between the complainant and her husband, is altogether ineffectual against the Richardson mortgage; for the judgment was rendered September 10, 1887, and the Richardson mortgage was recorded January 28, 1884. To enable the complainant to recover against those who assert the Richardson mortgage, she must maintain and establish that her lien springing out of her mortgage was unaffected by the discharge in bankruptcy of the husband, survived it, and settled down upon the property in dispute as soon as it was acquired by him, and before the execution of the Richardson mortgage. The question, then, here presented by the defendant's pleadings, is not whether he can urge the discharge, so far as relates to the personal judgment, but so far as it relates to property upon which the debt, if discharged, could thereafter impress no privilege.

The plea presents the discharge only as affecting the lien. This plea can be urged by any one claiming an interest in the thing adverse to the asserted lien, and is properly presented by the respondents.

The question then is, at the time when Richardson took and recorded the special mortgage upon the two plantations were they subject to the lien of the wife for her paraphernal estate springing out of the \$20,000 advanced under the marriage contract? It is urged that this debt and the individual lien were extinguished by the discharge in bankruptcy of the husband. The argument has been urged with great force, both orally and by brief, that the establishment of the lien of the wife growing out of the marriage contract, and under the laws which regulate the rights of the spouses *inter sese*, is in the nature of a provision of the law for the support and maintenance of a married woman, and is to be viewed, as is her right to dower in the common-law states, as incapable to be affected by the bankrupt law. But if the law of Louisiana left the wife, upon the delivery of her marriage portion to her husband, with a debt,

which, though existing from husband to wife, was, in its nature, a debt enforceable as, and recognized as having the qualities of, an ordinary debt, then the debt could be extinguished by the husband's discharge in bankruptcy, and with the debt would fall the lien upon the husband's property, which could not be continued or revived by any judgment between husband and wife to the displacement of the rights of a mortgagee under a mortgage already existing. It is not an easy question to solve, but I think the decisions of our supreme court have gone far towards settling it adversely to the claims of the wife in this case. In *Alling v. Egan*, 11 Rob. (La.) 244, a wife had a separation of property, a judgment, and execution against her husband partly satisfied, when the husband was discharged in bankruptcy. It was held that the balance of the debt due by the husband to his wife was extinguished by his discharge; that any property acquired by the husband afterwards was free from any claim on her part. It is urged in this case there had been no separation of property, and that the wife was not capacitated to consent to the discharge of the husband. But the wife may resume at any time the administration of her paraphernal property. Rev. Civil Code, art. 2387, (old art. 2364,) and art. 2391, (old art. 2368.) Nor is the authorization of the husband necessary in the administration of her paraphernal property. *Dickerman v. Reagan*, 2 La. Ann. 440. In case of insolvency, she can at will recover judgment against her husband, and enforce payment of any debt of the nature of the debt involved in this case. She is under our law fully capacitated to administer her paraphernal estate, and is qualified to do all that is necessary for that purpose. Hence she might have proved her debt. In *Hawes v. Bryan*, 10 La. 136, there was a debt due a wife from her husband arising from the receipt by him of money belonging to her paraphernal estate. This debt had been seized and sold under an execution upon a judgment against her. There had been no separation of property. The court held that the debt was subject to seizure, and that the creditor, who had bought it at the sheriff's sale, obtained a valid title to it. This case seems to dispose of the argument that there is any quality impressed upon such a debt, by reason of its existing in favor of a wife against a husband, which would prevent its extinguishment by any cause which would extinguish any other debt; for if it is so independent of the marital relations that it may be made to pass from her, and be acquired by her creditors by suit and seizure, it is difficult to see why it is not, for the same reason, capable of being destroyed by the discharge. This decision would seem to so characterize the rights of the wife in such a debt that to hold that it was extinguished by the discharge of the husband would neither give nor take away any quality, but would simply classify it among the provable debts according to the qualities which our jurisprudence has declared it possesses; and, like the case of *Porter v. Lazear*, cited from 109 U. S. 84, 3 Sup. Ct. Rep. 58, would neither destroy nor impair any rights of married women which are vested by the laws of the respective states. Great force is added to this view from the fact that, unless it should be held that a wife's debt of such a character as

is the one here submitted to the court was provable against her husband in bankruptcy, an estate ample to pay her, and without any outranking privilege, and against a husband who might thereafter acquire nothing, might be administered in bankruptcy, and distributed to her exclusion. It would seem that the congress must have intended such a debt should be provable. If the debt is provable, it is extinguished by the discharge. 14 St. U. S. pp. 525, 533, §§ 19, 34. My conclusion is that a decree must be entered that the bill be dismissed at the complainant's cost.

UNITED STATES *v.* SOUTHERN PAC. R. CO. *et al.*, (three cases.) SAME *v.* COLTON MARBLE AND LIME CO. *et al.*

(Circuit Court, S. D. California. May 27, 1889.)

1. PUBLIC LANDS—DONATIONS—RAILROAD COMPANIES.

Act Cong. July 27, 1866, granted to the A. & P. Co. every alternate section of public land by odd numbers to the amount of 10 sections on each side of the road wherever it might pass through a state. If any of these sections should be already granted, reserved, etc., before the map of the proposed route should be filed, other odd sections might be selected in lieu thereof within 10 miles on either side of the limits so granted. Whenever and as often as a portion of the road 25 miles long should be completed patents were to issue for the lands so granted, opposite to and coterminous with the portion or portions completed. The odd sections so granted were withdrawn from entry, etc. By section 18 the S. P. Co. was granted the same amount of lands, under similar restrictions, and it was provided that neither the present nor prospective rights of the A. & P. Co. should be thereby impaired. *Held*, that only the odd sections in the strip absolutely granted, and not those in the indemnity strip, were withdrawn from the public domain, and that the A. & P. Co., not having complied with the conditions of the grant, had neither a present nor prospective right to any lands in the last-mentioned strip, which were therefore still subject to grant.

2. SAME.

Act Cong. March 3, 1871, granted certain lands to the S. P. Co., to aid it in the construction of a branch line, and provided that if its route, when designated, should be found to be on the line of another road to which land had also been granted, the amount theretofore granted should be deducted from the quantity thereby granted to the S. P. Co. so far as their routes should be on the same general line. The map of the route of the A. & P. Co. was afterwards filed, and the routes of both roads were for some distance on the same general line. The S. P. Co.'s route included in its 10-mile limit part of the indemnity strip of the A. & P. Co., at points where the A. & P. Co. would have had the right to make selections of lands in lieu of others already taken up. *Held*, that the S. P. Co. acquired no rights as to lands in said indemnity strip so far as the two routes were on the same general line.

3. SAME—MEXICAN GRANTS.

Lands claimed to be included in a Mexican grant of a specific boundary, which grant was *sub judice* at the time of the grant of March 3, 1871, were not public land at that date, and did not pass by the grant though they were afterwards held not to be embraced by the Mexican grant.

4. SAME—RELIEF AGAINST MISTAKE—LIMITATION OF ACTIONS.

A bill filed by the United States as real and not merely nominal complainant, to repeal patents improperly issued, is not barred by the statute of limitations or by laches.

In Equity. Bill to repeal patents.

George J. Denis, U. S. Dist. Atty., and *Joseph H. Call*, Special Asst. U. S. Dist. Atty. for complainants.

Joseph D. Redwing, *J. D. Bicknell*, *Anderson*, *Fitzgerald & Anderson*, *W. D. Gould*, *Edwin Baxter*, *J. L. Murphey*, and *J. S. Chapman*, for defendants.

Ross, J. By the bill filed in this case the United States seek to annu-
certain patents issued by them to the Southern Pacific Railroad Com-
pany on March 29, 1876, April 4, 1879, and December 27, 1883, re-
spectively, for lands situated in Los Angeles county, Cal., and to quiet
plaintiffs' alleged title thereto. To the bill, as amended, demurrers have
been interposed which raise the question of the sufficiency of the mat-
ters alleged to entitle the plaintiffs to the relief sought. The allegations,
in substance, are that congress by an act approved July 27, 1866, en-
titled "An act granting lands to aid in the construction of a railroad and
telegraph line from the states of Missouri and Arkansas to the Pacific
coast," granted to the Atlantic & Pacific Railroad Company, for the pur-
pose of aiding in the construction of said railroad, etc., "every alternate
section of public land, not mineral, designated by odd numbers, to the
amount of twenty alternate sections per mile on each side of said rail-
road line, as said company may adopt, through the territories of the
United States, and ten alternate sections of land per mile on each side
of said railroad whenever it passes through any state, and whenever on the
line thereof the United States have full title, not reserved, sold, granted,
or otherwise appropriated, and free from pre-emption or other claims or
rights at the time the line of said road is designated by a plat thereof
filed in the office of the commissioner of the general land-office, and
whenever prior to said time any of said sections or parts of sections
shall have been granted, sold, reserved, occupied by homestead settlers,
or pre-empted, or otherwise disposed of, other lands shall be selected by
said company in lieu thereof, under the direction of the secretary of the
interior, in alternate sections and designated by odd numbers, not more
than 10 miles beyond the limits of said alternate sections, and not in-
cluding the reserved numbers: provided, that if said route shall be found
upon the line of any other railroad route, to aid in the construction of
which lands have been heretofore granted by the United States, as far
as the routes are upon the same general line, the amount of land here-
tofore granted shall be deducted from the amount granted by this act." That by section 4 of the same act it is provided that whenever said At-
lantic & Pacific Company shall have 25 consecutive miles of any portion
of said railroad and telegraph line ready for the service contemplated,
the president shall appoint three commissioners to examine the same,
and if it shall appear that 25 consecutive miles of the road and tele-
graph line have been completed as required by the act, the commission-
ers shall so report to the president, and patents shall be issued to said
company, confirming thereto "the right and title to said lands situated
opposite to and coterminous with said completed section of said road;"

and that from time to time, whenever 25 additional consecutive miles shall have been constructed, completed, and in readiness, upon like report patents shall be issued conveying to the company additional sections of the land. That by section 6 of the act it is provided that the president shall cause the lands to be surveyed for 40 miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, "and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act." That by section 18 of the same act the Southern Pacific Railroad Company was authorized to connect with the said Atlantic & Pacific Railroad at such point near the boundary line of the state of California as they should deem most suitable for a railroad line to San Francisco, and was required to have a uniform gauge and rate of freight and fare with the Atlantic & Pacific road, and was given similar grants of land, subject to all the conditions and limitations provided in the act, and was required to construct its road on the like regulations as to time and manner as provided in respect to the Atlantic & Pacific road. It is alleged that the Atlantic & Pacific Company duly accepted the said grant, and proceeded to construct its road, and on or about March 12, 1872, did designate the line of said road by a plat thereof filed in the office of the commissioner of the general land-office, and that all the odd sections on each side of said road for 30 miles were thereupon withdrawn from market and reserved from sale.

The bill, as amended, further alleges that by section 23 of an act of congress approved March 3, 1871, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," it was provided as follows:

"That for the purpose of connecting the Texas Pacific Railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific Railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July 27, 1866: provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company."

The bill, as amended, alleges that the Southern Pacific Company accepted this grant, and on April 3, 1871, did designate the line of its said road by a plat thereof which it on that day filed in the office of the commissioner of the general land-office, and did construct and complete the same in the manner and within the time prescribed, except that it did not connect with the Texas & Pacific Railroad. It is averred that on or about March 29, 1876, April 4, 1879, and December 27, 1883, respectively, the commissioner of the general land-office, without any authority of law therefor, caused certain patents to be signed by the president and by the recorder of the general land-office, and issued the same to the Southern Pacific Railroad Company for certain lands situated in

the county of Los Angeles, state of California, in odd-number sections, within 10 miles of the route of the road of said Southern Pacific Company, as shown by its designated route of location filed in the office of the commissioner of the general land-office pursuant to said act of congress of March 3, 1871, and which said lands are also within 30 miles of, but more than 20 miles from, the line of road of the said Atlantic & Pacific Railroad Company, as designated by its plat filed in the office of the commissioner of the general land-office pursuant to the act of July 27, 1866. The amended bill also avers "that at the time the route of location of said Atlantic & Pacific Railroad was filed, on March 12, 1872, there was within the twenty-mile or primary limits of said road, situated opposite to the tracts described in said pretended patents, a large amount of land which had previous to that time been granted, sold, reserved, and otherwise appropriated, which amounted to more in the aggregate than the amount of the lands described in said pretended patents, but no indemnity land has been selected in lieu thereof by the government or said railroad company;" and that the lands described in the patents have at all times been "agricultural lands, and of greater value than other lands in the indemnity limits of said Atlantic & Pacific Railroad Company," and "have never been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of by the United States, or by the Mexican or Spanish governments, or any other government or authority, in whole or in part, or any estate or interest therein, otherwise than as set forth herein."

It is further averred that on or about March 27, 1837, Ignacio Palomares and Ricardo Vejar presented a petition to Juan B. Alvarado, then governor of Upper California under the Mexican government, for a grant of the place known by the name of "San José." That thereupon, after investigation, such grant was, on April 15, 1837, duly made by Governor Alvarado to said Palomares and Vejar of the place called "San José," in conformity with the plat attached to the petition, and within the boundaries therein expressed. That thereafter, and on or about December 16, 1839, one Louis Arenas and said Ignacio Palomares and Ricardo Vejar presented their petition to the prefect of the district for a grant for the land called "San José," ceded by the decree of April 15, 1837, and one additional league of grazing land. That subsequently, to-wit, March 14, 1840, the then governor of the department of the Californias granted the land so petitioned for to said Arenas, Palomares, and Vejar, and that thereafter said grant was duly approved by the departmental assembly, and juridical possession of said land given to the said grantees. That on or about September, 1852, Henry Dalton, Ignacio Palomares, and Ricardo Vejar each severally filed his claim for confirmation of one-third of the place called "San José," granted as aforesaid, with the board of land commissioners, pursuant to the act of congress of March 3, 1851, entitled "An act to ascertain and settle the private land claims in the state of California," and thereafter, and on or about January 31, 1854, the said board rendered and entered its three several decrees confirming to each of said claimants the land applied for. That on appeal to the

district court, that court at its December term, 1854, rendered its decree in each case, affirming that of the board of land commissioners confirming to Dalton, Palomares, and Vejar an equal undivided one-third each "of the lands of San José, granted by Juan B. Alvarado, governor of California, to Ignacio Palomares and Ricardo Vejar on April 15, 1837, and regranted by said governor on March 14, 1840, to said Palomares and Vejar and to Louis Arenas, as described in the grant first mentioned and the map to which the same refers, and which boundaries fully appear from the act of juridical possession," (described substantially as follows:) "Commencing at the foot of a black walnut tree; thence westerly 9,700 varas to the foot of hills called 'Los Lomas de la Puente,' to a large walnut tree on the slope of a small hill on the side of the road which passes from San José to Puente; thence northerly 10,400 varas to the creek (arroyo) San José, opposite a high hill at a large oak; thence easterly 10,600 varas to the arroyo San Antonio, to two young cottonwood trees; thence southerly 9,700 varas to the place of beginning,"—from which decree there was no appeal, and the same became final. That under the direction and on behalf of the United States surveyor general for California, one George H. Thompson, deputy United States surveyor, did, in August, 1868, so survey and locate the said grant as to include as a part thereof all the lands described in the patents in question, and thereafter, and in the same year, such survey was duly approved by said surveyor general, and the same was then spread upon the records of the general land-office and of the office of said surveyor general. That subsequent to May 1, 1871, the said surveyor general made another survey of said San José grant, upon which the United States did on January 20, 1875, issue its patent to said Dalton, Vejar, and Palomares, which patent was duly accepted by said claimants, and which said patent and final survey did not include any of the lands described in the patents in question, but that all the said lands "were claimed and occupied by said Henry Dalton, Ignacio Palomares, and Ricardo Vejar, their heirs and assigns, as a part of said San José grant, as petitioned for, granted, and confirmed, located and surveyed, from August, 1868, till March 1, 1872." The bill, as amended, also alleges that by the act of congress approved July 6, 1886, entitled "An act to forfeit the lands granted to the Atlantic & Pacific Railroad Company to aid in the construction of a railroad and telegraph line from the states of Missouri and Arkansas to the Pacific coast, and to restore the same to settlement, and for other purposes," all the lands and rights to lands in California theretofore granted and conferred upon said Atlantic & Pacific Railroad Company were forfeited, resumed, and restored to entry for non-completion of that portion of said railroad to have been constructed in California.

By an amendment to the amended bill it is alleged that the plaintiffs have elected and do elect "to hold, select, reserve, and set apart all the lands in suit herein as a part of said twenty sections per mile granted to said Atlantic & Pacific Railroad Company by said act of congress of July 27, 1866, and which were deducted and excluded from said grant to said Southern Pacific Railroad Company on account of said grant to said

Atlantic & Pacific Railroad Company, and also on account of said San José ranch, and the location, claims, and survey thereof;" and further, "that the route of the Southern Pacific Railroad Company as designated by the plat thereof filed in the office of the commissioner of the general land-office as aforesaid, and as located and constructed, is, and it was necessary that it should be, upon the same general line as that of the said Atlantic & Pacific Railroad Company as designated by the plat thereof filed by said company as aforesaid, and all the lands in suit herein are situated opposite to that portion of said routes which are upon the same general line, and are upon the same side of the designated route of the Atlantic & Pacific Railroad Company as the lands for which that company had a right to select indemnity or lieu for prior to July 6, 1886, and which right since that time has been in the United States." Allegations are also made as to the value of the lands in controversy, and in respect to the claims of the defendants thereto. Three other cases, entitled, respectively, *United States v. Southern Pacific R. Co. et als.*, (No. 67,) *United States v. Southern Pacific R. Co. et als.*, (No. 69,) and *United States v. The Colton Marble & Lime Co. et als.*, (No. 88,) were submitted at the same time as the present case and upon the same arguments, and, as they involve substantially the same questions, what is here said will apply to them as well.

While in these cases but a comparatively small amount of land is involved, the suits, it seems from a decision of the secretary of the interior rendered June 23, 1888, and reported in volume 6 of the decisions of the department of the interior, page 816, were instituted by the government to test its right to a large amount of land similarly situated. That decision was made upon an application on the part of the Southern Pacific Railroad Company that it be called on, under the act of congress of March 3, 1887, for a reconveyance of the lands which were held by the land department to have been improperly patented to said company, so that upon a refusal to reconvey, suits might be brought by the government to set aside such patents, and that no further patents should be issued to said company for lands in the limits of the forfeited grant to the Atlantic & Pacific Railroad Company; and also that the then subsisting withdrawal of lands within the primary grant limit of the Southern Pacific Railroad, (branch line,) which are also within the granted and indemnity limits of the Atlantic & Pacific Railroad, should remain undisturbed until the rights of the Southern Pacific Company could be determined by suits before the courts. The secretary, in deciding upon the application, after dividing the lands covered by the grants into three classes, to-wit: (1) Lands within the common primary limits of the grant to the Atlantic & Pacific Railroad Company and of the grant to the Southern Pacific Railroad Company, (branch line;) (2) lands within the primary limits of the grant to the Southern Pacific Railroad Company, (branch line,) and within the indemnity limits of the grant to the Atlantic & Pacific Railroad Company; (3) lands within the indemnity limits of the grant to the Southern Pacific Railroad Company, (branch line,) and within the primary limits of the grant to the Atlantic & Pacific Railroad Com-

pany,—held that, as to the lands embraced in the first class, as thus divided, for which patents have been issued to the Southern Pacific Railroad Company, suits should be brought to annul them, and that all pending selections of similar lands be canceled, and other unpatented lands within said limits be restored to settlement and entry; and that the request of the railroad company that such lands be held in reservation until the rights of the company thereto could be determined by the courts be denied; the secretary basing his conclusions in that regard upon the decisions of the supreme court in the cases of *Railway Co. v. Railway Co.*, 97 U. S. 491, and *Railroad Co. v. Railroad Co.*, 112 U. S. 720, 5 Sup. Ct. Rep. 334. In respect to the lands embraced in the third class, the secretary authorized the institution of like proceedings, upon the authority of the supreme court in the cases of *Railroad Co. v. Railroad Co.*, 112 U. S. 414, 5 Sup. Ct. Rep. 208, and *Railroad Co. v. Railroad Co.*, 117 U. S. 406, 6 Sup. Ct. Rep. 790. In respect to those embraced in the second class, while expressing a doubt whether the reservation of “prospective rights” (of the Atlantic & Pacific Railroad Company) prevented the attachment of the grant of the Southern Pacific Company to lands in place, he did not feel disposed to disturb the ruling made by the department in the cases of *Gordon v. Railroad Co.*, 5 Dec. Dep. Int. 691; of *Coble*, 6 Dec. Dep. Int. 679, 812; and of *Voss*, (decided December 10, 1887,)—in which cases it was held that lands within the indemnity limits of the Atlantic & Pacific Railroad Company were excepted from the operation of the grant to the Southern Pacific Company by the proviso to the twenty-third section of the act of March 3, 1871, although said lands fell within the granted limits of the Southern Pacific Railroad, because the Atlantic & Pacific Company had a prospective right of selection of said lands whenever its grant should be located. But in view of the doubt expressed the secretary concurred in the recommendation of the commissioner of the general land-office that the unpatented lands of this class be continued in reservation pending adjudication by the courts, or until such time as the department should deem it proper to remove the reservation. The views of the department in the *Gordon*, *Coble*, and *Voss Cases* were the same as those of the assistant attorney general in the case of *Railroad Co. v. Railroad Co.*, 4 Dec. Dep. Int. 215, and were also in accord with those of Attorney General Garland, given in response to a question submitted to him by the secretary of the interior, (6 Dec. Dep. Int. 814.)

The act of July 27, 1866, unlike almost all other grants of land made by congress to aid in the construction of railroads, does not in terms fix a lateral limit within which the land granted is to be taken; but, reading sections 3 and 4 of the act together, and remembering what must never be forgotten in the construction of such grants, that the act is a law as well as a grant, and that effect must be given to the intention of congress in making it, I think a lateral limit of 20 miles is, in effect, fixed within which the lands granted are to be taken, with a provision for the selection of indemnity lands, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of the sec-

tions embraced in the primary grant. Taking section 3 of the act alone, the grant to the Atlantic & Pacific Company would be precisely like that made by the nineteenth section of the act of July 2, 1864, (13 U. S. St. 364,) to the Burlington & Missouri River Railroad Company, which was under consideration in the case of *U. S. v. Railroad Co.*, 98 U. S. 339. The grant there was of every alternate section of public land (excepting mineral land) designated by odd numbers, to the amount of 10 alternate sections per mile on each side of the road, on the line thereof, which were not sold, reserved, or otherwise disposed of by the United States, or to which a pre-emption or homestead claim had not attached at the time the line of the road was definitely fixed; and one of the positions taken by the government in that case was that the grant to the company was only of land situated within 20 miles of the road; but the court held that the position found no support in the language of the act of congress, which simply declared that a grant is made of land to the amount of 10 sections per mile on each side of the road. "The grant is one of quantity," said the court, "and the selection of the land is subject only to these limitations. (1) That the land must be embraced by the odd sections; (2) that it must be taken in equal quantities on each side of the road; (3) that it must be on the line of the road; and (4) that it must not have been sold, reserved, or otherwise disposed of by the United States, and a pre-emption or homestead claim must not have attached to it at the time the line of the road was definitely fixed." In the grant to the Burlington & Missouri River Railroad Company no indemnity was provided for, as is done by the act of July 27, 1866, and the act making the grant to that company, in providing for the issuance of patents for the lands as the sections of road should be completed, did not provide, as does the act of July 27, 1866, for the issuance of such patents confirming to the grantee "the right and title to said land situated opposite to and coterminous with said completed section of said road," but the provision there was that such "patents shall issue conveying the right and title to said lands to said company on each side of said road, as far as the same is completed, to the amount aforesaid." 13 U. S. St. 365. And in the course of the opinion (98 U. S. 340) the court laid stress upon the fact that the terms of the grant did not require the land to be contiguous to the road, and, if not contiguous, said the court, it is not easy to say at what distance the land to be selected would cease to be along its line. Nor is it without force that in the grant to the Burlington Company no provision was made for the selection of indemnity lands. Being simply a grant of quantity, without any limitation as to the distance from the road the land should be taken, there was no need for such a provision. In the act of July 27, 1866, however, not only is there a provision for the selection of land within extended limits to make up any deficiency arising from the disposition of a portion of the granted land between the date of the act and the location of the road, of which there would have been no need had the grant been intended as one only of quantity; but, as has been seen, the provision contained in section 4 of the act for the

issuance of patents as the sections of road should be completed refers to the land granted as being situated opposite to and coterminous with such completed sections. These considerations, it seems to me, justify the conclusion that the act of July 27, 1866, in effect, although not in terms, fixes a lateral limit of 20 miles on each side of the road within which every alternate section of public land designated by odd numbers is granted, with a provision for the selection of indemnity lands within an extended limit of 10 miles. And although the point does not appear to have been made in any of the cases in which the act of July 27, 1866, was under consideration, the construction above adopted is that which has uniformly been taken by the courts, the land department, and by the only one of the railroad companies that complied with the conditions of the grant, and earned the granted lands.

As appears from the bill the lands in controversy here are situated along and within 20 miles of the line of the road of the Southern Pacific Railroad Company as designated by its plat filed April 3, 1871, and as thereafter actually constructed, and more than 20 miles from, but within 30 miles of, the route of the Atlantic & Pacific Company as designated by its plat filed March 12, 1872. Had they been situated within 20 miles of the designated route of the Atlantic & Pacific Company they would clearly have fallen within the grant to that company, and consequently have been excluded from the subsequent grant to the Southern Pacific Company; for, if the construction above put upon the act of July 27, 1866, be the correct one, every alternate section of public land, designated by odd numbers, within 20 miles of the line of the road, as definitely fixed, would have passed to the Atlantic & Pacific Company as of the date of its grant. *Railroad Co. v. Railroad Co.*, 112 U. S. 726, 5 Sup. Ct. Rep. 334; *Railroad Co. v. Railroad Co.*, 117 U. S. 408, 6 Sup. Ct. Rep. 790, and cases there cited. It is contended by the government that all public lands designated by odd numbers, and embraced within the indemnity limits of the grant to the Atlantic & Pacific Railroad Company are also excepted from the grant to the Southern Pacific Railway Company by reason of the proviso to the twenty-third section of the act of March 3, 1871, which, as has been seen, reads: "Provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Railroad Company, or any other railroad company." The reason why, in grants in which a limit is prescribed, and all the alternate odd or even sections within the limit are granted, title to such sections attaches as of the date of the grant, and why, to lands embraced within the indemnity or lieu limits, no title attaches prior to selection, is that in the one case the land granted becomes ascertained, and consequently the title thereto fixed and perfected, by the location of the line of the road, whereas in the other case, there are no means known to the law by which the lands embraced in the grant can be ascertained prior to their selection. Authorities, *supra*. To lands to which no title could attach prior to selection I do not think the Atlantic & Pacific Company had, at the time of the grant to the Southern Pacific Company, a present or prospective right. If it had

such right to the particular lands in suit it had the same right to all other lands to which the right of selection might have applied. And since by the act making the grant the Atlantic & Pacific Company was empowered to construct its road along the thirty-fifth parallel of latitude to the Colorado river "at such point as may be selected by said company for crossing, thence by the most practicable and eligible route to the Pacific" ocean, the present and prospective right of that company, prior to selection, might be applied to any public land situated between the Colorado river and the Pacific ocean with equal propriety as to the particular lands in controversy here. The effect of such a holding would be to give to the proviso as broad a scope as the granting clause to which it is appended. In other words, to hold that while purporting to make a grant to the Southern Pacific Company to aid in the construction of a railroad from a point at or near Tehachapa pass by way of Los Angeles to the Texas Pacific Railroad at or near the Colorado river, the grant in effect was defeated by the proviso. While the Atlantic & Pacific Company had, at the time of the grant to the Southern Pacific Company, a clear present and prospective right to all lands embraced within the primary limits of its grant, I am of opinion, for the reasons stated, that it had no right of any nature to any particular piece of land within the indemnity limits prior to its selection; and, as the lands in question here never were selected by that company, but were selected and (except in one case) patented to the Southern Pacific Company under the direction of the land department, that the patents are valid, unless excepted from the grant to the Southern Pacific Company by reason of the alleged facts respecting the Mexican grant San José, or by reason of that provision of the act of July 27, 1866, which declares "that if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act." In the third section of the act of July 27, 1866, is to be found the terms of the grant to the Southern Pacific Company, as well as that to the Atlantic & Pacific Company, since the act of March 3, 1871 refers to section 18 of the act of July 27, 1866, and that in turn to the third section of the same act for the terms of the grant.

In addition to the proviso to which the grant to the Southern Pacific Company was made subject by the act of March 3, 1871, the grant to that company was also made subject to the provision that if the route it was authorized to designate should be found to be upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, "as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act." The grant to the Atlantic & Pacific Company was the prior grant, and the amount of land granted to it was 10 sections per mile on each side of its road when it passes through a state. This amount, by the provision annexed to the grant to the Southern Pacific Company, is to be

deducted from the grant to that company where the routes are upon the same general line; and, as the grant to the Southern Pacific Company was also 10 sections per mile on each side of its road, it results that no land was granted to the Southern Pacific Company where the routes of the two roads are upon the same general line. The allegations of the bill, which, upon demurrer, are to be taken as true, being that the route of the Southern Pacific Railroad Company as located and constructed is upon the same general line as that of the Atlantic and Pacific Railroad Company, as designated under the act of July 27, 1866, and that all the lands in suit herein are situated opposite to that portion of said routes which are upon the same general line, I am of opinion that in this respect the bill states a good cause of action. I am also of opinion that the allegations in respect to the Mexican grant San José are sufficient, if true, to invalidate the patents. The allegations show that that grant was *sub judice* at the date of the grant to the Southern Pacific Company, to-wit, March 3, 1871, and that the lands in controversy were claimed to be within the boundaries of the Mexican grant up to March 1, 1872. If such was the fact, the lands in controversy were not public lands within the meaning of the grant to the railroad company. *Newhall v. Sanger*, 92 U. S. 762; *Doolan v. Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228; *U. S. v. McLaughlin*, 127 U. S. 428, 8 Sup. Ct. Rep. 1177. It is argued by counsel for some of the defendants that the San José grant was one by specific boundaries, and that, it having been ultimately ascertained by the government that the lands in controversy were not embraced within those boundaries, they were all the time public lands, and therefore subject to the grant to the railroad company. It is for the very reason that the grant was one by specific boundaries, coupled with the alleged fact that the lands in controversy were within the claimed limits of that grant at the time of the grant to the railroad company, that prevents the latter grant from attaching to them. Authorities, *supra*.

But one other point remains to be considered, and that is that the bill shows on its face such laches as that a court of equity should refuse to grant any relief, at least as against those who are purchasers from the railroad company. It is sufficient to say in response to this that the case here is not one in which the government has allowed its name to be used for the sole benefit of a private person, in which event it would be a mere nominal complainant, but here the government is the real party complainant, seeking the enforcement of its own rights, and is therefore not bound by any statute of limitations nor barred by any laches of its officers, however gross. *U. S. v. Beebe*, 127 U. S. 338, 8 Sup. Ct. Rep. 1083. It results from these views that the demurrers in each of the cases should be overruled, with leave to the defendants to answer within the usual time. Ordered accordingly.

FARMERS' LOAN & TRUST CO. v. CHICAGO, P. & S. RY. CO. *et. al.*

(Circuit Court, W. D. Wisconsin. July 10, 1889.)

1. RAILROAD COMPANIES—LAND GRANTS—FORFEITURE.

The state of Wisconsin granted lands to the Chicago, P. & S. Railway Company upon the express condition that its road should be completed and in operation by May 9, 1882, and that it should construct 20 miles of road per year on another part of its line. By act Feb. 16, 1882, the legislature declared the grant forfeited for failure to perform the condition, and granted the lands to the Chicago, St. P., M. & O. Company. By act March 7, 1883, the Portage Company's road being still incomplete, the legislature confirmed the revocation and resumption of the grant attempted by the act of 1882. *Held* that, assuming that the act of 1882 was unconstitutional and void, and that its effect was to destroy the credit of the Portage Company, it did not render legally impossible the completion of the road within the prescribed time, no direct interference by the authorized agent of the state being shown.

2. SAME.

The revocation in the act of March 7, 1883, of the grant to the Portage Company, and the confirmation in the same act of the grant to the Omaha Company, were equivalent to a revocation made for the first time on that day, and to an affirmative grant, at the same time, to the Omaha Company, and the validity of that act was not affected by the invalidity of the former act.

3. SAME—INFLUENCING LEGISLATURE.

The validity of the act of the legislature in declaring the forfeiture cannot be affected by the fact that it was influenced or misled by false representations made to its members by the Omaha Company respecting the intentions, financial condition, etc., of the Portage Company. The judiciary cannot in this manner interfere with the legislative department.

4. SAME.

An adjudication as to rights acquired by individuals under public enactments, based upon an inquiry as to whether those individuals made false representations to the legislature, or as to whether the legislature was probably influenced by such representations, is an indirect interference with the power of the legislature, acting within the limits of its authority, to enact such laws as it deems best for the general good. The courts must, of necessity, presume (whatever may be averred to the contrary) that no general statute is ever passed either for want of information upon the part of the legislature or because it was misled by the false representation of lobbyists or interested parties.

5. SAME—CONSTITUTIONAL LAW.

Legislative enactments relating to public objects, so far as they confer rights upon individuals, must stand, if they be constitutional, without any attempt upon the part of the courts to conjecture or ascertain what the members of the legislature would or would not have done under any given state of facts established by extrinsic evidence.

6. SAME—PERFORMANCE OF CONDITION BY ANOTHER.

The facts that in January, 1882, the Omaha Company became the principal creditor and owner of all the stock of the Portage Company, and that during that year it built its own road, in its own behalf, parallel to and only a few yards from the half-graded line of the Portage Company, for the required distance, do not entitle the latter company to invoke the principle that where a condition is performed by a person interested it is at an end.

In Equity. On final hearing.

The Farmers' Loan & Trust Company, a New York corporation, brings this suit in its capacity as trustee in a mortgage or deed of trust, executed January 1, 1881, by the Chicago, Portage & Superior Railway Company, a corporation of Illinois and Wisconsin, having power to construct and equip a railroad from the city of Chicago to a point on the

north line of the former state, at or near the village of Genoa, Wis., thence by the way of Portage to Superior, at the west end of Lake Superior. The object of the mortgage was to secure the payment of the principal and interest of negotiable bonds which the railway company proposed to issue, to the amount of \$10,200,000, and to that end it conveyed to the plaintiff, as trustee, its entire road, together with all lands, land grants, franchises, privileges, powers, rights, estate, title, interest, and property belonging or appertaining thereto, including a certain grant of lands made by the United States to the state of Wisconsin, and by the latter to the mortgagor company. The mortgage authorized the trustee, upon default in the payment of interest, to enter upon the premises, and also, in certain contingencies, to sell the mortgaged property. It provided, among other things, that the right of action under it shall be vested exclusively in the plaintiff and its successors in trust, and that under no circumstances should individual bondholders institute a suit, action, or other proceeding, on or under the mortgage, for the purpose of enforcing any remedy therein provided. The bill shows that bonds to the amount of \$5,000,000 were executed, and a part of them issued and sold; and that, in respect to the latter, the mortgagor company (which will be called the "Portage Company") was in default as to interest. It is alleged that the defendant the Chicago, St. Paul, Minneapolis & Omaha Railway Company (which will be called the "Omaha Company") wrongfully claims to be the owner of the lands granted by the state to the Portage Company, such claim being founded upon enactments of the legislature of Wisconsin which, the plaintiff avers, are unconstitutional, null, and void. It is also alleged that, even if said enactments vested the legal title in the Omaha Company, the latter, for reasons to be hereafter stated, ought not to be permitted by a court of equity to hold the lands or their proceeds against the plaintiff and the creditors of the Portage Company. A decree is asked declaring this mortgage or deed of trust to be a first lien on the lands, including such as had been or might be certified to the state by the United States as indemnity lands under the above grant. In connection with this general outline of the present suit, it is necessary to state the history of these lands as disclosed by the legislation of congress and of this state. By an act of congress approved June 3, 1856, there was granted to Wisconsin, for the purpose of aiding in the construction of a railroad from Madison, or Columbus, by the way of Portage City, to the St. Croix river or lake, between townships 25 and 31, and from thence to the west end of Lake Superior, and to Bayfield, and also from Fond du Lac, on Lake Winnebago, northerly to the state line, every alternate section of land designated by odd numbers, for 6 sections in width, within 15 miles on each side of said road, respectively; the lands to be held by the state, subject to the disposal of the legislature, for no other purpose than the construction of the road for which they were granted or selected, and disposed of only as the work progressed. The fourth section provided that the lands be disposed of by the state only in manner following,—that is to say, that a quantity not exceeding 120 sections, and included within a continuous

length of 20 miles of the roads, respectively, might be sold; and when the governor certified to the secretary of the interior that any 20 continuous miles of either road were completed, then another like quantity of the land granted might be sold; and so, from time to time, until the roads were completed, and, if they "are not completed within ten years, no further sales shall be made, and the land unsold shall revert to the United States."

11 St. 20. By an act of the Wisconsin legislature, approved October 8, 1856, the lands, rights, powers, and privileges granted by congress were accepted upon the terms, conditions, and reservations contained in the act of June 3, 1856, and the state assumed the execution of the trust thereby created. Laws Wis. 1856, p. 137. On the 2d of March, 1858, the state filed in the general land-office of the United States a map fixing the definite location of the railway under the act of congress of June 3, 1856. By an act approved May 5, 1864, congress enlarged the grant of lands in aid of the construction of a road running northerly from the St. Croix river or lake. The first section of that act granted to Wisconsin for the purpose of aiding in the construction of a railroad from a point on that river or lake, between townships 25 and 31, to the west end of Lake Superior, and from some point on the line of the railroad, to be selected by the state, to Bayfield, every alternate section of public land designated by odd numbers, for 10 sections in width, within 20 miles on each side of said road, deducting lands granted for the same purpose by the act of congress of June 3, 1856, upon the same terms and conditions as are contained in that act; the state to have the right of selecting other lands, nearest to the tier of sections above specified, in lieu of such of those granted as should appear, when the line or route of the road was definitely fixed, to have been sold, or otherwise appropriated, or to which the right of pre-emption or homestead had attached; which lands "shall be held by said state for the use and purpose aforesaid." The time limited for the completion of the roads, specified in the act of June 3, 1856, was extended to a period of five years from and after the passage of the act of 1864. Section 5. The seventh section is in these words:

"That whenever the companies to which this grant is made, or to which the same may be transferred, shall have completed twenty consecutive miles of any portion of said railroads, supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turn-outs, watering-places, depots, equipments, furniture, and all other appurtenances of a first-class railroad, patents shall issue conveying the right and title to said lands to the said company entitled thereto, on each side of the road, so far as the same is completed, and coterminous with said completed section, not exceeding the amount aforesaid, and patents shall in like manner issue as each twenty miles of said road is completed: provided, however, that no patents shall issue for any of said lands unless there shall be presented to the secretary of the interior a statement, verified on oath or affirmation by the president of said company, and certified by the governor of the state of Wisconsin, that such twenty miles have been completed in the manner required by this act, and setting forth with certainty the points where such twenty miles begin and where the same end; which oath shall be taken before a judge of a court of record of the United States."

The eighth section provided that the lands granted should, when patented as provided in section 7, be subject to the disposal of the compa-

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nies respectively entitled thereto, for the purposes aforesaid, and no other, and that the railroads be and remain public highways for the use of the government of the United States, free from charge for the transportation of its property or troops. 13 St. 66. By a joint resolution of its legislature, approved March 20, 1865, the state accepted the grant made by the act of May 5, 1864, subject to the conditions prescribed by congress, (Gen. Laws Wis. 1865, p. 689,) and on the 6th day of May, 1865, filed in the general land-office of the United States a certificate adopting the location on the map previously filed as the definite location under the last act. That map and location were accepted and approved by the secretary of the interior. A subsequent act of the legislature, approved March 4, 1874, and published March 11, 1874, c. 126, (Laws Wis. 1874, p. 186,) granted to the North Wisconsin Railway Company, for the purpose of enabling it to complete the railroad then partially constructed by it, all the right, title, and interest the state then had or might thereafter acquire in and to the lands granted by the acts of congress to aid in the construction of a railroad from the St. Croix river or lake, between townships 25 and 31, to the west end of Lake Superior and Bayfield, "except those herein granted to the Chicago & Northern Pacific Air-line Railway Company." The eighth, ninth, twelfth, and fifteenth sections of that act are as follows:

"Sec. 8. There is hereby granted to the Chicago & Northern Pacific Air-Line Railway Company all the right, title, and interest which the state of Wisconsin now has, or may hereafter acquire, in or to that portion of the lands granted to said state by said two acts of congress as is or can be made applicable to the construction of that part of the railway of said company lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the land-office at Washington, and the west end of Lake Superior. This grant is made upon the express condition that said company shall construct, complete, and put in operation that part of its said railway above mentioned as soon as a railway shall be constructed and put in operation from the city of Hudson to said point of intersection, and within five years from its acceptance of said lands, as herein provided, and shall also construct and put in operation the railway of said company from Genoa northerly, at the rate of twenty miles per year. Sec. 9. The governor is hereby authorized and directed, upon the presentation to him of satisfactory proof that twenty continuous miles of that part of the railway of said company first above mentioned have been completed in accordance with said acts of congress and this act, to issue and deliver, or cause to be issued and delivered, to said company patents in due form from said state for two hundred sections of said land, and thereafter, upon the completion of twenty continuous miles of said railway, he shall issue, or cause to be issued and delivered, to said company, patents for two hundred sections of said lands, and on the completion of that part of the railway of said company lying between said point of intersection and the west end of Lake Superior he shall issue and deliver, or cause to be issued and delivered, to said company patents for the residue of said lands hereby granted to said company." "Sec. 12. The said Chicago & Northern Pacific Air-Line Railway Company shall, within sixty days from and after the passage of this act, file with the secretary of state a resolution duly adopted by the board of directors, accepting this grant upon the terms and conditions herein contained, and shall also, within said sixty days, give to the state of Wisconsin such security for the completion of

that portion of its railway lying between said point of intersection and the west end of Lake Superior, in accordance with the provisions of said acts of congress and this act, as shall be required by the governor: provided, however, that said security shall be of no force or effect until congress shall have passed an act renewing said grants or extending the time for the construction of said road, or until it shall have been decided by the supreme court of the United States that the present title of the state is absolute and indefeasible; and upon the failure of said company to file said resolution, and to give the said security within the time hereinbefore limited, this act shall be of no effect so far as it grants to said company any interest in or right to said lands." "Sec. 15. This act shall take effect and be in force from and after its passage and publication."

The bond required by the twelfth section of the above act was approved by the governor and filed May 9, 1874. Prior to March 16, 1878, the Chicago & Northern Pacific Air-line Railway Company changed its name to that of the Chicago, Portage & Superior Railway Company. By an act of the Wisconsin legislature, approved on the day last named, and published March 28, 1878, the time limited by the act of March 4, 1874, for the construction and completion of the railway of the Chicago, Portage & Superior Railway Company, was extended three years. Laws Wis. 1878, p. 442. By the first section of an act of the legislature, approved February 16, 1882, c. 10, (Laws Wis. 1882, p. 11,) it was declared that the grant of lands made to the Chicago, Portage & Superior Railway Company by the act of March 4, 1874, "is hereby revoked and annulled, and said lands are hereby resumed by the state of Wisconsin." The second section is in these words:

"There is hereby granted to the Chicago, Saint Paul, Minneapolis & Omaha Railway Company all the right, title, and interest which the state of Wisconsin now has, or may hereafter acquire, in and to the lands granted to said state by acts of congress, approved June 3, 1856, and May 5, 1864, to aid in the construction of a railroad from the Saint Croix river or lake to the west end of Lake Superior and Bayfield, which are applicable under said acts of congress to the construction of that portion of said railroad, from the Saint Croix river or lake to the west end of Lake Superior, which lies between the point of intersection of said last-named railroad by the Bayfield branch, as fixed by the surveys and maps of said railroad and the branch on file in the general land-office in Washington, and the west end of Lake Superior. This grant is upon the express condition that the said Chicago, St. Paul, Minneapolis & Omaha Railway Company shall continuously proceed with the construction of the railroad now in part constructed by it between said point of intersection and the west end of Lake Superior, and shall complete the same so as to admit of the running of trains thereover on or before the 1st day of December, A. D. 1882."

The seventh section provides that "sections 8, 9, and 10 of said chapter 126 of the Laws of 1874, and all acts and parts of acts in any manner contravening or conflicting with the provisions of this act, are hereby repealed." By an act of the Wisconsin legislature, approved March 5, and published March 7, 1883, it was declared:

"Section 1. The revocation, annulment, and resumption made by section 1 of chapter 10 of the Laws of Wisconsin for the year 1882, of the land grant mentioned in said section, are hereby fully in all things confirmed. Sec. 2.

The grant of land made by said chapter 10 of the Laws of 1882, to the Chicago, St. Paul, Minneapolis & Omaha Railway Company, is hereby in all respects fully confirmed. Sec. 3. All acts and parts of acts interfering or in any manner conflicting with the provisions of this act are hereby repealed. Sec. 4. This act shall take effect and be enforced from and after its passage and publication."

Turner, Lee & McClure and Ewing & Southard, for complainant.

C. M. Osborn and S. U. Pinney, for defendants.

Mr. Justice HARLAN, after stating the facts in the foregoing language, delivered the opinion of the court.

It will be seen from the above statement that the grant in the eighth section of the act of the Wisconsin legislature of March 4, 1874, embraced so much of the lands granted by the acts of congress of June 3, 1856, and May 5, 1864, as were applicable to the construction of the part of the road of the Portage Company "lying between the point of intersection of the branches of said grants, as fixed by the surveys and maps on file in the land-office at Washington, and the west end of Lake Superior," a distance of about 65 miles. That is the road to which this suit relates. According to the most liberal construction of the act of March 4, 1874, and that of March 16, 1878, the time limited for the completion of that road expired, at least, in May, 1882, eight years after the railway company filed its bond, as required by the ninth section of the act of 1874. It is conceded that the Portage Company never completed its land-grant division; nor did it ever construct any part of the road from Genoa northerly, as required by the act of 1874. The bill alleges that the Portage Company broke down in the monetary panic of 1873-74, under a large load of debts and embarrassments, and lay dormant until late in the year 1880, when its stockholders employed one Gaylord to find parties able and disposed to revive it and put it on the way of success; that the work of its rehabilitation had so far progressed that in the fall of 1881, and early in 1882, the company borrowed large sums of money, and expended them in pushing the construction of the land-grant division in which it was interested; that, on the 19th of January, 1882, more than one-half of the *substructure* of that division had been completed; that at the time last named more than 1,600 men were at work upon it, and its construction, in ample time to lay the rails and complete the division before May 5, 1882, was assured. It is further alleged that the Portage Company would have completed its land-grant road but for the following causes: (1) The passage by the state legislature of the act of February 16, 1882, revoking and annulling the grant contained in the act of March 4, 1874, which destroyed the credit of the company while actively engaged, under many disadvantages, in the construction of its road. (2) That the Omaha Company, its agents and emissaries, interfered with and defeated the efforts of the Portage Company to complete its road within the required time.

Although the act of June 3, 1856, provided that if the roads therein named were not completed within 10 years no further sales should

be made, and the lands unsold should revert to the United States, and although the only extension of the period for such completion ever made by congress was for five years from and after the passage of the act of May 5, 1864, no question is made in the present suit as to the title of these lands being in the state, at the date of the passage of the act of March 4, 1874, for all the purposes indicated in the acts of congress. This, perhaps, is because of the decision in *Schulenberg v. Harriman*, 21 Wall. 44, in which the court had occasion to interpret the acts of June 3, 1856, and May 5, 1864, holding that the requirement that the lands remaining unsold after a specified time shall revert to the United States, if the road be not then completed, to be nothing more than a provision that the grant shall be void if a condition subsequent be not performed; that, when a grant upon condition subsequent proceeds from the government, no individual can assail the title upon the ground that the grantee has failed to perform such condition; and that the United States having taken no action to enforce the forfeiture of the estate granted, "the title remained in the state as completely as it existed on the day when the title by location of the route of the railroad acquired precision, and became attached to the adjoining alternate sections." See, also, *McMicken v. U. S.*, 97 U. S. 204, 217; *Grimmell v. Railroad Co.*, 103 U. S. 739, 744; *Van Wyck v. Knevals*, 106 U. S. 360, 368, 1 Sup. Ct. Rep. 336; *Railroad Co. v. McGee*, 115 U. S. 469, 473, 6 Sup. Ct. Rep. 123. These authorities also indicate the mode in which the right to take advantage of the non-performance of a condition subsequent, annexed to a public grant, may be exercised, namely, "by judicial proceedings authorized by law, the equivalent of an inquest of office at common law, finding the fact of forfeiture, or adjudging the restoration of the estate on that ground," or by "legislative assertion of ownership of the property for breach of the condition, such as an act directing the possession and appropriation of the property, or that it be offered for sale or settlement."

The questions to which the attention of the court has been principally directed relate, more or less, to the act of February 16, 1882, revoking and annulling the grant to the Portage Company. The main contention of that company is that the grant of 1874, the acceptance thereof, and the bond given for the performance of the condition as to the construction of the land-grant division, constituted a contract, entitling it to earn the lands by completing the 65 miles of railway, to the west end of Lake Superior, by May 5, 1882, without opposition or hindrance on the part of the state; consequently, it is argued, the forfeiture declared by the act of 1882 impaired the obligation of that contract, and was unconstitutional and void.

On the part of the Omaha Company it is contended that one of the conditions of the grant to the Portage Company was that it would construct and put in operation its road from Genoa northerly at the rate of 20 miles each year; that no part of that road had been constructed when the act of 1882 was passed; and that by reason of such default the state had the right to withdraw the grant from the latter company without regard to what had or had not been done towards the construc-

tion of its land-grant division. To this the plaintiff replies that the obligation which the Portage Company assumed with reference to its road from Genoa northerly was not made, nor intended to be made, a condition of its right to earn the lands applicable to that part of the road between the point of intersection of the Bayfield branch with the branch extending to the west end of Lake Superior, and that, consistently with the acts of congress, the state could not make the right to earn these lands depend upon the construction of any part of its line except that which congress intended to aid by the grant.

It is also contended by the Omaha Company that the grant to the Portage Company was beyond the power of the state to make; that the mode in which the state disposed of the lands to the latter company was inconsistent with that prescribed in the act of congress,—that is, that the state had no authority, in advance of the completion of the road, to dispose of the land, by sale, conveyance, or otherwise, beyond 120 sections, or to make any additional contract in respect to their disposition. To this the plaintiff replies that the act of 1864, by necessary implication, permitted the state to dispose of the lands, subject to the conditions of the grant, as to the time when the absolute title should pass from the state to the corporation earning them, and as to the time within which the road should be completed. Such, it is claimed, was all that was done by the act of 1874.

As will be seen from the views hereafter expressed, touching other questions, it is not necessary to decide whether the eighth section of the act of 1874 made the construction by the Portage Company of its road from Genoa northerly a *condition* of the grant to it of these lands, or whether such a condition could have been legally imposed by the state. The court is inclined to the opinion that, if the Portage Company had duly performed the condition prescribed as to the completion of its land-grant division, its right to the lands applicable to that division, and expressly set apart to aid in its construction, would not have been affected by its failure to construct the Genoa branch. But the decision will not be placed upon that interpretation of the legislation in question.

Nor will it be necessary to determine the other questions above stated, nor the question as to the validity of the revocation contained in the act of February 16, 1882; for if it be assumed that such revocation was a nullity, as impairing the obligation of the alleged contract between the Portage Company and the state, especially because made before the expiration of the period limited for the completion of its road, and while the company was engaged in constructing it; if the mode in which the state disposed of the lands to the Portage Company be conceded to have been consistent with the acts of congress; and if the authority of that company to mortgage the lands in order to raise money for the construction of the road be admitted,—still there remain, in the way of granting the relief sought, these stubborn, indisputable facts:

First, that no corporation could acquire, and therefore could not pass, an interest in the lands, except subject to the condition prescribed in the act of the state legislature as to the time within which the land-grant.

division should be completed, and therefore subject to the right of the state, in some appropriate mode, to resume its ownership and possession of the lands for any substantial failure to perform that condition.

Second, that the road was not constructed or completed within the time prescribed by the acts of March 4, 1874, and March 16, 1878.

Third, that after the expiration of that period the revocation, annulment, and resumption declared by the act of February 16, 1882, and the grant in the same act to the Omaha Company, were in all things confirmed by the act of March 5, 1883, which, besides, repealed all previous acts interfering with or in any manner conflicting with such act of confirmation.

If the act of February 16, 1882, was a valid exercise of power by the legislature, that, plainly, is an end of this branch of the case; but if it was unconstitutional and void, upon any ground whatever, its passage did not in a legal sense deprive the Portage Company of the right to proceed with the work of construction, and by completing the road within the required time become entitled to receive patents, or to compel any corporation or persons to whom patents were wrongfully issued to surrender the title. The validity and effect of the confirmatory act of March 5, 1883, does not depend upon the validity of the act of February 16, 1882; for, if the latter act was void, it was clearly within the power of the legislature, by the act of 1883,—neither the road, nor any 20 continuous miles thereof, having at its date been completed by the Portage Company,—to withdraw or annul the grant to that company, and to make a new grant of the lands to another corporation. The revocation in the act of March 5, 1883, of the grant to the Portage Company, accompanied by a confirmation, in the same act, of the grant of the same lands to the Omaha Company, was equivalent to a revocation, made for the first time on that day, and to an affirmative grant, then, for the first time, to that company. The passage by the legislature, in 1882, of an act that was void did not prevent it from passing a valid act in 1883, touching the same subject. In *Strother v. Lucas*, 12 Pet. 454, it was said:

"That a grant may be made by a law, as well as a patent pursuant to a law, is undoubted, (*Fletcher v. Peck*, 6 Cranch, 128;) and a confirmation by a law is as fully, to all intents and purposes, a grant as if it contained in terms a grant *de novo*."

See, also, *Field v. Seabury*, 19 How. 323, 334; *Langdeau v. Hanes*, 21 Wall. 521, 530; *Slidell v. Grandjean*, 111 U. S. 412, 439, 4 Sup. Ct. Rep. 475; *Whitney v. Morrow*, 112 U. S. 693, 695, 5 Sup. Ct. Rep. 333.

It results from what has been said that, unless restrained by some legal obligation or contract from revoking the grant to the Portage Company, after the expiration of the time limited for the completion of the road to the west end of Lake Superior, the power of the state to pass the act of March 5, 1883, cannot be questioned. Were the hands of the state tied by any such obligation or contract? It has already been said that the mere revocation of February 16, 1882, if invalid, did not put the state under any legal obligation to forbear the exercise of any power it had

after, and by reason of, the failure of that company to complete its land-grant road within the time stipulated.

Assuming that the completion of the road, within the time limited, was rendered impossible by the act annulling the grant made to the Portage Company, it is contended that the case comes within the familiar rule that "where a condition subsequent be possible when made, and becomes impossible by act of God or the king's enemy, or the law, or the grantor, the estate, having once vested, is not thereby divested by the failure, but becomes absolute," citing *Co. Litt.* 206*a*, 206*b*; 4 Kent, Comm. 130; *Davis v. Gray*, 16 Wall. 230, 231. This rule cannot be applied to the present case. It is not to be disputed that the revocation of the grant to the Portage Company had an injurious effect upon its credit. But, in a legal sense, such revocation by an unconstitutional, void act of legislation—which the plaintiff affirms the act of February 16, 1882, to be—cannot be said to have made impossible the performance of the condition upon which the company's title to the lands depended. The attempted revocation by the legislature, in 1882, and the loss by the company of credit in financial circles, do not, in law, hold the relation of cause and effect. The contrary view is not sustained by *Davis v. Gray*, 16 Wall. 203, 230. While the court there recognized the rule excusing the performance of a condition subsequent where performance was rendered impossible by the act of the law or of the grantor, it was alleged in the bill, and admitted by the demurrer, that the state, by plunging her people into civil war, had herself prevented the railroad company from earning the grant of lands made in aid of the construction of its road. A condition of war, it was conceded, wholly precluded the completion of the road. But, even in that case, performance within a reasonable time was held to be essential to any claim to have the benefit of the grant. Here there has not been performance by the Portage Company in respect to any part of its land-grant division. If the act of 1882 was void, and if, despite its passage, the Portage Company had completed the road within the required time, it would not be disputed by the plaintiff that, as between the company and the state, or any other grantee of the state, the equitable title to lands would have been in that company. Its misfortune—assuming the representations as to its general financial condition to be true—was, that it had no credit of consequence except such as it got from the state's grant of lands; a circumstance that cannot control the determination of the question whether the act of 1882, in a legal sense, rendered it impossible to complete the road in time. If this be not so, it would follow that the act of 1882 would excuse or not excuse the failure of the Portage Company to complete the road within the time as the evidence was the one way or the other touching its financial ability to have done so, apart from the credit given by the grant of the lands in dispute. But the rule invoked by the plaintiff surely does not rest upon such a shifting foundation. Within that rule the impossibility to perform a condition subsequent is either one arising from some obstacle interposed by the grantor, actually precluding or preventing performance by the grantee, or one that en-

sues, as matter of law, from something that the grantor did or caused to be done. There is no claim of actual interruption by the officers or agents of the state of the construction of the road, and, assuming the act of 1882 to have been unconstitutional, it cannot be true, in any legal sense, that non-performance of the condition, as to the completion of the road within the prescribed time, resulted from the mere passage of that act.

It remains to consider other aspects of the case that have been presented with marked ability by the counsel for the plaintiff. It is contended, in substance, that the forfeiture of the land grant was caused by false representations made to the legislature by the Omaha Company, which desired the transfer of the grant to itself to aid in the construction of its own road, and that that company, by fictitious suits, and by corruptly conspiring with officers of the Portage Company, wrongfully and fraudulently prevented the latter company from performing the condition in respect to the time within which the road was to be completed. Consequently, the lands and their proceeds should be subjected by a court of equity to the debts of the Portage Company, secured by its land mortgage. The principal allegation of the bill as to what the Omaha Company did is:

"Furthermore, it, and at its instance others employed by it, and especially the said A. A. Jackson and C. J. Barnes, who were well known as officers of the Portage Company, and understood to be authorized to speak in its behalf, falsely represented to members of said legislature that the Portage Company had made no substantial progress towards the construction of said land-grant division, and never had any considerable number of men at work thereon, and was wholly without means or credit to prosecute said work; that it had at last voluntarily and finally abandoned all attempt to construct the same, and that it was willing to have the grant to it forfeited and given to the Omaha Company; whereupon, the legislature of Wisconsin, relying on these false representations, and without inquiry or hearing, hurriedly passed the act of February 16, 1882, above named, to forfeit the said land grant of the Portage Company and confer it on the Omaha Company."

Undoubtedly the Omaha Company was both willing and anxious that this land grant should be wrested from the Portage Company and transferred to itself, and to effect that end it appeared by its agents before legislative committees for the purpose of showing that the Portage Company did not have the means or credit necessary to construct, and never would construct, the road in question within the time fixed; and it may be assumed, for the purposes of this case, that the agents of the Omaha Company made representations as to the condition of the other company that were not in all respects consistent with the truth or with fair dealing. Still the question arises, how is a judicial tribunal to ascertain the extent to which the action of the legislative department in revoking this grant was controlled or influenced by representations made to its members by the Omaha Company about the other company? Can the courts, in any case, assume that the legislature was not fully informed when it passed a statute relating to public objects, as to every fact essential to an intelligent determination of the matters to which that statute relates? Must it not be conclusively presumed that in disposing of lands held in

trust for public purposes it was controlled entirely by considerations of the public good, and not in any degree by false representations of individuals having private ends to subserve, and having no special concern either for the general welfare or for the rights of other individuals?

These questions are all answered in numerous adjudged cases, the leading one of which is *Fletcher v. Peck*, 6 Cranch, 87, 129, 130. That was an action for breach of certain covenants in a deed made by Peck for lands embraced in a purchase by Gunn and others from the state of Georgia, under an act passed by the legislature of that state. One of the covenants alleged to have been broken was that all the title the state ever had in the premises had been legally conveyed to Peck, the grantor. It was assigned, in substance, as a breach of that covenant that the act there in question was a nullity, and so the title of the state did not pass to Peck, because its passage was procured by corruption and undue influence used by the original grantees from the state upon members of the legislature. Chief Justice MARSHALL, speaking for the court, said.

"That corruption should find its way into the government of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would in any case be competent, on proceedings instituted by the state itself, to vacate a contract thus formed, and to annul rights acquired under that contract by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements operating on members of the supreme sovereign power of the state, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect? Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment? If the majority of the legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct; and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated is not clearly discerned. * * * If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another, founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law."

It is true that there is no suggestion in the present case that the act of revocation of February 16, 1882, was procured by bribery or corruption practiced upon members of the Wisconsin legislature. But the charge is that that body was induced by false representations, made by the agents of the Omaha Company, to do what they would not otherwise have done. This difference in the facts does not make the princi-

ples announced in *Fletcher v. Peck* inapplicable to the present case; for, if an act of legislation cannot be impeached by proof of corruption upon the part of those who passed it, much less can it be made a matter of proof that legislators were deceived or misled by false representations as to facts involved in proposed legislation of a public character. The principle upon which *Fletcher v. Peck* rests excludes all extrinsic evidence of witnesses as to the motives of legislators, or as to the grounds of legislative action. In *Ex parte McCordle*, 7 Wall. 514, the court said:

"We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the constitution."

In *Doyle v. Insurance Co.*, 94 U. S. 541:

"If the act done by the state is legal,—is not in violation of the constitution or laws of the United States,—it is quite out of the power of any court to inquire what was the intention of those who enacted the law."

So, in *Soon Hing v. Crowley*, 113 U. S. 703, 704, 710, 5 Sup. Ct. Rep. 730:

"The rule is general, with reference to the enactments of all legislative bodies, that the courts cannot inquire into the motives of the legislators in passing them, except as they may be disclosed on the face of the acts, or inferable from their operation, considered with reference to the condition of the country and existing legislation. The motives of the legislators, considered as the purposes they had in view, will always be presumed to be to accomplish that which follows as the natural and reasonable effect of their enactments. Their motives, considered as the moral inducements for their votes, will vary with the different members of the legislative body. The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile."

It was well said by the supreme court of Michigan, in *Plank-Road Co. v. Woodhull*, 25 Mich. 103:

"The legislature will not only choose its own mode of collecting information to guide its legislative discretion, but from due courtesy to a co-ordinate department of the government we must assume that those methods were the suitable and proper ones, and that they led to correct results; and, if the records show no investigation, we must still presume the proper information was obtained, for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority."

To the same general effect are many other cases. *Aldridge v. Williams*, 3 How. 24; *Maynard v. Hill*, 125 U. S. 190, 209, 8 Sup. Ct. Rep. 723; *Johnson v. Higgins*, 3 Metc. (Ky.) 566, 576; *Railway Co. v. Cooper*, 33 Pa. St. 278, 283; *Stark v. McGowen*, 1 Nott & McC. 387, 400; *People v. Flagg*, 46 N. Y. 405; *Wright v. Defrees*, 8 Ind. 298, 302; *Jones v. Jones*, 12 Pa. St. 350, 357.

For the reasons stated, evidence as to the falsity or truth of representations made by the Omaha Company, or its agents, to the legislature, or to legislative committees, in respect either of this land grant or of the Portage Company, as well as evidence as to any efforts by the Omaha Company to bring about the revocation of the grant made

to the other company, is immaterial to the present controversy. Such evidence cannot be made the basis of judicial determination without intrenching upon the independence of a co-ordinate department of the government, and impairing its right to proceed, in the exercise of its functions, upon such information as it deems necessary. An adjudication as to rights acquired by individuals under public enactments, based upon an inquiry as to whether those individuals made false representations to the legislature, or as to whether the legislature was probably influenced by such representations, is an indirect interference with the power of the legislature, acting within the limits of its authority, to enact such laws as it deems best for the general good. The courts must, of necessity, presume (whatever may be averred to the contrary) that no general statute is ever passed either for want of information upon the part of the legislature or because it was misled by the false representation of lobbyists or interested parties. They must restrict their inquiries to the validity of such legislation. Such is the established doctrine as to legislative enactments relating to public objects, although a different rule is recognized by some courts in respect to private statutes alleged to have been procured by fraud practiced upon the legislature by those claiming benefits under them.

What has been said disposes of the suggestion that the dispersion of the force employed by the Portage Company in the early part of the year 1882 in the construction of its road, the suspension of the work of construction, and its inability to raise the necessary funds for the completion of the road within the time stipulated, was the result of the machinations of agents of the Omaha Company, acting by its authority, and of the corrupt conspiring by those agents with officers of the Portage Company, whereby those officers neglected to do towards the timely completion of the road what, in fidelity to their employers, they might have done. Whether this arraignment of the Omaha Company is justified by the evidence, or whether the Portage Company could, in its weak financial condition in 1882, have completed the road within the required time, if its plans had not been interfered with, in the manner stated, it is not necessary to determine; for, as already indicated, if all that is said in respect to the conduct of the Omaha Company were clearly established, the settled principles of law forbid the court from assuming that the legislative department of the state, when it passed the act of 1882, as well as the confirmatory act of 1883, was not in possession of every fact affecting the justice of such legislation. These principles cannot be disregarded in order to remedy the hardships of particular cases. If each member of the legislature was aware when that act was passed of everything which it is alleged was done by the Omaha Company in regard to this land grant and its rival company, and yet in discharge of what it deemed a public duty, and in order to secure the speedy completion of a public highway, supposed to be imperatively required by the interests of their constituents, the legislature passed the confirmatory act of 1883, and thereby selected the beneficiary of the grant made by congress in aid of the construction of that highway, the conduct of the

Omaha Company surely would not constitute any ground why a court of equity should attempt to thwart the wishes of the legislative department. That is precisely what would be done if the court took from that company the benefit of the grant deliberately made to it by the legislature in aid of the construction of its road. Legislative enactments relating to public objects, so far as they confer rights upon individuals, must stand, if they be constitutional, without any attempt upon the part of the courts to conjecture or ascertain what the members of the legislature would or would not have done under any given state of facts established by extrinsic evidence.

It is further said in behalf of the plaintiff that the Omaha Company became, as early as January and February, 1882, the owner of every share of the capital stock of the Portage Company, and of a large part of its bonded and floating indebtedness; that the former company built a road from Mud Lake to Superior City, parallel to and a few yards from the half-graded line of the latter company; and that the road so built was such an one as was described in the acts of congress of 1856 and 1864. Upon these facts the plaintiffs rest the contention that as that road was constructed by a corporation which was the sole stockholder and a principal creditor of the Portage Company, and as the law avoids forfeitures where practicable, the condition imposed by the state may be regarded as having been duly performed, within the rule that "any one who is interested in a condition may perform it, and when performed, it is gone forever;" citing 2 Crabb, Real Prop. 815; 2 Washb. Real Prop. (2d Ed.) 12, and other authorities.

The court is unable to assent to this view, for the reason, if there were no other, that what was done by the Omaha Company towards the construction of its road to Superior City was not done by it as a stockholder and creditor of the Portage Company. It did not elect or intend in that capacity to perform the condition imposed by the state upon the latter company. The record conclusively establishes the fact that in constructing the road to the west end of Lake Superior the Omaha Company proceeded under its own charter, and represented its own stockholders, and not the stockholders of the other company. It built its own branch road, and did not complete the road commenced by the Portage Company. It was so understood by the plaintiff, for it alleges in the bill that "in the year 1882 the Omaha Company constructed its branch to Superior City, along-side of the partially constructed line of the Portage Company, and has ever since operated the same." And this is consistent with the second section of the act of February 16, 1882, which made the grant to the Omaha Company upon the express condition that it would continuously proceed with the construction of the road then "in part constructed by it between said point of intersection and the west end of Lake Superior," and complete it on or before December 1, 1882. It is impossible to suppose that the Omaha Company ever intended to perform the condition imposed upon the Portage Company in reference to the latter's road. It performed the condition imposed in the act granting these lands in aid of the construc-

tion of its road. The plaintiff's whole case proceeds upon the theory that the Omaha Company sought to prevent any result that would be beneficial to the other company. It would therefore be a perversion of the rule upon which the plaintiff relies, and inconsistent with the entire evidence, to say that the Omaha Company was interested in performing, or intended to perform, or that the state regarded it as performing, the condition in question for or in behalf of the Portage Company. That would make the Omaha Company do something for another corporation which it did not elect to do, and was not in law bound to do.

Many other questions have been discussed by the counsel of the respective parties, about which the court forbears any expression of opinion. Their determination is rendered unnecessary by the conclusions reached upon the principal points. The bill must be dismissed for want of equity, and with costs to the defendants. It is so ordered.

HEWITT v. STORY *et al.*

(Circuit Court, S. D. California. June 17, 1889.)

PLEADING—PLEAS IN ABATEMENT—WHEN TO BE FILED.

Act Cong. March 3, 1875, § 5, provides "that if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not * * * involve a dispute * * * properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined * * * for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein." Rule 9 of the circuit court provides that "when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived." *Heid.* that neither the act nor the rule authorizes a plea to the jurisdiction to be entered after answer to the merits, and after the commencement of taking testimony.

In Equity. On motions to strike plea, and to dismiss.

Rowell & Rowell and John A. Wright, (*A. W. Thompson and Brousseau & Hatch*, of counsel,) for complainant.

Geo. E. Otis and Byron Waters, (*R. E. Houghton*, of counsel,) for defendants.

Ross, J. The original bill in this case was filed more than two years ago, having for its object the establishment of the complainant's alleged right to 500 inches of the water of the Santa Ana river, and the securing him in its use. Without filing any plea in abatement, the defendants, who are many in number, answered to the merits of the bill, and in due course the taking of testimony was commenced before the examiner, and continued from time to time for a considerable period. The complain-

ant was then, on motion, of which notice was required to be given, allowed to file an amended bill, in which the claim made in the original bill was reduced from 500 to 333 $\frac{1}{3}$ inches of the water in question. In granting the motion of complainant to file the amended bill, it was, on motion of the respondents and upon complainant's consent, and in consideration of the fact that the taking of such testimony had cost the respective parties large sums of money and consumed much time, further ordered as follows:

"That all of the testimony heretofore taken herein, with each and all, and subject to each and all, of the several exceptions thereto, be held, deemed, and regarded as being taken upon the said amended bill of complaint, and the pleadings hereafter to be made thereto, so far as the same is or may be applicable to such amended bill of complaint, the answers thereto, and the issues presented thereby."

The amended bill was duly served on the respondents, who obtained extensions of time to plead thereto to February 4, 1889, on which day, without filing any plea in abatement or to the jurisdiction, they answered the amended bill on the merits. To that answer complainant on the same day filed his replication. February 20, 1889, was then fixed upon by the examiner for the resumption of the taking of testimony, of which due notice was given to the respective parties. Upon the representation of respondents' counsel that they desired to amend their answer, and by consent of counsel for complainant, the matter was postponed until March 6th, at which time the respective parties appeared before the examiner, and then and there entered into this stipulation:

"It is hereby stipulated that the respondents may amend their answers to complainant's amended bill of complaint herein on or before March 18, 1889, by serving and filing joint or several answers thereto, as they may be advised; that said answer or answers shall be served on complainant's solicitors on or before said 18th day of March, 1889; that verification of said answer or answers, and verification of all objections, exceptions, or replications thereto, is and are waived; that, in case complainant objects or excepts to any of said answers, such objections or exceptions, leave of the court being obtained, shall, upon two days' notice to respondents' solicitors, be set down for hearing by said court on or before March 22, 1889; that the further taking of testimony by and before Charles L. Batcheler, the examiner for said court, shall be set for and resumed on Tuesday, March 26, 1889, at 11 o'clock A. M.; that all of the testimony heretofore taken before said examiner on the original bill of complaint and answers thereto shall be deemed, held, and regarded as having been taken upon the issues framed by said amended bill of complaint and amended answer or answers thereto, so far as applicable, without taking the same anew, subject, however, to all objections taken at and upon the former hearings before said examiner, and as by him noted in said testimony, subject, however, to being read and signed by the respective witnesses."

On May 18th, instead of answering, counsel for the respondent F. E. Brown filed a plea to the jurisdiction, in which is set forth, on information and belief, that the complainant was not at the time of filing his bill, and is not now, a citizen of the state of New York, as is therein alleged, but that he then was and still is a citizen of the state of California, and that other persons claiming under the same title with complainant—

having interests in the property which is the subject of the suit, are citizens of the state of California, but are not made parties complainant or defendant; and that it is not in the bill made to appear that such other persons, or any of them, were requested to and refused to join with complainant in bringing the suit; and that the suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, in this: that parties have been improperly or collusively made and joined as defendants for the purpose of creating a case cognizable by this court. A motion was thereupon made on the part of the complainant to strike this plea from the files of the case, and that motion, together with a motion to dismiss the suit, upon the same grounds as those stated in the plea, having been argued by the respective parties, are now to be determined.

The plea is attempted to be justified by section 5 of the act of congress of March 3, 1875, and by rule 9 of this court, as amended in January, 1882. By the act referred to it is provided "that if, in any suit commenced in a circuit court, or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit, or remand it to the court from which it was removed, as justice may require."

I understand the supreme court to have held, in effect, in the case of *Hartog v. Memory*, 116 U. S. 588, 6 Sup. Ct. Rep. 521, that this act has not altered the theretofore well-settled rule that, when the citizenship necessary for the jurisdiction of the federal courts appeared on the face of the record, evidence to contradict the record was not admissible, except under a plea in abatement in the nature of a plea to the jurisdiction, and that a plea to the merits was a waiver of such a plea to the jurisdiction; but that, notwithstanding the parties continue bound by that rule, "if in the course of a trial it appears by evidence, which is admissible under the pleadings and pertinent to the issues joined, that the suit does not really and substantially involve a dispute of which the court has cognizance, or that the parties have been improperly or collusively made or joined for the purpose of creating a cognizable case, the court may stop all further proceedings, and dismiss the suit;" and, further, "if, from any source, the court is led to suspect that its jurisdiction has been imposed upon by the collusion of the parties or in any other way, it may at once, of its own motion, cause the necessary inquiry to be made, either by having the proper issue joined and tried, or by some other appropriate form of proceeding, and act as justice may require for its own protection against fraud or imposition."

It is one thing for the court, in the interest of justice and in the exercise of the power conferred and duty imposed upon it by the act of

1875, whenever it has reason to suspect that its jurisdiction is being imposed upon, of its own motion to cause the necessary inquiry to be made to the end that all further proceedings may be stopped, and the suit be dismissed in the event it should be found that a fraud upon its jurisdiction has been committed, and quite another thing for parties to interpose pleas out of the regular and established order of proceedings. If the plea in question was properly filed, it might with equal propriety have been withheld until all of the testimony should be taken and then put in. It was too late when filed, or it would not have been too late then. That parties have the right, after answering to the merits and permitting testimony to be taken, thereby entailing expense upon the opposite party and consuming the time of the court and its officers, to interpose a plea to the jurisdiction which from its very nature is a matter to be first disposed of, and which under the long-established practice should be interposed before answer to the merits, seems to me out of all reason. Such a practice should never be tolerated in the absence of a statutory requirement, for it would lead to unnecessary expense to the parties, and to great uncertainty, delay, and inconvenience in the proceedings of the court. I see nothing in the act of 1875, or in rule 9 of this court as amended in 1882, which at all sustains the position of respondent that such a plea may be filed by a party at any time; and that the same view of the act of 1875 was taken by the supreme court seems to me to be clear from the opinion in *Hartog v. Memory*, *supra*, in which it is in terms stated that in its general scope the rule prevailing prior to the passage of that act has not been altered, but that the statute did change the rule so far as "to allow the court at any time, without plea and without motion, to 'stop all further proceedings, and dismiss the suit the moment a fraud on its jurisdiction was discovered.'" "Neither party has the right, however," continued the court, "without pleading at the proper time and in the proper way, to introduce evidence the only purpose of which is to make out a case for dismissal. The parties cannot call on the court to go behind the averments of citizenship in the record, except by a plea to the jurisdiction or some other appropriate form of proceedings."

Nor is there anything in rule 9 of this court, as amended in 1882, to sustain the position taken by respondent. As amended, it reads: "Rule 9. *Matters in Abatement*. All matters in abatement shall be set up in a separate preliminary answer, in the nature of a plea in abatement, to which the plaintiff may reply or demur; and the issue so joined shall be determined by the court before the matters in bar are pleaded. And when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived. When the matter so pleaded in abatement consists of matter of fact, the plea or preliminary answer shall be sworn to; and when matters showing that the court has no jurisdiction, which might have been pleaded in abatement, are first developed during the proceedings in the cause upon the

merits, the court will, upon its own motion, dismiss or remand the case, in pursuance of the requirement of section 5 of the act of March 3, 1875, and, in its discretion, tax the costs of such proceedings upon the merits, so far as is practicable, to the party most in fault in not presenting such matters in some proper mode, before proceeding upon the merits." The particular clause of this rule relied upon by respondent is that reading: "And when any matter in abatement, other than such as affects the jurisdiction of the court, shall be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, the matter so pleaded in abatement shall be deemed to be waived." Even if this was saying that such matter in abatement as affects the jurisdiction of the court may be pleaded in the same answer with matter in bar or to the merits, or simultaneously with an answer of matter in bar or to the merits, it would be no authority for the position of the respondent in the present case, where the right is claimed to interpose the plea after answer to the merits, and after the commencement of the taking of testimony.

A reference to the opinion of Judge SAWYER, however, in the case of *Sharon v. Hill*, 10 Sawy. 666, 26 Fed. Rep. 722, will show that the clause of rule 9, relied on by respondent was inserted by that learned judge because of a doubt entertained by him as to whether the supreme court would hold that, since the passage of the act of 1875, the jurisdictional question might be raised in the answer, where no plea in abatement had been interposed, although at the same time expressing his own opinion that the old rule had not been changed by the act. "No decision of the supreme court," said he, "made since the passage of that act, as to whether this jurisdictional question may be raised in the general answer, where it has not in fact been otherwise presented, has been brought to my notice by counsel; and it has not been very clear to my mind what the ruling of the supreme court would be, were that point so presented. In my opinion, however, the former decisions should by followed still. * * * The question is by no means new to me; and, in consequence of the doubt above expressed, where no plea in abatement is interposed, this court in January, 1882, amended rule 9 of its rules of practice so as to read" as above quoted. 10 Sawy. 669, 670, 26 Fed. Rep. 723, 724. Judge SAWYER proceeds to say, in the same opinion, that it is as important now to determine the question of jurisdiction upon a plea in abatement before going into the merits at large as it ever was, and that he sees in the act of 1875 no satisfactory indication of an intention on the part of congress to change the rule theretofore prevailing in respect to that matter. Such being my own opinion, also, the complainant's motion is granted, and an order will be entered striking out the plea of the respondent Brown. There being nothing in the present stage of the case to justify its dismissal, the motion to dismiss is denied.

CARY *et al.* v. LOVELL MANUF'G Co., Limited.

(Circuit Court, W. D. Pennsylvania. May 29, 1889.)

COSTS—DEPOSITIONS.

A number of depositions, taken in one or the other of two suits in other districts, brought by the present plaintiffs against other defendants for the infringement of the same patent, having been introduced by written agreement into this case, and read at the hearing "with the same force and effect as if taken in this suit," a solicitor's fee of \$2.50 for each of said depositions is not here taxable under section 824, Rev. St.

In Equity. *Sur* exceptions to clerk's taxation of costs.

John K. Hallock and W. Bakewell & Sons, for exceptants.

Witter & Kenyon, *contra*.

Before McKENNAN and ACHESON, JJ.

PER CURIAM. By written agreement a number of depositions, taken in one or the other of two suits in other districts, brought by these plaintiffs against different defendants for the infringement of the same patent, were introduced into this case, and read at the hearing thereof, "with the same force and effect as if taken in this suit," and the question now arising is whether a solicitor's fee for each of said depositions is here taxable under section 824 Rev. St., which allows to the solicitor "for each deposition taken and admitted in evidence in a cause two dollars and fifty cents." Upon a like state of facts, Justice BLATCHFORD, in *Wooster v. Handy*, 23 Fed. Rep. 49, decided against the allowance of the fee, and so, also, did Judge SEVERENS, in *Winegar v. Cuhn*, 29 Fed. Rep. 676. We concur in this conclusion, which, we think, is in harmony with both the letter and the spirit of the statute. By its express terms the deposition must be "taken" as well as "admitted in evidence" in the cause, and the manifest intention of the statute was to compensate for the labor and expense of taking the deposition. We therefore sustain the exceptions to the allowance by the clerk of \$102.50 solicitor's fees for depositions taken in the suits of *Cary & Moen v. Domestic Spring-Bed Co.* and *Same v. R. H. Wolff & Co.* But the exception to the allowance of \$53.20, traveling expenses, etc., incurred by the master, is overruled.

GARRETTSON *et al.* v. NORTH ATCHISON BANK.

(Circuit Court, W. D. Missouri, St. Joseph D'c. June 17, 1889.)

1. BANKS AND BANKING—CHECKS—ACCEPTANCE.

A cattle company had agreed to sell to one T. certain cattle for \$22,000. T. offered in payment his check on defendant bank. The vendor refused to accept it unless plaintiffs, to whom vendor was indebted, would accept it in payment of the debt. The payee in the check telegraphed to defendant asking if it would pay T.'s check for \$22,000. and defendant telegraphed: "T. is good. Send on your paper." The telegram was shown to plaintiffs,

who took the check in payment of their debt. *Held*, that the answer was an acceptance of the check for the sum named in the first telegram, and was sufficient, under Rev. St. Mo. § 533, providing that an acceptance of a bill of exchange must be in writing, and section 534, providing that an acceptance on a separate paper will bind the acceptor in favor of one to whom it has been shown who takes the bill on the faith thereof for a valuable consideration, to render defendant liable to plaintiffs on the check.

2. SAME.—ACCEPTANCE BEFORE CHECK DRAWN.

In such case the evident purpose of the inquiry being to obtain assurance of payment before taking the check defendant, was liable under Rev. St. Mo. § 535, providing that an unconditional written promise to accept a bill before it is drawn shall be deemed an actual acceptance in favor of any person to whom it is shown, and who on the faith thereof receives the bill for a valuable consideration.

At Law. Action on a check. Demurrer to petition.

Karnes, Holmes & Krauthoff, for plaintiffs.

Lancaster, Hall & Pike, for defendant.

PHILIPS, J. This cause stands on demurrer to the petition. Omitting the formal matters, the petition alleges in substance that the Muscatine Cattle Company, on the 28th day of September, 1888, sold to one James Tate 1,000 head of cattle at the agreed price of \$22,000. Tate tendered in payment thereof his check drawn on the defendant bank. The said cattle company, being indebted in a large sum at that time to plaintiffs, refused to deliver the cattle, or to accept said check, from said Tate unless plaintiffs would accept the said check in payment of said indebtedness of said cattle company to them, which plaintiffs declined to do unless defendant would certify said check to be good. Thereupon said cattle company sent or caused to be sent, from Pueblo, Colo., to defendant at Westboro, Mo., the following telegram: "Will you pay James Tate's check on you twenty-two thousand dollars? Answer." Which said telegram was received by defendant, whereupon it sent to said cattle company the following answer: "James Tate is good. Send on your paper." Upon the receipt of this answer said cattle company and Tate exhibited the same to plaintiffs, whereupon plaintiffs, in reliance upon said acceptance and certification of said check, agreed to accept the same for the purpose aforesaid; and the said cattle company, in reliance on said telegram, accepted said check, and delivered to said Tate said cattle, and, after duly indorsing said check to plaintiffs, delivered the same to them, which the plaintiffs accepted in reliance upon said acceptance or certification, and duly entered credit therefor on the indebtedness of said cattle company to them. The petition then alleges presentment for payment, and the refusal of defendant to pay the said check, and the due protest thereof. Judgment is asked for said sum, with interest and protest fees, damages, and costs. The demurrer is general that the petition does not state facts sufficient to constitute a cause of action. The argument in support of the demurrer is that there was no acceptance in writing, in contemplation of the statute; that the answer sent by telegram from defendant was at most but a promise to pay, and, the petition not averring that said Tate had any funds at the time in the bank, the promise was wholly voluntary; that if the plaintiffs have any remedy it is against

the payee named in the check, who might then have action against the defendant on the breach of promise.

A brief recurrence to some general principles applicable to bank checks may not be impertinent, as a due regard to these will materially aid in a proper conclusion. Many text writers liken such checks, in their substance, to inland bills of exchange, payable on demand. 1 Rand. Com. Paper, § 8; Byles, Bills, 13; 1 Edw. Bills, § 19. Mr. Justice SWAYNE, in *Bank v. Bank*, 10 Wall. 647, very aptly notes the essential difference between checks and bills of exchange:

"Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law-merchant are alike applicable to both. Each is for a specific sum, payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such case would be a fraud. * * * By the law-merchant of this country the certificate of the bank that a check is good is equivalent to acceptance."

It would therefore follow that when a check has been certified, which is but the equivalent of acceptance, by the drawee, it stands, in its commercial relation, as an accepted bill of exchange. From its acceptance the implication arises that it is drawn upon sufficient funds of the drawer in the hands of the drawee, and that such fund is set apart, appropriated, for the check whenever presented. It is not only an admission that the drawer then has in the hands of the drawee the required fund, but it imposes the obligation on the drawee to reserve and hold the fund for the redemption of the check when presented. *Bank v. Bank, supra*. Nor is it material, as between a *bona fide* transferee of the check and the drawee, that the drawer in fact had no money in the bank at the time of the acceptance. The certification operates, in such case, an effectual estoppel against such defense. *Cooke v. Bank*, 52 N. Y. 96; *Bank v. Bank, supra*; *Jarvis v. Wilson*, 46 Conn. 90-92; 2 Daniell, Neg. Inst. § 1603. Such accepted check, possessing the quality of commercial paper, passes by indorsement, and confers upon the indorsee the right of action, as upon any other chose in action. *Freund v. Bank*, 76 N. Y. 355, 356; *Bank v. Richards*, 109 Mass. 413; *Whilden v. Bank*, 64 Ala. 29, 30.

It only remains, therefore, to be determined whether or not the defendant bank did accept the payment of the check in question, and, if it did accept, what are the rights of these plaintiffs? The check being drawn on a Missouri bank, to be paid here, the state statute regulating the matter of acceptances of such paper applies.

"Sec. 533. *Acceptance of Bill of Exchange must be in Writing.* No person within this state shall be charged as an acceptor of a bill of exchange

unless his acceptance shall be in writing, signed by himself or his lawful agent. Sec. 534. *Acceptance Written on Separate Paper will Bind Acceptor, when.* If such acceptance be written on a paper other than the bill, it shall not bind the acceptor, except in favor of a person to whom such acceptance shall have been shown, and who upon the faith thereof shall have received the bill for a valuable consideration."

The statute recognizes, what had already become the established common-law rule, that the acceptance may be written on a paper other than the bill, and of consequence, it may be made by letter, and, if by letter, also by telegram. *Bank v. Bank*, 1 N. Y. Leg. Obs. 26; *Espy v. Bank*, 18 Wall. 604; *Whilden v. Bank*, 64 Ala. 32, 33. "The statute requires the promise to be in writing, but is silent as to the mode of communicating it to the party cashing the draft upon the faith of it. When it is in writing and thus acted upon, its mode of conveyance, whether by telegraph, mail or otherwise, affects no rights, and such effect must be given to it as manifest justice, and the exigencies of commerce call for in this class of communications." *Bank v. Howard*, 40 N. Y. Super. Ct. 20. The material facts disclosed by the petition are that the Muscatine Cattle Company had contracted to sell to one James Tate 1,000 head of cattle at the price of \$22,000. In payment, Tate tendered to the company his check for \$22,000, drawn on the defendant bank. Before the vendor would accept said check, and part with his property, and before the plaintiffs would accept the check as payment on the indebtedness of the cattle company to them, the payee named in the check telegraphed to defendant and received from it the answer alleged in the petition. The question raised by the argument on the demurrer is as to whether this correspondence constitutes an acceptance within the meaning of the law-merchant and the statute, or whether it amounts simply to a promise to accept or pay. Reading the two telegrams together, in the light of the ordinary understanding and acceptance of such terms among commercial men, it does seem to me that the plain meaning and purport of the answer was an acceptance of the check for the sum expressed in the first telegram. The language of the inquiry made in the first telegram clearly indicated that the check had been drawn by Tate on defendant for \$22,000; and defendant was asked if it would pay it. It would seem to be a strained construction that the check named was to be sent on merely for acceptance. The answer was that "Tate is good. Send on your paper." If the check had been presented to the bank in the ordinary way, and the drawee had indorsed thereon the word "Good," undersigned by its proper officer, it would by all the authorities have amounted to a certification of a check. *Espy v. Bank*, 18 Wall. 604; 2 Rand. Com. Paper, § 648. The language "send on your paper," taken in connection with both telegrams, clearly implies that it is to be sent on for payment, and not merely for acceptance. In *Coolidge v. Payson*, 2 Wheat. 66, Chief Justice MARSHALL states the rule that "a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who

afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise." While in the subsequent case of *Boyce v. Edwards*, 4 Pet. 111, the ruling in *Coolidge v. Payson*, was reviewed, the rule as stated by Chief Justice MARSHALL was not disturbed where the letter of acceptance applies directly to a particular bill drawn or to be drawn. By section 535, Rev. St. Mo., it is provided that "an unconditional promise in writing to accept a bill before it is drawn shall be deemed an actual acceptance in favor of every person to whom such written promise shall have been shown, and who upon the faith thereof shall have received the bill for a valuable consideration." It would be difficult to perceive, on principle, what difference there could be in a promise to accept before drawing and the facts as disclosed in the petition. The defendant, in the very nature of such commercial transactions, must have understood that the purpose of the inquiry made of it was to have the payment of the check assured if taken by the party sending the telegram. The answer was shown to the plaintiffs, and in reliance upon the assurance it contained the plaintiffs accepted the check. As well settled in this jurisdiction, the application of the check by the plaintiffs to the indebtedness to them from the cattle company was for a valuable consideration, and constitutes them *bona fide* holders of the check, and as such the right of action thereon inures to them regardless of any equities between the original parties. *Railroad Co. v. Bank*, 102 U. S. 14-22; *Pope v. Bank*, 59 Barb. 226; *Bank v. Howard*, *supra*; *Whilden v. Bank*, 64 Ala. 1-30; *Freund v. Bank*, 76 N. Y. 353-358; *Johnson v. Clark*, 39 N. Y. 216; *Coolidge v. Payson*, 2 Wheat. 66. The conclusion is that the petition does state facts sufficient to constitute a cause of action, and the demurrer is therefore overruled.

WILLIAMS v. QUEEN'S INS. CO.

(Circuit Court, D. Connecticut. June 24, 1889.)

1. INSURANCE—CONDITIONS OF POLICY—PROOFS OF LOSS.

An insurance policy provided that on a loss the policy-holder should, "if required, produce the certificate of a magistrate or notary public nearest to the place of fire. * * * stating that he has investigated the circumstances of the fire, and believes that the owner has, without fraud, sustained loss to the amount claimed." The company's agent replied to proofs of loss sent by plaintiff, the policy-holder, which contained a certificate that such proofs were insufficient, because they did not meet the requirements of the policy in regard to the location of the magistrate or notary signing the certificate, and said: "For the above reasons, we decline to accept the proofs * * * as sufficient, under the requirements of the policy." Plaintiff thereafter sent the certificate of the nearest justice of the peace, though there were notaries who were materially nearer. *Heid*, that there was a sufficient requirement of the certificate mentioned, which plaintiff recognized.

2. SAME.

Under such requirement, the certificate of the nearest officer of the classes named, whether magistrate or notary, is necessary.

3. SAME—WAIVER.

The policy also provided that plaintiff should, if required, submit to an examination under oath. *He d.* that the mere examination of plaintiff under oath was not a waiver of defendant's right to require the certificate, where it appears that plaintiff knew that he was still required to furnish proofs of loss.

4. SAME.

The mere delay by the company of 37 days before requiring the certificate is not a waiver thereof, where it appears that the policy was not payable until 60 days after proofs of loss were received by the company, and plaintiff does not claim that the delay prevented him from obtaining the required certificate so as to begin suit at the expiration of the 60 days, or that any other injury or detriment was occasioned by the delay.

At Law. On motion for new trial.

Action on fire insurance policy by Russell Williams against Queen's Insurance Company.

Franklin Chamberlin, for plaintiff.

George A. Fay and *T. E. Doolittle*, for defendant.

SHIPMAN, J. This is a motion for a new trial of an action at law, upon a policy of fire insurance upon a stock of merchandise in the city of Meriden. The policy provided, among other things, that the assured should, within 60 days after the fire, render an account of the loss, signed and sworn to, stating how the fire originated, giving copies of the written portions of all policies thereon; also the cash value and ownership of the property and the occupation of the premises; and, whenever required, should submit to examinations under oath, by any person designated by the company, * * * and should, "if required, produce the certificate of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, or related to the aforesaid, stating that he has investigated the circumstances of the fire, and believes that the owner has, without fraud, sustained loss to the amount claimed." On September 12, 1885, and during the life of the policy, the insured property was seriously injured by fire. The origin of the fire was not satisfactorily ascertained, and immediately thereafter an investigation was had, nominally by the municipal authorities of Meriden, under the provisions of its charter, which, the plaintiff claimed, was really conducted by the various insurance companies which were concerned in the loss. Upon this investigation the plaintiff was examined at length, under oath. The examination was conducted by an agent of one of the companies, who, as the plaintiff claimed, represented also the defendant. Any participation in the investigation was denied by the defendant. About September 30, 1885, the plaintiff voluntarily made out and sent to the defendant proofs of loss upon a blank which was furnished by its local agent. George W. Smith, Esq., filled out the proofs of loss, and, as notary public, filled out and signed the magistrate's certificate, which was a part of the blank form. He was neither the nearest disinterested magistrate nor the nearest disinterested notary public to the place of the fire. These proofs were received by the defendant on September 30th, and were received by Mr. E. G. Richards, who was special agent of the company, and had charge of all losses in the New England states, on the week after

they went to the New York office. On November 6th he wrote to the plaintiff that the proofs were "incomplete and insufficient, inasmuch as they do not meet the requirements of the policy contract, first, as to the requirement of a certificate of a magistrate or notary public nearest to the place of the fire. * * * For the above reasons * * * we decline to accept the proofs you have offered as sufficient under the requirements of said policy." On December 14, 1885, the plaintiff wrote to the defendant: "If you will return my proofs of loss, I will see if I can get them in the way you want them." They were returned to the plaintiff, and were retained by him. On September 12, 1886, and before the commencement of this suit, he, by his counsel, sent to the attorney of the defendant a magistrate's certificate, of about that date, of John Q. Thayer, the nearest justice of the peace to the place of the fire. At least two disinterested notaries were materially nearer the burned store.

The plaintiff requested the court to charge the jury as follows:

"(1) That the certificate of a magistrate or notary public nearest the place of fire, and not concerned in the loss as a creditor or otherwise, had not been required. (2) If the letter of defendant's agent of November 6th contained such requirement, then that the plaintiff might elect from which class, notary public or magistrate, he would procure such certificate, and, having furnished the certificate of the nearest justice of the peace, he had conformed to the requirements of the policy. (3) That by the examination of the plaintiff under oath, in accordance with the policy provision, the defendant had waived its right to require the certificate of a magistrate or notary public. (4) That having made no requirement for the certificate of a magistrate or notary public until after November 6th, 54 days after the fire, and 37 days after the proofs of loss were received, the defendant should be held for this reason to have waived its right to require such certificate."

The court did not so charge, but upon the admitted facts in the case, in regard to the non-production of a disinterested magistrate's certificate, who was nearest to the place of the fire, directed a verdict for the defendant.

1. That a certificate of a magistrate or notary was not required. By the terms of the policy it was not incumbent upon the assured to furnish such a certificate, "unless required." The proofs contained a certificate, but not of the required officer, if a certificate was to be given. The company's agent replied that the proofs were incomplete and insufficient, because they did not meet the requirements of the policy in respect to the location of the magistrate or notary, and said: "For the above reasons, we decline to accept the proofs you have offered as sufficient, under the requirements of the policy." In substance and effect, though not in formal and technical terms, the letter informed the assured that the certificate of the nearest magistrate or notary was required. The requirement was understood, and was attempted to be complied with, by the plaintiff. In view of the manifest call which is contained in this letter for the certificate from the person specified in the policy, a call the meaning of which the plaintiff fully recognized, it cannot be said that the certificate had not been required.

2. That the plaintiff had his election from which class of officers he

would procure the certificate, and the certificate of the nearest justice, though he was materially more remote than the nearest notary, would be sufficient. Such a construction is manifestly adverse to the accomplishment of the object to be effected by this old and familiar provision in fire policies, which was to obtain the opinion of an unbiased public officer, who, from his location, might be presumed to have the most intimate knowledge of the assured, of the origin of the fire, and of the amount of the loss. It would be a strained construction to hold that when three classes of officers are named, as is now frequently the case, the assured has the privilege of selecting the nearest member of one of these classes, although numerous qualified members of each of the other classes were materially nearer to the place of the fire. There is no notary public in many of our agricultural towns, and the construction of the plaintiff would permit the assured in such a town to pass by all the magistrates in his neighborhood, and seek a notary in some adjoining town, whose ignorance of the circumstances of the fire would render his certificate alike attainable and destitute of information to the insurer. The meaning of the clause is that the certificate of the member of the named classes of officers who is nearest to the place of the fire shall be furnished when it is required. Such is the tenor of the decision in *Giligan v. Insurance Co.*, 20 Hun, 93, affirmed, but without a written opinion, in 87 N. Y. 626. The facts in regard to the location of the respective officers, so far as they can be learned from the statement, corresponded with those of this case.

3. The alleged waiver of the right to require a certificate by reason of the examination of the plaintiff, or by reason of the defendant's delay in making the requirement. The policy in this case expressly provided that, whenever required, the assured should submit to an examination under oath, and, if required, should produce a certificate. He was to do either, and he was also to do both "when required," and there is nothing in the terms of the policy from which it can be inferred that a requirement of one act is an abandonment of or a waiver of the right to require the assured to perform the other act. There may be facts in particular cases which justify a court or jury in inferring therefrom that the company had substituted the examination for the proofs of loss, but the mere fact that an examination was had at the instance of the insurance company is not a waiver of its right to require proofs or a certificate. It is not contended that proofs of loss are waived by an examination, if they are called for, and it may be added that the whole history of the case shows that the plaintiff knew that he was required in fact to furnish the customary proofs of loss. He obtained a blank from the local agent, whom he asked to assist him, and whose advice he solicited and obtained in regard to the manner in which some of the details of the proofs should be made.

It would also be improper to hold, as matter of law, that a delay of 37 days before a request is made for a magistrate's certificate is an absolute waiver of the right to require such a certificate, for that would be a declaration that whatever might be the pressure of business upon the

company, or whatever might be the engagements or health of the officers, the circumstances of each loss must be so far ascertained before the expiration of 37 days that the company must know whether the circumstances required proof of absence of fraud. The most that can be claimed in regard to this part of the case is that the delay was a fact from which a jury could infer a waiver. The strongest case upon this subject in favor of the plaintiff is that of *Keeney v. Insurance Co.*, 71 N. Y. 396, in which it was held that a silence of five weeks after the proofs had been furnished was evidence from which alone the jury had a right to find that the defects in the proofs had been waived. The circumstances of that case were peculiar. Some of the objections of the insurance company were deemed by the court to be groundless, and others to be frivolous. No reason was shown for the delay, and the objections were evidently considered to be an after-thought, and not the real reason upon which payment was refused. The decision is not a guide for the decision of other cases in which the circumstances are different. Prolonged and unexcused silence by an insurance company after the reception of proofs of loss is held to be evidence of a waiver of defects or technical mistakes in the proofs, upon the ground that good faith requires of the company to notify the insured of such defects and thus enable him to correct them, and not mislead him to his hurt, by an unnecessary delay; and that if the company did not do what good faith required, and misled the assured, it must be held to have regarded the defects as unworthy of consideration, and so to have waived it. The reason upon which the doctrine of implied waiver from silence and that of estoppel *in pais* is based is the same. It is that the conduct of the insurance company has misled the assured, and induced him to omit doing, or has prevented him from doing, what he might have done, and therefore that the effect of its setting up the defect would be, by a breach of good faith, to work an injury upon the adverse party. It is important to notice that this implied waiver is another name for estoppel, because the principle of estoppel is that the person in whose favor the estoppel operates would, except for its aid, be defrauded; and where no injury can have arisen from the act of the insurance company there is no estoppel. It is said, in a well-considered case, that the waiver or estoppel "can never arise by implication alone, except for some conduct which induces action in reliance upon it to an extent that renders it a fraud to recede from what the party has been induced to expect." *Insurance Co. v. Fay*, 22 Mich. 467. It might be added that the waiver or estoppel may arise, if the conduct of the insurance company induces an inability to act in consequence of it, which produces an injurious effect. In this case the policy was not payable until 60 days after proofs of loss were made and received by the insurance company. Suit could not be commenced until the policy was payable. *Gauche v. Insurance Co.*, 10 Fed. Rep. 347. It is not claimed that the delay of the company prevented the plaintiff from obtaining the required certificate, or from obtaining it in time to commence his suit at the expiration of the 60 days. If the defendant had a right to require a certificate, the delay

wrought no injurious effect upon the plaintiff. Where there is no claim of injury to the insured, or that he has been misled or deprived of an advantage by a delay which did not affect the time when the policy was payable, there is no reason or propriety in submitting to a jury the question of implied waiver from unexcused delay. The motion is denied.

HILL v. UNITED STATES.

(Circuit Court, D. Maryland. June 22, 1889.)

NAVIGABLE WATERS—RIPARIAN RIGHTS—LIGHT-HOUSES—CONSTITUTIONAL LAW.

Land completely covered at low tide by the waters of the Chesapeake bay, within the limits of the state of Maryland, was, for purposes of navigation, given up to the United States upon the ratification of the federal constitution by the state, by virtue of the provision giving the federal government power to regulate commerce, and though the state, by statute, granted such land to the owners of the adjacent dry land as far as to the channel of the navigable waters, such grant was subject to the right of the United States to build light-houses for commercial purposes, and the owner of the adjacent land is entitled to no compensation for damages resulting from the erection of such structures.

At Law. Action for use and occupation.

On the 1st November, 1888, the plaintiff filed his petition in this court, under the provisions of the act of congress of March 3, 1887, c. 359, in which he seeks to obtain compensation from the United States for the use and occupation of the site of Miller's Island light-house, which was built by the United States in the year 1874 on the bottom of the Chesapeake bay, one of the public navigable waters of the United States, at about 200 yards from the shore of Miller's island; this light-house having been ever since its construction used as the rear range light of Craighill channel, the same being a channel constructed by the United States in the Chesapeake bay, and used by ocean vessels in their approach to the port of Baltimore. The plaintiff, in the year 1873, became by purchase the owner of Miller's island, the same being an island in the Chesapeake bay, near its western shore. The claim of the plaintiff to compensation for the use of the site is based on his riparian rights as the owner of the fast land of Miller's island, which lies adjacent to the site in question, and he relies on a law of the state of Maryland, known as "Act 1862," c. 129, to support his claim. The United States resists this claim of the plaintiff upon the ground that his riparian rights under the law of the state of Maryland are subordinate, and subject to paramount rights of the United States, under the commercial clause of the federal constitution, article 1, § 8, to use the said site without condemnation or compensation to the plaintiff for the purposes of commerce and navigation.

FINDINGS OF FACTS.

(1) I find that copies of the plaintiff's petition were in compliance with the requirements of the act of March 3, 1887, c. 359, duly served

on the United States district attorney and the attorney general of the United States, and said law in all respects complied with. (2) I find that the plaintiff since the 14th day of February, 1873, has been seised and possessed in fee-simple of the tract of land described in these proceedings and known as "Miller's Island," and of all the riparian rights attached thereto, under the laws of the state of Maryland. (3) I find that no part of the fast land included in the deed of the plaintiff has been used or occupied by the United States, but that a site for the rear range light of Craighill channel, situated about 200 yards from the shore line of the plaintiff's land, has been occupied and used by the United States; that the said site is submerged land in the Chesapeake bay, one of the public navigable waters of the United States, and within the ebb and flow of the tide, and in water about two feet deep at low tide. (4) I find that Craighill channel is a channel in the Chesapeake bay, constructed by the United States, and used by ocean vessels in their approach to the port of Baltimore, and that the light-house constructed by the United States in the year 1874 on the site in question is an important and necessary aid to the navigation of said channel. (5) I find that the United States took possession of said site for the purpose of building the light-house in question without condemnation or the payment of any compensation to the plaintiff, or any other person, in the year 1874. (6) I find that the land of Miller's island, belonging to the plaintiff, was heretofore used and is chiefly valuable on account of the gunning for geese, swan, and ducks, and for the fishing privileges with nets, and that since the erection of the light-house adjoining the shore the value of the land has decreased greatly, and the plaintiff's testimony tended to show that said decrease is due to the erection of said light-house, and that the island formerly rented for \$3,000 per annum, but since the erection of the light-house the rent has decreased to \$500 per annum.

I. Alexander Preston and Alexander Preston, for plaintiff.

Thomas G. Hayes, U. S. Dist. Atty., for defendant.

Before BOND and MORRIS, JJ.

BOND, J. This is an action for use and occupation of plaintiff's land. The facts of the case are that on the 14th day of February, 1873, the plaintiff became the owner in fee of an island on the western side of the Chesapeake bay, known as "Miller's Island." In the year 1862 the state of Maryland granted by statute to the owners of all lands bounding on the navigable waters of the state the lands of the state covered by water in front of such shores to the deep water or channel of the navigable waters. The United States, in 1874, for the purposes of the proper navigation of the Chesapeake bay, erected on the lands covered by water of the bay and within 200 yards of plaintiff's island, a light-house, known as "Rear-Range Light of Craighill Channel." The water covering the land on which the light-house is built is within the ebb and flow of the tide, and is about two feet deep at low tide. The plaintiff claims that the land upon which the light-house is built belongs to him by vir-

tue of his deed and the statute of Maryland, (referred to,) and that private property cannot be lawfully taken for a public use by the defendant without just compensation. It is true that after the authority of Great Britain had been overthrown by the states all the property of the sovereign or of the lords proprietary belonged to the state. But the state of Maryland, when she ratified the constitution of the United States, and became a member of the Federal Union, held the lands under her navigable waters subject to the conditions of that instrument. The constitution provides that congress shall have power to regulate commerce between the states and with foreign nations, and it has long been held that the power to regulate commerce carries with it the power to build light-houses, and do all other necessary things without which commerce cannot be successfully carried on. When the state of Maryland yielded this power to the United States she held the lands beneath the navigable waters *sub modo* only. They are subject to the right of the United States to use them in the regulation of commerce, as much so as the navigable waters themselves are under the control of the federal government, upon which she may fix a light-boat certainly and anchor it permanently to the bottom. When, therefore, the state granted the riparian privileges mentioned in the statute referred she could grant no more than she possessed, and the plaintiff holds them subject to the right of the United States to regulate commerce as the state did. This light-house is in the determination of congress necessary for the commerce or navigation of the Chesapeake, was within their power to build ever since the adoption of the federal constitution, and the plaintiff has no claim for the use and occupation of the premises.

MORRIS, J., concurs.

SHUMACHER v. ST. LOUIS & S. F. R. Co.

(Circuit Court, W. D. Arkansas. June 8, 1889.)

1. NEGLIGENCE—GROSS NEGLIGENCE.

A party is guilty of gross negligence if he fails to exercise the care required of him by the law. This care required by the law is such care as is necessary under the circumstances to secure the protection of the lives, persons, and property of other persons.

2. SAME.

Gross negligence is the absence of the care necessary under the circumstances to secure protection to life, person, and property. The entire absence of that prudent and proper care necessary to render safe life, person, and property, and the failure to exercise such care, shows a conscious indifference to consequences, which makes a state of case in which there is constructive or legal willfulness.

3. SAME.

In a case where, as a probable consequence, the danger is very great, the greater the degree of care required. In such a case the law requires the very highest possible care to prevent an injury.

4. SAME—WILLFUL ACT.

An act characterized by a high degree of negligence, or, as it is familiarly called, "gross negligence," is the counterpart of a willful act. When the danger is very great, and the care to prevent disaster is very slight, or none at all, the neglect of a party becomes a willful act in law.

5. SAME.

The highest duty of man is to protect human life, or the person of a human being. That duty is never performed so as to escape responsibility until all possible care, under the circumstances, has been exercised.

6. SAME.

If a conductor in charge of a gravel train was aware of the peril of a party who was in a position of danger, or might by the exercise of ordinary care have discovered it in time to have avoided the injury to the party plaintiff, that he permitted the danger to be created; that he thereafter, and up to the time of the collision, failed to use the means within his power with a proper degree of care consistent with the safety of those on board the train to avoid the infliction of such injury to them as would spring as a probable, reasonable, and natural consequence from the act,—a state of case would be created which would indicate such a degree of indifference to the rights of others as to warrant the characterization of such conduct as recklessness of such a character as to leave no place for the doctrine of contributory negligence in the case.

7. SAME—CONTRIBUTORY NEGLIGENCE.

The fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or recklessly injuring him. An act may be legally willful without a direct intent. It may be so willful if reckless.

8. NEW TRIAL—EXCESSIVE VERDICT.

A court cannot interfere with a verdict on the ground of excessive damages, unless such damages are so excessively large and disproportionate as to warrant the inference that the jury was swayed by prejudice, preference, partiality, passion, or corruption.

9. NEGLIGENCE—PLEADING.

If an injury is charged in a complaint to have been negligently done, a plaintiff may prove any degree of negligence, although it may be such a degree as to make a case of constructive or legal willfulness.

10. SAME.

If a pleading is too narrow to cover the proof it can be widened, in a case where all the issues which will be embraced by the amended pleading were presented to the jury at the time of the trial.

11. SAME—AMENDMENT.

If neither the actual nature of the case, nor the real issue between the parties as it has been tried, would be changed by an amendment, the same should be permitted in furtherance of justice, even after verdict.

(*Syllabus by the Court.*)

At Law.

This is a suit against defendant for damages, plaintiff claiming in his original complaint that he was injured by the negligence and carelessness of defendant in not providing suitable and proper brakes for defendant's cars; that he was on a gravel train of defendant as an employé; that he was so injured by defendant, while its employés were engaged in switching cars, by reason of defective brakes with which said cars were supplied by defendant. In the amended supplemental complaint plaintiff says the injury to him was caused by the defendant through its agents, who so negligently and improperly managed the said train that the plaintiff was knocked off the same, and the cars of defendant ran over him. Plaintiff says it was the duty of the defendant to make and enforce suitable regulations as to the manner of switching and making up trains, and

regulating the speed thereof, and providing a sufficient number of brakemen to check and control said cars while switching, and at all other times, and to manage its train so as not to endanger the lives or limbs of its servants; that the defendant violated its duty to plaintiff in the said particulars, and the same wholly neglected and failed to perform; and that by said negligence of said defendant the plaintiff was run over and injured. The proof shows the wheels of a car ran over the left foot of plaintiff, injuring it so his left leg had to be finally amputated close up to his thigh. The plaintiff claimed \$15,000 damages. The jury rendered a verdict in his favor for \$8,000 damages. The defendant filed a motion for a new trial containing the following causes:

"Because the verdict is contrary to law; because the verdict is contrary to the evidence; because the verdict is contrary to both law and evidence; because of error of law in refusing to give instructions from one to nine, inclusive, as asked for by defendant; because the court erred in modifying instructions as asked for by the defendant, over the objection of defendant, and by giving the same as modified to the jury; because the court erred in giving instructions numbered from three to eleven, inclusive, as asked for by plaintiff, over the objections of defendant; because the verdict is not supported by the evidence."

George A. Grace and J. P. Byres, for plaintiff.

Cluyton, Brizzolara & Forrester, for defendant.

PARKER, J., (*after stating the facts as above.*) How did the employes of the defendant, or, more properly speaking, the conductor, as he was in charge of that train, and responsible for its management, make the switch at the time of the accident? The evidence shows that the engine and four loaded cars, they being loaded with gravel, were stopped on the main track. The engine was detached and run up the road to pass a switch, and when it was run past this switch it was backed and attached to 10 cars loaded with gravel which were standing on the switch. It was then run far enough up a steep grade of the track to pull the cars off the switch and place them on the main track. Then the engine was detached from the 10 cars, and they were let go down a steep grade until the front one of the 10 struck the rear one of the four left on the main track; and this was done with but one brakeman using one brake to check the increasing velocity of these 10 loaded gravel-cars. The witness Kinney says: "The cars came down pretty hard,—pretty fast,—and the further they came the faster they came, and struck pretty hard. I think it struck harder than usual. It was down grade. Was a steep grade. It is harder to hold on a down grade." The brakeman Gifford says: "Grade was steeper than he thought it was. Cars got start of me a little, and when I saw they were going to hit a little too hard I hallooed to the men 'Look out!'" He further says: "*Question.* You say you were going to strike harder than you ought to? *Answer.* Yes, sir; harder than cars ought to strike to be safe on making a coupling." In describing how the switching was done Gifford says: "Pulled ten loaded cars, loaded with gravel, off the switch, took them up a steep grade, cut the engine loose, and let them go down the grade." Again he says: "The grade

was too steep for him to stop the cars." Further he says: "I suppose it would have been of advantage to me if other brakemen had been there." "Q. If there had been enough men you could have held her down so as not to hurt anybody? A. Yes, sir. As a matter of fact there was not enough men to hold her down easy." Other witnesses corroborate Gifford as to the manner of making the switch, the nature of the grade, the number of brakemen on the train at the time, the rapidity with which the 10 cars moved after being detached from the engine, the force with which the cars came together, and how such a result could have been prevented. The conductor in charge of this train knew the nature of that grade. It was his duty to know that one brakeman managing one brake could not control that train of 10 loaded cars. It was the duty of the conductor to take these 10 cars off that switch and attach them to the four on the main track in a prudent and careful manner, having due regard to the safety of the property of the company, and above all to the safety of the lives and persons of the employes of the company, many of whom from this evidence were known by every employe of that company on that train,—from the conductor to the water-monkey,—to be on the open gravel-cars, which, from the testimony in this case, was recognized as a position of danger; and with that knowledge such a switch was made. In the light of this evidence, can a want of care in changing these cars be imputed to the conductor? Did he exercise the care that was necessary under the circumstances? If he did not, as was said by the supreme court in the case of *Railroad Co. v. Arms*, 91 U. S. 495, he was guilty of gross negligence. "That this means, after all, the absence of the care that was necessary under the circumstances." Indeed, I think this evidence would raise the presumption of a conscious indifference to consequences on the part of the conductor. It seems to me from the testimony that there was an entire absence of that prudent and proper care which, when there is a failure to exercise it, shows that conscious indifference to consequences which makes a state of case in which there is constructive or legal willfulness. The principle, in short, applicable in a case like this is that the plaintiff was guilty of imprudence in sitting where he did on the car, but that defendant, by exercising the degree of care required of it, could have prevented the injury; that the degree of care required is proportioned to the extent of the danger. If, as a probable consequence, the danger is very great, the greater the degree of care required. In such a case the law requires the very highest possible care to prevent an injury. An act characterized by a high degree of negligence, or, as it is familiarly called, "gross negligence," is the counterpart of a willful act. When the danger is very great, and the care to prevent disaster is very slight, or none at all, the neglect of a party becomes a willful act in law. The highest duty of man is to protect human life, or the person of a human being. That duty is never performed so as to escape responsibility until all possible care, under the circumstances, is exercised. The law says if the management of these cars, after the plaintiff was discovered on one of them in a position of danger in time to have prevented the injury, was characterized by gross and reckless neg-

ligence, it is equivalent to intentional mischief. *Railroad Co. v. Ledbetter's Adm'r*, 45 Ark. 246; Cooley, Torts, 810. This striking together of the cars, caused by the negligence or want of proper care on the part of the conductor, was an act which, under the circumstances, considering the proven situation of a number of men on the gravel-cars, would produce the result that was produced as a natural, probable, and ordinary consequence. If the conductor was guilty of such a degree of negligence as naturally led to such a result, in law he is held to have intended the result. This may appropriately be called "legal willfulness." The evidence, to my mind, shows that the switching was done in a careless and reckless manner. Did the conductor know of the dangerous position of plaintiff, or could he have known it by the exercise of such a reasonable degree of diligence as the circumstances required, in time to have prevented the injury? Did he know it, or could he have known it, long enough before the injury to have prevented it by the exercise of reasonable care in making the switch? The evidence of Gifford is that he did. On this subject he states that "Burk told the men they had better ride in the caboose; there was lots of room in there." "Question. When did Burk tell them that? Answer. While they were running between Tushka Homma and Talihina. Q. Did you ever tell these men? A. I don't know that I did, personally. He [meaning Shumacher] was on the end of the car when Burk told him. Q. Did he get off the end of the car? A. No, sir; I don't think he did. Q. He remained there? A. Yes, sir." By this testimony plaintiff was in this place of danger while they were running between Tushka Homma and Talihina. This was a considerable time before the injury was inflicted, and from the testimony he must have remained there until he was knocked off by the collision. The conductor saw him there. The conductor was about these cars or the caboose all the time. He knew the men were in the habit of riding on the gravel-cars. If he did not actually know that the plaintiff was on the end of the car, he had such good reason to know that he was there, or might be there, as to make it his duty to see whether he was there or not before such a reckless and careless act as switching these cars was done. His knowledge of the position of this plaintiff before the switching made such a state of case as that it became his duty to exercise due care to see if the plaintiff was in a position of danger. From this evidence he either knew of the perilous situation of the plaintiff, or by the exercise of ordinary care might have discovered it, in time to have avoided injuring him. It is apparent to my mind, from the facts, that he failed to use the means in his power with a proper degree of care to prevent injuring plaintiff, or any one else on the cars. This makes a case of constructive or legal intent, or a case where such conduct is equivalent to intentional mischief. *Guenther v. Railroad Co.*, 8 S. W. Rep. 375. The facts, in my judgment, show the injury to plaintiff could have been prevented by the use of ordinary care on the part of the conductor after he obtained knowledge of the position of plaintiff on the train, or after and while he had good reason to know his position of danger. He having such good reason to know this fact, it was his duty to

make an effort to know the real truth at the time of the switching. We are to consider that the conductor knew it to be a habit of many, if not all, of these men to ride on the open dirt-cars. This was a position of danger, as shown by all the evidence in this case. This conductor, under the law, could not change the position of these cars under such circumstances as described by the evidence without making some reasonable effort to learn the position of the men at the time the cars were taken from the switch and turned loose on a steep grade without being guilty of such negligence as would make the act willful in law. The act was one of great carelessness. It was an act which naturally, reasonably, and probably would produce just such a result as was produced. It was a result that could have been prevented by the exercise of that reasonable and ordinary care which should have characterized the act of the conductor as a reasonable and prudent man having in charge a very dangerous agency. The negligence of the conductor in this case commenced when the switching commenced in the manner that it did, and it continued until the injury was inflicted. It is claimed that warning was given of the approaching danger. It was, but it was too late. I do not think it can be gathered from any of the evidence that the warning was given until after the cars had been cut loose from the engine, and started down the steep grade, as the witnesses call it. Mr. Kinney says: "This hallooing was when the cars had not much more than started down the grade." Take all the evidence together, and it shows it was after they had started, and gone some distance down the grade, before the hallooing was done. This did not break in on the state of negligence on the part of the conductor that had commenced, then existed, and continued up to the time of the injury of plaintiff.

On a careful review of the evidence in this case, I conclude the place on the car that plaintiff fell from was a position of danger. The conductor was aware of Shumacher's presence on the car, and only a short time before, if not at the very time of the injury, he knew of his presence on the very spot from which he fell, or had good reason to have such knowledge; that any place on the car was a place of danger; that Shumacher was guilty of negligence in being where he was; that the injury to plaintiff could have been prevented by the use of ordinary care on the part of the conductor, who was the man in charge of the train at that time, and who had the control of plaintiff and all others on that train while it was in transit from the gravel-pit to where its load of gravel was discharged; that he failed to exercise this care. This care, under the circumstances, he must exercise. *Sullivan v. Railroad Co.*, 10 S. W. Rep. 852. The conductor was aware of the peril of plaintiff, or might, by the exercise of ordinary care, have discovered it in time to have avoided the injury to plaintiff. He permitted the danger to be created. He thereafter, and up to the time of the collision, failed to use the means within his power with a proper degree of care consistent with the safety of those on board the train to avoid the infliction of such injury to them as would spring as a probable and natural consequence from the act. This state of case indicated such a degree of indifference to

the rights of others as to warrant the characterization of such conduct as recklessness of such a character as to leave no place for the doctrine of "contributory negligence" in the case. The fact that one has carelessly put himself in a place of danger is never an excuse for another purposely or recklessly injuring him. Cooley, Torts, 811. An act may be legally willful without a direct intent. It may be so willful if reckless. It seems to me that the facts referred to above, and the legal principles enunciated, entirely justify the court in giving the instructions asked for by the defendant, as modified, and in giving the instruction on its own motion, defining "willfully or intentionally," which is as follows:

"'Willfully or intentionally,' as used in the instructions, means either a specific purpose to do the plaintiff an injury, or a grossly reckless management of the car or cars after plaintiff's position on the car was discovered by defendant's agent, the conductor. To make the management of the car or cars a grossly reckless management the position of plaintiff on the car must have been known to the conductor sufficiently long before the injury to have enabled him, and those under him in the management of the train, to have prevented the injury. If such management was grossly reckless, after plaintiff's position was discovered in time to have prevented the injury, such recklessness is equivalent to willful or intentional mischief."

The court, in the light of the evidence, was justified in giving such instructions as were asked by plaintiff on the subject of the injury being produced by an act that was in law willful. Of the other instructions in the case I think the defendant has no right to complain. These given at the request of its attorneys are more favorable than I think the facts warrant, but it cannot complain on this ground. I was at one time inclined to the opinion that the damages were excessive. Whether they may be or not, before a court can interfere with a verdict on that ground the same must be so excessively large and disproportionate as to warrant the inference that the jury were swayed by prejudice, preference, partiality, passion, or corruption. *St. Martin v. Desnoyer*, 61 Amer. Dec. 494; *Schlencker v. Risley*, 38 Amer. Dec. 100, note, 106. It is complained by defendant that the theory of the case presented by the instructions, that the act which injured the plaintiff was legally willful, was not alleged in the complaint. It is charged in the complaint to have been a negligent act. I do not think it necessary to specifically allege the degree of negligence. When it is charged to have been a negligent act the defendant must take notice that the plaintiff can rely upon his right to prove negligence of any degree. It is now well settled, as I believe, by the English cases, and generally by the American courts, that a plaintiff may recover, notwithstanding his own negligence exposed him to the risk of injury, if the defendant, after becoming actually aware of the plaintiff's danger, or if, under the circumstances, it was defendant's duty to know it, failed to use ordinary care to avoid injuring him. Such a case is one of legal willful injury. *Shear. & R. Neg.* 36.

I think all the facts out of which spring the true legal aspects of this case are alleged; but, if not, after all the evidence has been heard, the case submitted to the jury, a verdict rendered, and the right result, as

shown by the law and the evidence, has been reached, in view of the liberal doctrine of amendments which in the interest of justice now prevails in the courts, I think a court would hardly be justified in setting aside a verdict on that ground. The purpose of all trials is to secure a just result,—to arrive at an honest finding. To do this the federal courts put aside all the mere technicalities of the law. They are brushed out of the way as so many cobwebs. If the pleading is too narrow to cover the proof, it can be widened, in a case where all the issues which will be embraced by the amended pleading were presented to the jury. Proof was offered on them, and the law covering and defining these issues was fully presented. In my judgment neither the actual nature of the case nor the real issue between the parties, as it has been tried, would be changed by an amendment. In such a case, if necessary, it ought to be made, even after verdict, in furtherance of justice. *Bamberger v. Terry*, 103 U. S. 40. After a careful consideration of the case I am brought to the conclusion that substantial justice has been done the parties; that the real merits of the controversy have been reached, and upon these grounds the verdict should stand, and judgment should be entered on same. Motion for a new trial will be overruled.

BEASLEY v. WESTERN UNION TEL. CO.

(Circuit Court, W. D. Texas, San Antonio Div. May 29, 1889.)

1. TELEGRAPH COMPANIES—NEGLIGENCE.

If a message is written by the sender on a telegraphic blank containing stipulations restrictive of the right of recovery in case of negligence in the transmission of the message, he is bound by such stipulations whether he reads them or not; no fraud or imposition being used to prevent him from acquainting himself with their purport.

2. SAME.

A stipulation requiring a claim for damages for such negligence to be presented in writing within 30 days is valid, and, no reason being shown for failing to present it, no recovery can be had.

3. SAME—AUTHORITY OF AGENT.

Although a telegraph company's rules prohibit its agents from receiving messages written otherwise than on its printed blanks, a sender ignorant of the prohibition is not bound thereby, and hence where the agent, without the sender's request, copies a message written on ordinary paper onto a blank, the sender will not be bound by the stipulations in the blank.

4. SAME.

A telegraph company is held only to reasonable care and diligence in the transmission of messages, and if stress of weather prevents their being sent by the usual and most direct route, the company is not chargeable with negligence by selecting the next best available route.

5. SAME.

It is no excuse for delay in transmitting a message that an agent at an intermediate point was in doubt as to its proper destination, the message being addressed to "Wallace" instead of "Wallis," there being no place in the state of the former name, if he knew of the existence of the latter town, and failed to send it to that point.

6. SAME.

If the error in the name was chargeable to the agent who received the message from the sender, the company would be liable, regardless of the diligence used by the agent at the intermediate office to discover the correct destination.

7. SAME.

Where the message alleged to have been unreasonably delayed contained information of the probable death of plaintiff's wife, and the only means by which, if the dispatch had been duly received, plaintiff could have arrived before her death was by a train which passed at a distance of 15 miles from the point to which the message should have been sent, within 2 hours and 15 minutes after the earliest time at which he could have received the message, it is for the jury to decide whether he could have reached her while living, and therefore whether he was injured by the delay.

8. SAME—DAMAGES.

The recovery in such a case is measured by a proper compensation for the disappointment and anguish suffered by plaintiff's inability to be with his wife before her death, no punitive damages being allowed, nor should the grief naturally arising from the wife's death enter into the determination of the amount awarded.

At Law. Action for damages.

Tarleton & Kellar, for plaintiff.

John A. & N. O. Green, for defendant.

MAXEY, J., (*charging jury*.) The plaintiff, Robert Beasley, brings this suit to recover damages of the defendant for the failure to deliver a telegram to him at Wallis, a station on the San Antonio & Arkansas Pass Railway. The message, alleged in the petition to have been delivered by Miss Annie Melas, as agent of plaintiff, to the defendant's operator at San Antonio for transmission, is set out as follows:

"SAN ANTONIO, TEXAS, January 11, 1888.

"*To Robert Beasley, News Agent, S. A. & A. P. Ry. train, Wallis, Texas:*

"Dell is worse, come at once.

[Signed]

"SISTER ANNIE."

The telegram has reference to the wife of plaintiff, who (the wife) was then in a critical condition, and who died on the morning of the 11th, and, as stated by Miss Melas, between the hours of 11 and 12 o'clock. Referring to that telegram, it is alleged by the plaintiff "that said message was written by said Annie Melas upon a half sheet of common commercial note paper, and when the same was delivered, as aforesaid, to the agent of defendant, he, the said agent, of his own volition, and without the request of the said Annie Melas, copied, or rewrote, said message upon one of the telegraphic blanks of said defendant." It is insisted, on the contrary, by the defendant that Miss Melas herself wrote the body of the message, including the signature, and that at her request the agent of defendant, Towhey, merely inserted the address, and that Miss Melas so wrote the message on one of the printed forms or blanks which are in general use by the defendant company; the same being as follows:

Form No. 46.

THE WESTERN UNION TELEGRAPH COMPANY.

NIGHT MESSAGE.

The business of telegraphing is subject to errors and delays, arising from causes which cannot at all times be guarded against, including sometimes negligence of serv-

ants and agents whom it is necessary to employ. Errors and delays may be prevented by repetition for which, during the day, half price extra is charged in addition to the full tariff rates.

The Western Union Telegraph Company will receive messages, to be sent without repetition during the night, for delivery not earlier than the morning of the next ensuing business day at reduced rates, but in no case for less than twenty-five cents tolls for a single message, and upon the express condition that the sender will agree that he will not claim damages for errors or delays or for non-delivery of such messages, happening from any cause, beyond a sum equal to ten times the amount paid for transmission; and that no claim for damages shall be valid unless presented in writing within thirty days after sending the message.

Messages will be delivered free within the established free delivery limits of the terminal office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery, the sender hereby guaranteeing payment thereof.

The Company will be responsible to the limit of its lines only, for messages destined beyond, but will act as the sender's agent to deliver the message to connecting companies or carriers, if desired, without charge and without liability.

THOS. T. ECKERT, General Manager.

NORVIN GREEN, President.

<i>Receiver's No.</i>	<i>Time Filed.</i>	<i>Check.</i>
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Send the following night message, subject to the above terms, which are hereby agreed to. }

....., 188

To.....

READ THE NOTICE AND AGREEMENT AT THE TOP.

You observe a clause in the printed form to the effect "that no claim for damages shall be valid unless presented in writing within thirty days after sending the message;" and the evidence, without contradiction, clearly showing that no claim for damages was made until the following July, about six months after the death of the wife, the defendant contends that the suit is not maintainable. There is evidence tending to show that Miss Melas did not read the printed matter of the company's form, and was ignorant of its contents. Whether Miss Melas wrote the message or the body of the message on the printed form furnished by the defendant is a question of fact which you will determine from an examination of all the facts and circumstances in evidence. If she did thus write the message,—if she wrote it on a form containing the stipulation

which I have read to you as to the time for presenting a claim for damages,—there are certain principles of law bearing upon that question which it becomes necessary for me to call to your attention.

1. It is immaterial whether Miss Melas read the printed matter or not. Upon this point the supreme court of this state say:

“The sound and practical rule of law in such cases is that in the absence of fraud or imposition a party to a contract, which has been voluntarily signed and executed by him, with full opportunity for information as to its contents, cannot avoid it on the ground of his own negligence or omission to read it.” *Womack v. Telegraph Co.*, 58 Tex. 179.

In the same connection the court quote the following extract from an opinion delivered by the supreme court of Michigan:

“This printed matter on the face of the paper could hardly escape the attention of any one not naturally or purposely blind who should write a message upon the paper. He must at least know that there is some printed matter on the face of the paper, and he must be held to know that it had been placed there for some purpose connected with the message. It is therefore no excuse for him to say he did not read the printed matter before his eyes. It was gross negligence on his part if he did not. The printed blank, before the message was written upon it, was a general proposition to all persons of the terms and conditions upon which messages would be sent. By writing the message under it, signing and delivering it for transmission, the plaintiff below accepted the proposition, and it became a contract upon those terms and conditions.” *Id.* 180; citing *Telegraph Co. v. Carew*, 15 Mich. 536. See, also, *Telegraph Co. v. Neill*, 57 Tex. 285 *et seq.*

I do not say, gentlemen, that Miss Melas was guilty of gross negligence in failing to inform herself of the contents of the printed form, but her want of knowledge, under the circumstances, is due to her failure to avail herself of the opportunity she had of obtaining the information, and she and the plaintiff, for whom she was acting, are chargeable with knowledge of what the printed form contained.

2. As before stated to you, the printed form provides that no claim for damages, unless presented in writing within 30 days, shall be valid. Referring to a stipulation of that character in a printed telegraphic blank form, the supreme court of this state, speaking through Mr. Justice STAYTON, say: “Agreements of this character are held to violate no rule based on public policy, and to be reasonable and obligatory.” *Telegraph Co. v. Rains*, 63 Tex. 28. The testimony in this case shows that the plaintiff, at the time of the death of his wife, resided in San Antonio; that his wife died on the 11th of January; that he reached his home on the night of the same day; and that within three or four days thereafter he was shown by his sister-in-law the message which she says she delivered to Towhey. He therefore had ample time to present his claim for damages to the defendant, and no reason is disclosed or attempted to be shown by the testimony for his failure to present it within the 30 days. You are instructed, therefore, that if Miss Melas wrote the body of the message on the printed form, to which you have been referred, and requested Towhey to write the address, then the plaintiff is not entitled to maintain this suit, and you will find in favor of the defendant. If, however, you con-

clude from the testimony that, as alleged in the petition, Miss Melas delivered to Towhey a message on note paper, addressed to plaintiff at Wallis, for transmission, and that Miss Melas and Towhey made an agreement for transmitting the message, so delivered by her, for the sum of 30 cents, and that Towhey afterwards, of his own volition, and without request of Miss Melas, copied the message on a printed form of the defendant, without directing her attention to what the form contained, then the plaintiff would not be bound by the conditions and stipulations of the printed matter found on the form; and, in that event, you will proceed further and consider other questions affecting the plaintiff's right to recover.

In connection with the delivery of the message by Miss Melas and its receipt by Towhey your attention will be directed to certain printed rules and regulations of the defendant introduced in evidence. Counsel for defendant insists that those rules prohibit its agents (operators) from receiving a message unless it be written on a company printed blank. That may be true, and yet the prohibition would not prejudicially affect a third party, who had, in ignorance of the rules, made a contract or agreement with an agent for sending a message. If an authorized agent of the defendant—and you are instructed that Towhey had full power to act for the defendant in contracting for the transmission of messages (*Telegraph Co. v. Broesche*, 10 S. W. Rep. 735, 736)—receives a message from a person written on note or other kind of paper, and agrees for a stipulated consideration to transmit the message to its destination, the defendant would be bound by such agreement; and the fact that the message had not been written on a printed blank would be immaterial, unless the sender had actual notice of the prohibitory rule. If the rule of law were otherwise, a telegraph company could effectually escape liability for the negligence of its agents by merely providing them with printed rules. I cannot adopt that view of the law, so repugnant in my judgment to reason, and so contrary to sound public policy; and, if you find that Towhey did agree with Miss Melas to send the message in manner and form as claimed in the petition, it will be your duty to determine whether the defendant exercised due care and diligence in the effort made to transmit it to the plaintiff.

Touching the duties which telegraph companies owe to the public, and the degree of care required of them in the performance of their duties, the supreme court of this state use this language:

"The great weight of authority, and which, from the nature of the employment of telegraph companies, seems founded upon reason, is that, though in some essential particulars they partake of the character of common carriers, they are not strictly such, and should not be held to the same degree of strict responsibility. * * * As our legislature, however, has delegated to telegraph companies the power to exercise the right of eminent domain, and as their employment is *quasi* public, they should so far be governed by the law applicable to common carriers that the general duty devolves upon them to serve the public and act impartially and in good faith to all alike, and to send messages in the order received. But they are not, as is the general rule with common carriers, insurers, simply by reason of their occupation, but are held

only to a reasonable degree of care and diligence in proportion to the degree of responsibility." *Telegraph Co. v. Neill*, 57 Tex. 288.

It was therefore the duty of defendant's agents to exercise a reasonable degree of care and diligence, considering the importance and urgency of the message intrusted to them, in sending the telegram forward to the plaintiff. Was such diligence exercised by Towhey and the agents at Dallas and Galveston? Your attention is drawn to the places named particularly for the reason that, because of the prevalence of "sleet storms" at that time, the direct line connecting San Antonio and Galveston was out of repair, and it thus became necessary for the defendant to transmit the message by the more circuitous Dallas route. No negligence can be imputed to the defendant, growing out of the impaired condition of the wires between San Antonio and Galveston, as it resulted from causes altogether beyond its control.

But the question remains for you to consider, was due diligence used to deliver the message to the plaintiff via the Dallas line? The message, you will remember from the testimony, was delivered to the agent, Towhey, at San Antonio, Miss Melas testifies, between 12 and 1 o'clock, 10th or 11th of January, and Towhey, about 1:35 A. M. on the 11th. It is shown by the testimony of the defendant that the message was received at Galveston at 2:15 A. M. on the 11th, and delayed there until 10:41 A. M. of that day. To account for the delay at Galveston it is insisted by defendant that the telegram was addressed to plaintiff at "Wallace," when it should have been "Wallis," and, there being no such place in the state as "Wallace," it became necessary for the Galveston office to ascertain from the office at San Antonio the point or place to which the message should be transmitted. And defendant's counsel further insist that, owing to the lateness of the hour at which the message was received at Galveston, and the crowded business condition of the wires, the inquiry could not be made of the San Antonio office until the next morning. Now, as to the misspelling of the name of Wallis you should regard that as immaterial, if the defendant's agents, by reasonable diligence, could have seasonably transmitted the message to the plaintiff at the place spelt and known as "Wallis." Although there may not have been a place in the state spelt "Wallace," yet the two names are pronounced alike,—the pronunciation is the same, the only difference being in the terminal letters of the names,—and if the agents knew of "Wallis" it was their duty to send the message to that point, and, failing to reach the party to whom it was addressed, then they should have made further inquiry as to the proper place. Again, if Towhey, as the plaintiff contends, was responsible for the mistake, the misspelling of the name,—and of that you must judge from considering the testimony,—then his mistake would be chargeable to the defendant, and in that event it would not be necessary to inquire into the conduct of the agents at Galveston, for although they may have exercised the highest degree of diligence, still, if the delay at Galveston originated in the fault and negligence of the San Antonio agent, the defendant would be liable to the plaintiff for any injuries which may have resulted directly from that negligence. Whether due diligence was ex-

exercised by defendant's agents is a question solely for you to determine, and in deliberating upon that question you should consider all the facts and circumstances in evidence, and come to such conclusion as will be just, fair, and reasonable as between the parties to the suit. If the defendant, through its agents, exercised reasonable care and diligence in the performance of the duty which it owed the plaintiff in respect of transmitting the message to him, it would not be liable in this suit, although the message may not have been delivered at Wallis in time for the plaintiff to have reached his home and been with his wife before her death. If, however, it was negligent in the performance of its duty, you will inquire whether such negligence caused or resulted in damage to the plaintiff. It is not every act of negligence that gives a right of action. Upon this point the rule is thus stated by the supreme court of this state:

"It may be laid down as a true proposition that bare negligence, unproductive of damage to another, will not give a right of action; negligence causing damage will do so." *Railway Co. v. Levy*, 59 Tex. 567; *Telegraph Co. v. Broesche*, 10 S. W. Rep. 736; *Womack v. Telegraph Co.*, 58 Tex. 181.

Now, were the injury and damage of which the plaintiff complains the direct result of negligence on the part of the defendant's agents? Upon this branch of the case it will be necessary for you to carefully look into the evidence. The defendant left San Antonio on the 10th of January for Wallis, and reached the latter place at 3:20 A. M. on the 11th. His wife died, according to the testimony of Miss Melas, between 11 and 12 o'clock on the morning of the 11th. There was only one train by which the plaintiff, as he himself testifies, could have reached his wife before her death, and that was the Southern Pacific train which passed Eagle Lake at about 5:35 on the morning of the 11th, and that train reached San Antonio at 11:30 A. M. of that day. Wallis is not on the line of the Southern Pacific road and is 15 miles distant from Eagle Lake. Now, to place the case in the most favorable attitude for the plaintiff, let it be assumed that the telegram was delivered to him at Wallis at 3:20 A. M. of the 11th of January, immediately upon his arrival there. Could he then have procured a conveyance of any kind and reached Eagle Lake in time to have taken the Southern Pacific train passing that point for San Antonio? If he could, and he would have thus been enabled to reach his wife before her death, and there was negligence on the part of the defendant's agents in failing to transmit the message to Wallis, as above defined in this charge, then the plaintiff would be entitled to recover. But if the plaintiff could not have reached Eagle Lake in time for said Southern Pacific train, assuming the telegram to have been delivered at Wallis at 3:20 A. M. of the 11th, then the plaintiff should not recover in this suit, for, in that case, the injury of which he complains could not have resulted from defendant's negligence, notwithstanding it may not have exercised due diligence in the transmission of the message.

If, in view of the evidence and charge of the court, you find a verdict for the plaintiff, you will award him such sum as will fairly and reasonably compensate him for the disappointment, grief, and mental anguish which he may have suffered on account of his failure to be present with

his wife before her death. *Stuart v. Telegraph Co.*, 66 Tex. 580 *et seq.*; *Telegraph Co. v. Broesche*, 10 S. W. Rep. 736. Under the facts of this case no exemplary or punitive damages are recoverable.

It is my duty to say to you, in reference to the question of damages, that great caution ought to be observed in the trial of cases like this, as it will be so easy and natural to confound the corroding grief occasioned by the loss of a wife with the disappointment and mental anguish occasioned by the fault or negligence of the company; for it is only the latter for which a recovery may be had. *So Relle v. Telegraph Co.*, 55 Tex. 313, 314.

Under the instructions and the evidence, you will render such a verdict, gentlemen, as you may deem right and proper.

SKINNER v. ATCHISON, T. & S. F. R. Co.

(Circuit Court, N. D. Illinois. June 20, 1889.)

CARRIERS OF PASSENGERS—ACCIDENTS—RISKS ASSUMED.

A passenger on a railway train, who, while ascending the steps of a car on the invitation of the railway company's agent, is injured by the fall of a servant of the company against her, the fall being caused by accidentally slipping while standing on the rails of the platforms of two cars, engaged in the performance of his duty, cannot recover from the company therefor, as there is no negligence, and the risk of such an accident is assumed by the passenger.

At Law. On motion to direct verdict.

On October 13, 1887, plaintiff, a lady 45 years of age, was a passenger over the defendant's railroad, traveling from Kansas City to Wellington, Kan. At Newton, an intermediate station, she was obliged to alight and change cars. Being notified by the station agent that the train for Wellington was ready, she started to take her place in the passenger coach. Her testimony was that as she ascended the steps she saw a brakeman suddenly climb the rails of the car platform, as if to adjust the bell-rope, and that almost simultaneously with his ascending the rails he fell backward upon her, crushing her left hand with his foot, and inflicting other serious injuries. A witness for plaintiff testified that he preceded the plaintiff up the steps, and that the brakeman was standing upon the rails, adjusting the bell-rope, when the witness began to ascend the steps. This witness' attention was first attracted by a cry from the plaintiff, and, turning quickly around, he saw the brakeman in the act of falling. Two other witnesses for the plaintiff saw the brakeman about the instant he came in contact with the plaintiff. One of them had not noticed the brakeman before, the other testifying that he saw the brakeman suddenly appear, (but could not tell whence,) and quickly climb the rails in the manner testified to by the plaintiff. At the close of the plaintiff's case defendant moved the court to exclude the evidence. This motion was overruled *pro forma*, and the defendant introduced the evidence of the

brakeman, who testified that in the course of his duty, and in the usual and ordinary method, he was adjusting the bell-rope while standing, not upon the rail at the outer edge of the platform, as plaintiff's witnesses testified, but upon the two rails attached to the end of the body of the car, one on each side of the door. While in this position, his legs spanning the opening of the door, he was jostled or run into by some one from within the car; his right foot was pushed off from the rail, and in the effort to regain his balance he fell upon the plaintiff. At the conclusion of this evidence defendant renewed the motion for the court to direct a verdict for the defendant.

Moses & Newman and Frank Ives, for plaintiff.

Williams, Holt & Wheeler, for defendant.

JENKINS, J., (*orally.*) In disposing of this motion the court is obliged to consider the evidence in the light that is most favorable to the plaintiff, and give to the plaintiff the benefit of all the inferences from the facts which the jury would have a right to draw. The facts are within small compass. The plaintiff was a passenger, and was entitled to the protection of a passenger from the defendant, and was entitled from the defendant to the highest degree of practical skill and care to protect her from injury. So far as the evidence discloses, everything connected with the train was in perfect order. She was ascending the steps of the car, lawfully, upon invitation from the official who supervised the station where the train was standing, and upon reaching the second step she was injured by the falling of this brakeman, who, in the discharge of his duty, had ascended the rail for the purpose of coupling the bell-rope. The court must assume that the version which the plaintiff gives of that transaction is the correct one, and that the brakeman had one foot upon the forward rail of one car and the other foot upon the rear rail of the other car, stretched across. That seems to be the fact that the plaintiff's testimony tends to establish. The court must also assume that while in the discharge of that duty, so situated, he accidentally slipped, fell, and injured the plaintiff. The declaration is founded on the careless and negligent manner in which the brakeman discharged his duty, and the only two questions in the case to be determined upon this motion are—*First*, whether the company failed to discharge the duty which it owed to the plaintiff as a passenger; and, *second*, whether the brakeman was negligent in the discharge of the duty committed to his care. The defendant owed, as I have said, care and protection to the plaintiff,—such care and protection as, in the ordinary management and operation of trains, the highest degree of skill and care could exercise properly to protect her. I have carefully considered and reflected upon the evidence and upon the duty which this defendant owed, and the court is unable to see wherein the negligence of the defendant consisted. If the facts occurred as related by the brakeman, he was discharging his duty in the ordinary, usual, and customary mode, and his foot was pushed off by a passenger or some one from the interior of the car. If that were so, then he was simply the medium by which injury was inflicted upon

the plaintiff through the act of some one else, and there would be no more liability upon the part of the company than if this passenger had rushed out upon the platform against the plaintiff, and thrown her down, in which case, I take it, there could be no question of liability on the part of the company. If, on the other hand, standing upon the two rails, as the plaintiff's witnesses have testified, he accidentally slipped and fell against the plaintiff, there is then no negligence proven either upon the part of the company or upon the part of the brakeman. It is one of those accidents that will happen. It is unusual, and of which every traveler assumes the risk when it has not been produced by the act of the company, or the omission of its duty, or by the negligent act of its agents. The court has been able to discover in this case no ground of legal liability upon the part of the defendant, and, however much it regrets the injury which the plaintiff has suffered, it could not discharge its duty under the law by permitting the case to go to the jury, because should there be a verdict for the plaintiff it would be the duty of the court to set it aside.

Plaintiff moved for leave to take a nonsuit, which was allowed.

BERNHEIMER *v.* ROBERTSON, Collector of Customs.

(*Circuit Court, S. D. New York. April 10, 1889.*)

1. CUSTOMS DUTIES—ACTION TO RECOVER.

The provision of Schedule K of the tariff act of March 3, 1883, for "all manufactures of wool of every description made wholly or in part of wool." (Heyl. Dig. par. 362.) covers all manufactures of wool whether they were made from wool by one step or by two, and covers all articles manufactured of wool which are not elsewhere provided for in the schedule.

2. SAME—CONSTRUCTION OF STATUTE.

"Worsted coatings," or "cotton backed worsteds," being goods of which the face is of worsted and the back of cotton warp and shoddy filling, are dutiable as "manufactures of wool of every description composed wholly or in part of wool," under the provision therefor in Schedule K of the tariff act of March 3, 1883, (Heyl. Dig. par. 362.) and not as manufactures of every description composed wholly or in part of worsted, (except such as are composed in part of wool,) under the succeeding provision of the same schedule in the act, (Heyl. Dig. par. 363.)

At Law.

This was an action against a former collector of the port of New York to recover duties alleged to have been exacted in excess of the lawful rate on certain goods known in trade as "worsted coatings" or "cotton backed worsteds." The evidence showed that these goods had a face of worsted and a back of cotton warp and shoddy filling; that shoddy was a substance made by tearing into shreds woolen or worsted rags; and that the goods were worth less than 80 cents per pound. The goods had been returned by the appraiser as "manufactures of wool, worsted, and cot-

ton," and the collector had classified them as "manufactures of wool," and assessed the duties accordingly. The importer claimed in his protest that the goods were "manufactures of worsted," and so dutiable. At the close of plaintiff's testimony counsel for defendant moved that a verdict be directed for defendant.

Charles Curie, Edwin B. Smith, and Stephen G. Clarke, for plaintiff.

Stephen A. Walker, U. S. Atty., and W. Wickham Smith, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) I shall not determine this case upon any close analysis of mere phrase. I cannot escape the conviction that in the 362d paragraph it was the intention of congress to cover, and that they have used the proper words for covering, generally and comprehensively, manufactures of wool, whether they were made of wool by one step or by two, and that from that general class are to be differentiated only such other cases as they elsewhere refer to. In *Elliott v. Swartwout*, 10 Pet. 137, there was such differentiation by the express use of the words "manufactures of worsted." The use of that phraseology, coupled with the testimony in that case, as to the trade meaning of worsted, enabled the court to find in it provision for another class of articles. Here, however, there is nothing in the tariff act covering the goods now before us except the provision as to manufactures of every description composed wholly or in part of wool. Inasmuch as there is no differentiation of any manufactures of shoddy, waste, or flocks, I am led to the conclusion that manufactures into which the last-named articles enter are enumerated only under paragraph 362. I am therefore constrained to direct a verdict for the defendant.

BULLOCK v. MAGONE, Collector of Customs.

(*Circuit Court, S. D. New York. May 20, 1889.*)

1. CUSTOMS DUTIES—ACTION TO RECOVER.

The expense of changing goods from one condition to another is a part of their dutiable value, and is not one of the charges made non-dutiable by section 7 of the tariff act of March 3, 1883.

2. SAME—CONSTRUCTION OF STATUTE.

Where an importer has caused rice purchased abroad by him to be ground before shipment into granules of sufficient fineness to entitle it, under the rulings of the treasury department, to be entered at a lower rate of duty than unground rice, the cost of granulation forms part of the dutiable value of the article, and cannot be deducted therefrom by the importer as a non-dutiable charge.

At Law.

This was an action against the collector of the port of New York to recover duties alleged to have been improperly exacted on certain granulated rice. It appeared from the testimony that the secretary of the

treasury had decided that when cleaned rice was ground to a certain degree of fineness it should be entitled to entry at a duty of 20 per cent., as rice-meal, but that, if the grains were larger than the prescribed standard, the article should be dutiable as cleaned rice, at 2 cents per pound. The plaintiff had imported rice from Copenhagen, and, solely for the purpose of getting advantage of the lower rate of duty, had caused the rice to be ground before shipment to the degree of fineness of the standard fixed by the secretary. The collector had exacted duty upon the value of the article in the condition in which it was imported, including therein the cost of granulation. The importer protested against the exaction, and claimed that the cost of granulation should be deducted from the value, inasmuch as the granulation had been done solely in deference to the rulings of the treasury department, and its cost was a non-dutiable charge, under section 7 of the tariff act of March 3, 1883. At the close of plaintiff's case defendant's counsel moved that a verdict be directed in his favor.

Joshua M. Fiero and Green B. Raum, for plaintiff.

Stephen A. Walker, U. S. Atty., and *W. Wickham Smith*, Asst. U. S. Atty., for defendant.

LACOMBE, J., (*orally*.) The difficulty with this case is that the expense which has been incurred is not an expense that had anything to do with the shipment or transportation of the article to the United States. It is an expense which the importer for his own pleasure has put upon the article that he bought, and it enters into the value of the article when it leaves the other side. Congress in the act of 1883 has provided that those expenses which, before shipment, were incurred in order to get the article on shipboard in such proper condition for transportation as to conform to the customs of trade in that regard should be excluded from the valuation. The expenses of packing, boxes, cartons, etc., all of which were essential elements in the process of shipment and transportation, are thus excluded under the act of 1883, but this case presents no element of that kind at all. If, for any reason of his own, the importer decided to color these grains some particular color, that would have nothing to do with their transportation, nor has his making them larger or smaller, so long as such charge does not operate to facilitate such transport. I do not see that the charge falls within the kind of charges that are covered by the amendment of 1883, but that it is fairly to be considered as entering into the value of the article. I shall therefore direct a verdict for the defendant.

*In re CARRIER et al.**(District Court, W. D. Pennsylvania. June 28, 1889.)***1. BANKRUPTCY—THE ASSIGNEE—ACCOUNTING.**

Where the account of an assignee in bankruptcy, at the instance of his successor, was referred to a register to audit, and, if necessary, to restate it, and there was a full hearing before the register, who did not undertake to restate the account until after the lapse of nearly eight years, *held* that, while such inexcusable delay might not operate as an abandonment of the proceeding, yet the court would not sustain any surcharge unless the accountant's liability was indubitably established, and every reasonable presumption would be made in his favor.

2. SAME—JOINT DEBTORS—SET-OFF.

Under the bankrupt law of 1867, where one of two joint debtors becomes bankrupt, the creditor may set off the debt against his separate indebtedness to the bankrupt.

3. SAME—SALE AND PURCHASE BY ASSIGNEE IN HIS OWN RIGHT IN STATE COURT.

Where real estate of a bankrupt came to his assignee in bankruptcy incumbered with prior liens exceeding its value, the assignee himself being one of the judgment-lien creditors, it was competent for the bankrupt court to grant to the assignee leave to proceed in the state court to sell the property on his judgment, and to bid in his individual right at the sheriff's sale.

4. SAME.

Where, in the exercise of such authority, the assignee purchased at the sheriff's sale in his own right and with his own money, and afterwards sold the property at an advance, he is not chargeable in his account as assignee with the profit he thus made, no fraud or misconduct being imputable to him, and the sheriff's sale having been conducted openly and fairly.

In Bankruptcy. *Sur* exceptions to the register's report upon the account of Richard Arthurs, late assignee.

Jenks & Clark, Miller & McBride, and H. C. Campbell, for exceptants.

Levi Bird Duff and W. S. Purviance, for report.

ACHESON, J. John Carrier and Andrew F. Baum were adjudged bankrupts on June 22, 1874, and on the 28th day of the succeeding September James Bredin, J. M. Wilcoxon, and Gilles McGregor became their assignees in bankruptcy. These assignees were successively discharged, and on February 19, 1877, Richard Arthurs was appointed the assignee. He acted in that capacity until April 12, 1880, when, upon his own petition, he was discharged from the trust, and Levi Bird Duff was then appointed assignee. On August 5, 1880, Arthurs filed his final account in court, and on November 11, 1880, he filed with the register a similar account, but in a more formal shape. The account showed a balance of \$1,275.78 in the hands of the accountant. Shortly thereafter he honored a draft for \$1,000 which his successor drew on him; and thus there then remained in his hands, apparently, the small balance of \$275.78 only. On March 4, 1881, the new assignee presented his petition to the court, setting forth that he had reason to believe that Arthurs' account was incorrect, and he annexed to his petition specifications of objection thereto; and thereupon, at his instance, the court made an order referring the account and objections to the register, who was directed

to examine the same, and to audit, and, if necessary, to restate the account. Soon after the date of this order the register proceeded thereunder. Mr. Arthurs was called before him, and was subjected to a rigid examination in respect to his account and all the transactions connected with or involved in the administration of his trust. His disclosures appear to me to have been frank and full. A number of other witnesses were examined, and a large amount of documentary evidence was submitted. The taking of testimony in the matter ended on October 18, 1881, and the register was then fully advised as to all the facts, as was also the present assignee, who had instituted and conducted the investigation.

If a proper case was made out for surcharging the accountant, such action should have been taken promptly. This was imperatively required by the policy of the bankrupt law, which contemplated that two years were a reasonable period for the settlement of the estates of bankrupts. *Bailey v. Glover*, 21 Wall. 342, 347. But here nearly eight years elapsed before the register undertook to restate Mr. Arthurs' account, for it was not until April 5, 1889, that he filed his report surcharging the accountant with large sums, the balance reported against him being \$26,604.46. Of this unexplained laches the accountant justly complains. He had, indeed, good right to suppose that the attempt to surcharge his account had been abandoned. But, while such may not be the legal conclusion deducible from a delay so unreasonable, still, at the threshold of this discussion, I do not hesitate to declare that at this late day no surcharge should be sustained here unless the accountant's liability is indubitably established. After so great a lapse of time every reasonable presumption should be made in favor of the accountant. With these preliminary observations, I now proceed to consider the several items of surcharge, but in a somewhat different order from that in which they are discussed in the register's report.

1. The two bankrupts and Alexander McClure were owners as tenants in common of certain timberlands in Clearfield county, Pa., each owning the undivided one-third part. During the winter of 1877 one McCrackin, under some adverse claim of right, went upon these lands and cut, manufactured, and rafted 27 rafts of square timber. This timber having been run into Jefferson county, Pa., a writ of replevin therefor was sued out of the court of common pleas of that county at the suit of Arthurs, as assignee, and McClure, and upon their giving security the sheriff delivered the timber to them, and they jointly ran it to Pittsburgh, some of the rafts arriving there in the spring, and the rest in the fall, of that year. At Pittsburgh, P. R. Bohlen caused a writ of replevin for this timber to be issued out of the United States circuit court, making Arthurs and McClure defendants. McClure gave security to the marshal, who thereupon left the timber in the defendants' possession. It does not appear when the action of replevin in Jefferson county was tried, but it resulted in a verdict for the plaintiffs. The suit in the circuit court was tried at May term, 1878, when a verdict was rendered for the defendants. But there was a motion for a new trial, which was not dis-

posed of until June 25, 1879, when it was denied. Then, upon judgment being entered on the verdict, the plaintiff sued out a writ of error to the supreme court of the United States, and the litigation was not terminated until November 23, 1885, when the judgment was affirmed. *Bohlen v. Arthurs*, 115 U. S. 482, 6 Sup. Ct. Rep. 114. In his account as assignee Arthurs charged himself with the proceeds of 10 of these rafts of timber. He sold no more, and received none of the proceeds of the others. McClure took into his possession 14 of the rafts, and he afterwards appropriated them to his own use. He subsequently (about January 1, 1879) made a voluntary assignment for the benefit of his creditors. The bankrupt Baum sold three of the rafts, and kept the proceeds. The register charged the accountant with 18 rafts. This charge is based mainly upon two findings of fact made by him, viz.: *First*, that after the rafts reached Pittsburgh the joint ownership of Arthurs and McClure ceased by reason of an actual division which they made of the rafts between themselves; and, *secondly*, that Baum was the agent of Arthurs and McClure to sell the three rafts he disposed of. But I do not concur with the register in either of these conclusions. There is not a particle of direct evidence in the case to show that there was any division of the rafts, and the positive testimony of Arthurs is to the contrary. The register rests this finding upon the entry in Arthurs' account and on certain bills of measurement. But there is nothing in either inconsistent with the fact of continued joint ownership, and, indeed, nothing to indicate that the assumed division ever took place. Nor is there any proof of Baum's alleged agency. The uncontradicted evidence is that Arthurs and McClure left bills of sale for these rafts at the Second National Bank of Pittsburgh, to be delivered by the bank to any purchaser upon payment of the price to the bank, and they put men upon the rafts to take care of them. Baum was simply told by Arthurs and McClure that if he found purchasers to take them to the bank. Without the slightest authority from any one, he took away the three rafts from the place where they were moored, and disposed of them. The fact did not come to the knowledge of Arthurs (who lived in Jefferson county) until late that fall or in the spring of 1878.

Under the peculiar circumstances of the case, I am not satisfied that Arthurs was guilty of any negligence creating liability on his part. As joint owner McClure had an undoubted right to take possession of the 14 rafts. Moreover, he had given security to the marshal, and thus relieved the rafts from the Bohlen writ of replevin. Again, the title was in litigation, and that litigation had not ended when Arthurs retired from his position as assignee in bankruptcy in April, 1880. McClure made an assignment for the benefit of creditors, as early as January, 1879, and nothing was then to be gained by a personal suit against him. Baum was utterly insolvent, and it does not appear that any good result would have followed any attempt to pursue the persons to whom he sold the three rafts. Arthurs paid most of the expenses incurred in running the rafts to Pittsburgh, etc., and he took credit for the same. It is admitted that these expenditures were reasonable. Yet the register charged

Arthurs with \$697.61 for the purpose of reducing his credit to two-thirds only of the whole expenditures. But for the reasons above indicated I am of the opinion that Arthurs is justly chargeable only with the net amount he realized from the 10 rafts, and I am unwilling to sanction any of the surcharges based on this transaction.

2. By written agreement dated September 1, 1868, A. F. Baum sold to John B. Campbell an interest (the undivided one-third) in a saw-mill, lands, and certain timber situated in Jefferson county, and Campbell agreed to deliver to Baum, at Pittsburgh, 5,000,000 feet of boards, 500,-000 feet in the spring of 1869 and the like amount annually thereafter until the whole quantity was delivered; and Baum afterwards, for the benefit of Campbell, entered into a contract with R. J. Nicholson to manufacture the lumber. On May 12, 1874, Baum assigned to Richard Arthurs 2,750,000 feet of the boards coming to him under the Campbell contract as collateral security for the sum of \$3,875.93, then paid by Arthurs to Baum, and the further sum of \$6,667.23, the amount of three judgments against Baum, which the Deposit Bank of Clarion had entered up in Jefferson county. These judgments Arthurs then paid, and the bank assigned them to him. On the same day Baum and Arthurs signed a paper, which, after reciting the assignment, reads thus:

"The said Arthurs is to sell said boards and pay out any liens or debts that the said Baum may be liable for, such as Sulger's, and any liens that may now be entered in the common pleas of Jefferson county, after taking expense which he is to have, 15 per cent. for advances and personal attention, besides anything he may expend on the same, and, if any balance, to pay the same to A. F. Baum."

On May 21, 1874, Arthurs, with Baum's knowledge and consent, advanced to Campbell \$5,100 for the purpose of paying Nicholson the expense of manufacturing the lumber, and on June 1, 1874, Arthurs advanced for Baum to Sulger \$3,074.14. The fourth specification of objection to Arthurs' account relates to the Campbell boards, and, after stating that the said assignment of May 12, 1874, was made "as security for a certain debt which Baum owed him," (Arthurs,) it alleges that the latter received under the same more than was sufficient to pay his debt, and that "he [Arthurs] should render an account of said lumber, and make a statement of his debt, and account to said Baum's estate for the surplus." During the hearing before the register, Arthurs submitted an account covering the whole transaction, and to the correctness of the same he testified. This account shows a large balance in favor of Arthurs. The register adopted it as the basis of his report upon this branch of the case, but he so modified it that he produced a balance against Arthurs of \$1,680.18, and with this sum he charged him.

After a patient examination of all the items of the account and the proofs touching the same, I am unable to agree with the register in the result here reached by him. In the first place, the register undertook to restate the account between Arthurs and Campbell by making deductions for alleged usurious interest. But that account seems to be perfectly satisfactory to Campbell, and I do not see that it was within the

province of the register to readjust it. As he carried the supposed balance due Campbell into the account, as stated by him between Arthurs and Baum, the effect was to give the latter a credit of \$367.76, to which he was not entitled. Again, he restated the interest account between Arthurs and Baum so as to deprive the former altogether of the benefit of that provision of the contract which gave him "fifteen per cent. for advances and personal attention." True, Arthurs did not sell the boards as was originally intended, but the change in the mode of executing the contract had the consent or sanction of all the parties in interest, and I see no reason why Arthurs was not entitled to the stipulated compensation for his trouble, which was very great. Furthermore, I think the evidence does not fairly warrant the charge against Arthurs of \$494.48—the principal and interest of Darrah, Moore & Co.'s note. Before that note matured the makers had become bankrupt, and Arthurs handed it to Baum, saying he might make the best of it. It is not shown that Baum realized a farthing out of it. In fact the note seems to have been worthless, and was so regarded by every one. Then again, the charge against Arthurs of \$564.16, the principal and interest of the Edelblute note, is of very doubtful propriety, even upon the register's own statement of the case; and in view of Campbell's positive testimony that Arthurs did not receive it, it does seem to me that the register ought not to have debited the latter with it. Still further, in his statement of the account between Arthurs and Baum the register, as he himself mentions in his report, "only included such items as relate to the arrangement of May 12, 1874." Hence he ignored certain credits which Arthurs claims, and among these a credit of \$1,000, the amount paid to redeem lands from a tax-sale, and a credit of \$2,049, the balance due on McCrea & Co.'s notes. The register assigns as his reasons for disregarding these claims that they were not explained, and that they did not "belong to the question arising under the arrangement of May 12, 1874;" and he says:

"I do not presume to consider whether they are right or wrong as claims that Arthurs may prove against the bankrupt's estate."

But if these are provable claims against Baum's estate in bankruptcy, then Arthurs is clearly entitled to set them off against his liability, if any, to Baum under the contract of May 12, 1874, Rev. St. § 5073; Blum. Bankr. 282, 283. Now, in fact these two specified items are very fully explained in the evidence. By deed dated January 1, 1874, containing the usual covenants for title, Baum, for the consideration of \$6,000 paid to him by Arthurs, sold and conveyed to the latter certain lands in the state of Michigan. But those lands, as Arthurs afterwards discovered, had been previously sold for taxes, and Arthurs was compelled to pay \$1,000 to redeem them. This payment, it is true, was made after Baum was adjudged a bankrupt, but Baum's covenants were broken at the date of the delivery of his deed, and I cannot doubt that his liability here was a provable debt against his estate in bankruptcy. Then as to McCrea & Co's notes. They were produced before the regis-

ter, and given in evidence. They were discounted before Baum's bankruptcy by Arthurs. They bear Baum and Osborne's indorsement, and the balance due thereon is as above stated. Baum and Osborne, indeed, are joint debtors of Arthurs, but it is settled that a joint indebtedness may be proved and set off against the estate of either of the joint debtors who may become bankrupt. *Tucker v. Oxley*, 5 Cranch, 34; *Gray v. Rollo*, 18 Wall. 629. Therefore Arthurs is entitled to set off the debt of Baum to him on the McCrea & Co. notes against his own indebtedness to Baum. Id.

I have now gone far enough to show that the surcharge of \$1,680.18 cannot stand, nor any part of it, and hence I deem it unnecessary to consider the question arising upon the register's report, whether the assignment of May 12, 1874, created such a confidential relation between Baum and Arthurs in respect to the lands embraced in the Campbell contract as would preclude Arthurs from purchasing in his own behalf at the tax-sale, and make him chargeable with the sum he realized by his resale.

3. Means & Nicholson brought suit against Andrew F. Baum in the court of common pleas of Jefferson county, and therein obtained an award of arbitrators for \$3,226.46, which was filed August 13, 1873. From this award Baum appealed, and on the 22d day of September, 1874, upon a trial in court, there was a verdict for the plaintiffs for \$3,440.48, and for this sum judgment was entered. This judgment was assigned by the plaintiffs to Arthurs on January 13, 1875. The register finds that the date of Arthurs' purchase of the judgment was January 13, 1874; but in this he is undoubtedly mistaken. He relies very much upon a letter from Arthurs to Baum, notifying the latter of the purchase, which letter bears date January 13, 1874. It is, however, satisfactorily shown that there was a mistake in this date as to the year. I do not regard the date of the purchase as a matter of controlling importance, but that it actually was January 13, 1875, is established by the direct and positive testimony of all the parties to the transaction. Arthurs paid for the judgment the sum of \$2,000, and this was his own money. This is not disputed. It is clear, also, that he bought the judgment for himself. At the time of the purchase Arthurs had no money in his hands belonging to Baum. The account as stated by the register shows that at that time he was in advance to Baum to an amount exceeding \$13,000. It will be observed that the transaction took place more than two years before Arthurs became the assignee in bankruptcy. Out of the proceeds of a sheriff's sale of certain real estate of Baum, which occurred in November, 1879, and which will be more particularly referred to hereafter, Arthurs received the whole amount of this judgment, viz., \$4,572.24. The register holds that he was entitled to collect from the estate of the bankrupt only the amount of money he invested in the judgment, with interest, and therefore he charged him with the excess, to-wit, \$2,089.82. The register bases this decision upon the alleged ground that in respect to this judgment Arthurs stood to Baum in a confidential relation of a twofold nature,—first as his counsel or attorney at

law, and then as his trustee under the assignment of May 12, 1874. But the evidence, taken as a whole, most clearly shows that the relation of attorney and client never existed between Arthurs and Baum in respect to the Means & Nicholson judgment. Arthurs was not the attorney of record nor was he consulted by Baum about the case. Neither was he the general counsel or attorney of Baum. Occasionally Baum employed Arthurs, as he did many other lawyers. Besides, even if such relation existed, it was dissolved by the adjudication of Baum, as a bankrupt, in June, 1874. Again, Arthurs was not Baum's counsel in the transaction of May 12, 1874, and the assignment of that date simply created the relation of creditor and debtor between them. Such is the view advanced in the fourth specification of objection. At the date of said assignment the claim of Means & Nicholson was still in litigation, and Baum denied and was contesting his liability to them. From the terms of the papers executed on May 12, 1874, the circumstances surrounding the transaction, and the parol testimony relating thereto, I am well satisfied that the Means & Nicholson award was not one of the liens within the contemplation of the parties. But what if it was one of them? Arthurs was under no sort of obligation to discharge liens until he himself was reimbursed his advances. But not only had he no funds of Baum in his hands when he purchased the Means & Nicholson judgment, but he never had any surplus out of the Campbell boards to apply to that judgment. Finally, here, there is no specification of objection relating to this matter. In my opinion, then, this surcharge is most clearly wrong.

4. By an agreement in writing, dated November 6, 1866, Andrew F. Baum sold and agreed to convey, upon payment of the purchase money, his undivided interest in certain lands in Jefferson county, Pa., known as the "North Fork" property, to E. G. Carrier. This matter stood open when Baum was adjudged a bankrupt, at which time his interest was heavily incumbered with liens, and it passed to his assignees in bankruptcy so charged. Shortly after Arthurs became assignee by an agreement between him and E. G. Carrier, dated March 21, 1877, the balance of purchase money was fixed at \$20,000, payable in four equal yearly installments. The register's report shows, and the fact is, that the amount of liens against Baum's interest, which had attached prior to his adjudication as a bankrupt, and subject to which the assignees took title, was in excess of its value. I may add that such excess was large. These liens were kept alive. The second of them was the Means & Nicholson award, which, it will be remembered, was filed August 13, 1873. It appears that by deed dated and acknowledged August 13, 1873, and duly recorded on the 15th of the same month and year, Andrew F. Baum and wife, for the recited consideration of \$20,000, conveyed to Jake Hill all their estate and interest in the North Fork property. It does not appear at what hour of the day this deed was delivered or the said award was filed, and which was the earlier in time is undetermined. On June 9, 1875, the Pittsburgh National Bank of Commerce obtained a judgment in the court of common pleas of Jefferson county against Jake

Hill, and under judicial proceedings upon that judgment the sheriff sold Hill's interest in the said lands to the bank, and executed to the bank deeds therefor, dated December 16, and acknowledged in open court on December 23, 1875. On November 18, 1874, the then assignees in bankruptcy of Baum presented a petition to the bankrupt court, alleging that the said conveyance from Baum to Hill was in trust for the former, etc., and thereupon a restraining order was issued by the court against Hill. Whether it was served does not appear, but at that point this proceeding stopped, and nothing further was done therein until November 13, 1877, nearly two years after the bank had acquired Hill's title, when, upon Hill's voluntary answer to said petition, the bankrupt court made a decree adjudging that the deed of August 13, 1873, from Baum to Hill, was void for want of consideration, and as a fraud upon Baum's creditors. But it does not appear that the bank ever had any notice or knowledge of this singular proceeding, and it seems very clear that it was not affected by the decree of the bankrupt court. In this condition of affairs Richard Arthurs presented his petition on April 9, 1879, to the Hon. W. W. KETCH M., the then United States district judge for this district, sitting in bankruptcy, setting forth his ownership of the Means & Nicholson judgment, and the facts connected with its original entry, and the revival thereof, the interest which the bankrupt Baum had in said North Fork property, and the said agreement of March 21, 1877, fixing the amount of purchase money coming from E. G. Carrier; that Baum's interest was subject to the lien of a large number of judgments, amounting to more than said unpaid purchase money; that by reason of the liens and legal complications he (Arthurs) was unable to make title to E. G. Carrier; and that he refused to pay the purchase money, or any part of it, and praying leave to proceed on his lien in the court of common pleas of Jefferson county, and to sell thereon Baum's said interest. Subsequently the bankrupt court made the following order:

"And now, June 21, 1879, the objections filed by John Wilson and S. P. Fulton, Esq., to the application of Richard Arthurs for leave to issue writs of execution on judgment No. 75 of Sept. term, 1878, court of common pleas of Jefferson county, entitled Means & Nicholson, for use of Richard Arthurs, vs. A. F. Baum, having been withdrawn, and on due consideration of said petition it is hereby directed that said Richard Arthurs, assignee of said bankrupt, have leave to issue all necessary writs of execution required to sell the interest of said A. F. Baum, bankrupt, in certain purchase money due from E. G. Carrier on a certain article of agreement for the purchase of what is known as the North Fork property in Jefferson county, and said Richard Arthurs, assignee of said bankrupt, has leave to bid at said sale in his individual right, giving due notice to bidders of his intention on the day of sale. PER CURIAM."

Accordingly, on June 26, 1879, a writ of *fi. fa.* was issued out at the court of common pleas of Jefferson county upon the Means & Nicholson judgment, and a levy was made on Baum's interest in said property, and, after inquisition and condemnation, upon a writ of *vend. ex.*, the sheriff of said county on November 6, 1879, sold Baum's said interest to Richard Arthurs for the sum of \$9,500, and by deed dated Novem-

ber 24, 1879, and acknowledged in open court February 19, 1880, the sheriff conveyed the same to Arthurs, who paid to the sheriff his bid, \$9,500. The sheriff paid the same into the court of common pleas, and by that tribunal the fund was distributed among the lien creditors. By deed dated April 19, 1880, but not acknowledged or delivered until August 7, 1880, Richard Arthurs, for the price of \$16,000, conveyed the title he had thus acquired to Cassius M. Carrier.

The register decides that Arthurs is accountable to the estate of the bankrupt for the whole of the Carrier purchase money as fixed by the agreement of March 21, 1877, with interest, less the \$9,500 he paid to the sheriff, and accordingly he has surcharged Arthurs with the sum of \$17,148.93. The register proceeded upon the idea that here was a good security of the value of \$20,000, available to the estate of the bankrupt Baum,—a secured debt which the assignee Arthurs might and should have collected. This erroneous notion pervades his report. The register was strangely oblivious to the fact that Baum's interest in this property came to his assignees in bankruptcy burdened with liens much beyond its value, and that to his estate in bankruptcy, or, in other words, to his general creditors, it was an absolutely worthless asset. In suggesting that Arthurs was censurable because he did not sue E. G. Carrier, the counsel overlooked the authoritative decisions which show that he could not have maintained the action without removing the liens. *Withers v. Baird*, 7 Watts, 227; *Magaw v. Lothrop*, 4 Watts & S. 316; *Garrett v. Crosson*, 32 Pa. St. 373. That Arthurs had any funds of the estate in his hands with which to discharge the liens, even if that had been a wise thing to do, is not pretended. The fact is in the incumbered condition of the title the only persons who had any real interest in this security were the lien creditors. Hence it was that the prior assignees in bankruptcy, who had had charge of the bankrupt's estate for more than two years before Arthurs was appointed, were not able, and did not attempt, to realize anything out of this purchase money. In simple truth there was nothing in it for the general creditors. Therefore it was not the duty of Mr. Arthurs to apply to the bankrupt court for an order to sell the property discharged of liens, (*In re Mebane*, 3 N. B. R. 347;) and if he had made such application it is very certain that it would have been denied, (*Blum. Bankr.* 292.) Nothing, then, remained to be done but to let the lien creditors sell the property, and Arthurs was guilty of no infidelity to the general creditors in applying to the bankrupt court for leave to proceed to sell upon his judgment in the state court. There is not anything in the evidence to warrant the register's conjecture that the judge who signed the order of June 21, 1879, was not fully advised as to its scope. Under the then existing circumstances there was nothing out of the way in granting to Arthurs permission to bid in his individual right at the sheriff's sale. It had come to be a mere matter of competitive bidding between incumbrancers, and it was right enough to put Arthurs on the same footing with the other lien creditors. That it was within the discretion of the court to make such order is not to be doubted.

Hill, Trustees, *536; *Campbell v. Walker*, 5 Ves. 678; *Dundas' Appeal*, 64 Pa. St. 325, 333. The order of the court is free from ambiguity. It stands unappealed from, and is not to be questioned collaterally.

At this point occurs the question, what appreciable difference did it make to the general creditors whether the property at the sheriff's sale brought \$9,500 or \$16,000, seeing that in either case the liens would have absorbed the entire proceeds? That the general creditors sustained any substantial loss by reason of the sale being made at the lesser of the named sums instead of at the larger is not apparent. There is no evidence whatever tending to show that the sheriff's sale was conducted otherwise than openly and fairly. That the highest bid was only \$9,500 is not even a suspicious circumstance. Baum's title, to say the least of it, was most seriously clouded by reason of his conveyance to Hill and the sheriff's sale of Hill's title to the Pittsburgh National Bank of Commerce. The purchaser at the sheriff's sale under the Means & Nicholson judgment took a grave risk in view of the bank's adverse claim, undoubtedly. Arthurs was alive to this, and hence, when he came to convey to Cassius M. Carrier he was willing to warrant the title only to the extent of \$11,000, as is fully explained in the testimony. But the register concluded that there was some sort of collusion between Arthurs, on the one hand, and E. G. Carrier and Cassius M. Carrier on the other, and in his report he states and comments upon the circumstances from which he deduces bad faith. This opinion, however, has grown to such a length that I must forbear to follow the register in that discussion, and I here content myself with saying that I am unable to assent to the register's reasoning or conclusion. I can discover no evidence to justify a finding of any fraud. It is true that before the sheriff's sale took place there was some conversation between Arthurs and Cassius M. Carrier about a sale by the former to the latter in the event of Arthurs' becoming the purchaser; but nothing was then definitely arranged, and in fact they never came to an agreement until August 7, 1880. It does not appear that they had any understanding not to bid against each other, or that they, or either of them, did anything to deter or mislead bidders or to repress competition at the sheriff's sale. There is not a *scintilla* of evidence to impeach the sheriff's sale on account of any misconduct on the part either of Arthurs or Carrier. It was freely open to any and every person to overbid Arthurs; and upon the whole I cannot perceive any just reason for depriving him of the fruits of a purchase which he was authorized to make by the order of the bankrupt court.

And now, to-wit, June 28, 1889, upon consideration, the exceptions to the register's report, in so far as they are in accordance with the foregoing opinion, are sustained, and the register's surcharges against the accountant are set aside, and it is decreed that the balance in the hands of the accountant, Richard Arthurs, is the sum of \$275.78, and this sum he is ordered to pay to the present assignee, with interest from January 1, 1882; and it is further ordered that the costs of this proceeding be paid out of the funds of the estate of the bankrupt Baum.

In re WEST et al.

(District Court, S. D. New York. June 22, 1889.)

BANKRUPTCY—DISTRIBUTION—PARTNERSHIP—FIRM AND PRIVATE CREDITORS.

The bankruptcy act of 1841 provides that the "net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate to pay the separate creditors." *Held* that, as partnership debts are both joint and several, there is no marshaling of assets unless there is a joint as well as a several fund before the court.

In Bankruptcy.

George Bell, for Sayre, a firm creditor.

Evarts, Choate & Beaman, for Union Bank, a firm creditor.

Phillip Carpenter, for individual creditors.

BROWN, J. On March 30, 1843, Jesse West and Noah C. Pratt, composing the firm of Jesse West & Co., were adjudicated bankrupts in this district as individuals and as a firm. Four creditors proved claims, two against the firm and two against Jesse West individually. The act of 1841 required moneys received by the assignee to be paid into the registry. On April 12, 1845, the assignee, accordingly, paid into the registry \$350 on account of the estate of Jesse West, and on September 17th \$400 more. No other moneys have ever been paid into the registry on account of the estate. There were nominal assets of the firm to the amount of \$13,000. Two orders were obtained in behalf of the assignee for leave to sell certain assets of the firm. In one of those applications a receipt of \$25.62 is recited. It is scarcely possible, however, that the fees and expenses chargeable against the firm estate should not have exceeded that sum, and as there is no evidence that any other firm assets were ever received, although full opportunity has been given upon the reference before the commissioner to ascertain the facts, it must be assumed that there are no "net proceeds" of the firm estate. The act of 1841 provides that the "net proceeds of the joint stock shall be appropriated to pay the creditors of the company, and the net proceeds of the separate estate to pay the separate creditors." Section 5121, Rev. St. Section 36 of the act of March, 1867, is to the same effect. Partnership liabilities are both joint and several. The construction placed upon the above provisions of both bankrupt acts, and of the words "net proceeds," by the great weight of authority, has therefore been, that if there are no net proceeds of the joint estate for distribution, the joint and several creditors may share *pari passu* in the individual estate. *In re Jewett*, 1 N. B. R. 491; *In re Downing*, 3 N. B. R. 748; *In re Rice*, 9 N. B. R. 373; *In re McEwen*, 12 N. B. R. 11; *In re Collier*, Id. 266. It is only when there are two funds to be administered (a joint fund and a separate one) that the joint debts are excluded from the separate estate. In the present case, although there is evidence that there were nominal joint assets, and an expectation of receiving some joint proceeds, the evidence does not go beyond this, save the

small sum above stated. The fact that the assignee paid into the registry moneys received on individual account, and that no moneys were paid into the registry on the firm account, in the absence of all evidence of any receipt of joint funds beyond the small sum above referred to, must be taken as *prima facie* evidence that no "net proceeds" were ever received from the joint estate, and that no joint fund is, or ever was, available to the firm creditors. The weight of authorities is to the effect that in order to exclude the firm creditors, an available joint fund must be affirmatively shown to exist. As the new firm, moreover, assumed the debts of the old firm, the claim of the Union Bank stands on the same footing as the original debts of the new firm. *In re Downing, supra.* The report of the commissioner is confirmed, admitting all the creditors to share *pari passu* in the separate estate.

In re REINITZ.

(Circuit Court, S. D. New York. June 24, 1889.)

1. EXTRADITION—INTERNATIONAL—SUBSEQUENT CIVIL ARREST.

The implied limitation in extradition treaties, that the person extradited shall not be arrested for any offense except that for which he was extradited until the lapse of a reasonable time after the termination of the extradition proceedings, to enable him to return to the country from which he was brought, and the provisions of Rev. St. U. S. § 5275, giving the President power to secure the accused against lawless violence until his final discharge, and for a reasonable time thereafter, apply to a subsequent arrest in a civil action, as well as to an arrest for crime.

2. SAME—HABEAS CORPUS—FEDERAL COURTS.

An extradited person arrested in a civil action before he has had time, after his acquittal of the offense for which he was extradited, to return to the place from which he was brought, is "in custody in violation of the constitution or of a law or treaty of the United States," within the meaning of Rev. St. U. S. §§ 752, 753, relating to writs of *habeas corpus* in the federal courts, though the prisoner is held under process from a state court.

Habeas Corpus.

Benno Loewey, for relator.

Salomon, Dulon & Sutro, for respondent.

BROWN, J. The prisoner, upon the demand of this government, was extradited from Queenstown, Ireland, in April, 1889, under the treaty of 1842, upon a charge of forgery. He was tried upon that charge in this city before a court and jury, and was acquitted on June 19th. Within a few minutes thereafter, as he was leaving the court-house, he was arrested by the sheriff of this county upon an order of arrest granted by the supreme court of the state on April 22d in a civil action for the recovery of \$4,220.90, moneys of the plaintiff alleged to have been wrongfully converted by the prisoner to his own use. Writs of *habeas*

corpus and *certiorari* from this court were thereupon obtained under section 752 of the Revised Statutes.

Upon the returns made to the writs by the sheriff, including copies of all the papers in the civil action, there is no controversy as to the above facts, and the only question is whether the prisoner after his acquittal was liable to arrest before the expiration of a reasonable time for his return to Ireland, from which he was extradited. A preliminary objection is made that this court has no jurisdiction to issue a writ of *habeas corpus* in such a case. But sections 752 and 753 of the United States Revised Statutes provide for writs of *habeas corpus* to inquire into the "cause of restraint of liberty" where the prisoner is "in custody in violation of the constitution, or of a law or treaty of the United States." The petition presents facts sufficient to raise an inquiry upon that subject, and if a case under that clause of section 753 is made out, *habeas corpus* from the federal courts is an appropriate remedy, though the prisoner be held under process of the state courts. *Ex parte Royall*, 117 U. S. 241; 6 Sup. Ct. Rep. 734; *U. S. v. Rauscher*, 119 U. S. 407, 431, 7 Sup. Ct. Rep. 234; *Wildenhus' Case*, 120 U. S. 1, 7 Sup. Ct. Rep. 385. The preliminary objection, therefore, presents no different question from that on the merits of the application. Until the decision in the *Case of Rauscher*, *supra*, in December, 1886, wide differences of opinion had prevailed in both the federal and state courts whether a prisoner extradited under a treaty for one offense could be tried for another. The supreme court, in the *Case of Rauscher*, upon full consideration and a review of the leading authorities, has definitely settled that question, holding that an extradited prisoner cannot be arrested or tried for any offense except that for which he was extradited, until the termination of the extradition proceedings and the lapse of a reasonable time thereafter, to enable him to return to the country from which he was brought. The *Case of Rauscher*, however, like nearly all the other reported cases on this subject, was a case of arrest and trial on a criminal charge. The only reported case to which I have been referred of a prisoner extradited from a foreign country and arrested in a civil suit is that of *Adrianse v. Lagrave*, 1 Hun, 689, 59 N. Y. 110, which arose in 1874, and does not essentially differ from the present case. The order of arrest was there set aside at the general term, but was upheld in the court of appeals. The supreme court, in the *Case of Rauscher*, referred to the *Lagrave Case*, and, while alluding to the difference between an arrest on a criminal charge and an arrest in a civil suit incidental to the collection of a debt, withheld any expression of opinion as to the legality of an arrest in a civil suit under such circumstances. The question to be now determined is whether there is any difference in the principles applicable that should lead to a different result in the case of an arrest in a civil suit. The main difference of opinion has been as to the construction to be put upon extradition treaties; whether the surrender of the prisoner is to be deemed a surrender for a particular purpose only, with the implication that he is not to be restrained of his liberty for any other cause, and whether, if so, the surrendering government alone can take any advantage of such a limita-

tion; or whether the surrender, when made upon compliance with the preliminary conditions of the treaty, becomes an absolute surrender and without any such implied limitation. The latter was the view of a majority of the court of appeals in the *Case of Lagrave*, while the opposite view was maintained at the general term. The decision of the court of appeals, however, was not based upon any grounds peculiar to an arrest in a civil suit, but upon grounds applicable alike to a civil and criminal arrest, without distinction. As those grounds are disapproved by the supreme court in the *Case of Rauscher*, and the right of criminal arrest denied, the *Lagrave Case*, as an authority for a civil arrest, fails also. The opinion in the supreme court, treating the subject in the broadest manner, upholds in its general scope, the views of DANIELS, J., at the general term in the *Lagrave Case*; and it re-enforces them by its construction of sections 5270, 5272, and 5275 of the Revised Statutes, which are declared to be supplementary to the extradition treaties, and to enforce their implied limitations.

The right of asylum is a principle of public law, recognized by all sovereignties. No concession by a surrender of a prisoner in abridgment of this right is made, except for grave offenses, and under careful restrictions that exclude minor misdemeanors, most political offenses, and, much more, mere claims for the collection of debts. Though the implied restrictions of the treaty are for the most part spoken of by the supreme court in reference to a criminal arrest, since that was the question before the court, yet there are many passages in the opinion that in principle embrace equally arrests in civil suits. At page 420, 119 U. S., 7 Sup. Ct. Rep. 241, it is said:

"It is therefore very clear that * * * it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty."

Again, at page 422, 119 U. S., 7 Sup. Ct. Rep. 242:

"As this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition."

A civil arrest is clearly as incompatible with such limitations as an arrest on a criminal charge. So just in principle are these limitations that the court of appeals, in the *Lagrave Case*, declared that the provisions for protection against "lawless violence" under section 5275, Rev. St. U. S., "ought [by legislation] to be extended to protection from other prosecutions or detentions." But that section, as construed by the supreme court, does extend to protection from other prosecutions. It declares that "the president shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for security against lawless violence, until the final conclusion of his

trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused." The language of the section includes not merely "security against lawless violence," but, in addition thereto, "the safe-keeping and protection" of the accused until his acquittal, or, if convicted, until he has served out his sentence, and for a reasonable time thereafter. Reasonable time for what? "Obviously," says the supreme court, "until he shall have had a reasonable time to return unmolested to the country from which he was brought." Mr. Justice GRAY concurred in the judgment of the court solely upon that construction of the statute.

No reasons are perceived why the limitations of the treaty and the provisions of the statute, as thus construed, are not as applicable to a civil arrest as to a criminal one. The prisoner may, indeed, give bail in a civil action. But so might he in all those minor criminal offenses for which he could not be extradited, and upon which no arrest is permitted. If he could not procure bail on the civil arrest, or pay the final judgment, he might, indeed, be discharged under the state practice after a certain term of imprisonment; but that term might be as long as the sentence allowed on conviction for many of the minor crimes. It may be said that the implications of extradition treaties have reference to crimes only, and that neither of the contracting governments can be supposed to have concerned itself about the mode of collecting private debts, or about any arrest of a prisoner that might be incidental to a civil suit; but this is hypothesis only, and an examination of some of the more recent treaties shows the contrary. Thus, the treaty of 1872, between England and Germany, (article 11,) provides that "a person surrendered can in no case be kept in prison * * * for any other crime, or on account of any other matters than those for which the extradition shall have taken place." Clarke, *Extr. Appendix*, lxiv. It is certain that no government surrenders a person for the purposes of arrest in a civil action; and such an arrest is as much an infringement of personal liberty and a diversion of the object of the treaty as an arrest for crime; and there is the less justification for the former, since the courts of all civilized countries are alike open for the prosecution of money demands, while crimes can be punished only within the jurisdiction where committed.

The main question must be as to the presumed intention of the treaty itself, and of the acts of congress supplementary to it. If these intend only the surrender of the prisoner for the limited purpose of a trial for the extradition offense, and if by express enactment and by the implications of good faith they guaranty him protection for a reasonable time thereafter to enable him "to return unmolested" to the country from which he was brought, as the supreme court declares, a civil arrest must be as unlawful as a criminal one. Section 5275, moreover, makes no

distinction between a civil and a criminal arrest, against which the accused may require protection for a reasonable time to enable him to return. The demands of public justice, on elementary principles, are superior to claims for the satisfaction of private debts. If, therefore, the demands of the state must give way to the prisoner's right of return, much more, it would seem, must the right of private arrest.

There are numerous cases holding that a person brought within the jurisdiction by violence or fraud is amenable to prosecution at the instance of persons not privy to the wrong. *Ker v. Illinois*, 119 U. S., 436, 7 Sup. Ct. Rep. 225; *Mahon v. Justice*, 127 U. S. 700, 8 Sup. Ct. Rep. 1204. These cases all proceed upon the ground that the defendant is not himself clothed with any immunity or right of protection, by the mere fact that third persons have done him violence or injury in bringing him within the jurisdiction. He has his private remedy for that wrong. Hence, though the person guilty of the wrong cannot profit by it in any suit of his own, this furnishes no defense against public justice, or against private suitors, who are in no way responsible therefor. But this principle cannot apply where the prisoner is himself clothed with a legal right or immunity. And in the *Case of Rauscher*, the supreme court declares that the prisoner is clothed with such an immunity. At page 422, 119 U. S., 7 Sup. Ct. Rep. 242, it is said that "it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty * * * without an implication of fraud upon the rights of the party extradited." Again, as respects the prisoner's right of return, it is said (119 U. S. 424, 7 Sup. Ct. Rep. 243) that section 5275 "is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings." At page 430, 119 U. S., 7 Sup. Ct. Rep. 246, also, the court again speak of a reasonable time to return as a "right of the prisoner under such circumstances. In *Ker v. Illinois*, 119 U. S. 443, 7 Sup. Ct. Rep. 225, 229, also, the court say that the prisoner "came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed * * * was that he should be tried for no other offense," etc. If the opportunity to return is a "right conferred" upon the prisoner as well as a duty owed to the extraditing government, it is manifest that both the right and the duty are infringed by a civil arrest as much as by a criminal one. The good faith of third persons who prosecute the prisoner becomes immaterial. See LOWELL, J., on *Winslow's Case*, 10 Amer. Law Rev. 620.

Finally, the language used by the various publicists and text writers, referred to with approval by the supreme court in the *Rauscher Case*, forbids an arrest in one form of proceeding as much as in the other. Mr. William Beach Lawrence says that the prisoner is entitled, unless found guilty of the offense for which he is extradited, to be restored in safety to the country of his asylum at the time of his extradition. Judge Cooley declares that "the prisoner has a right to have the particu-

lar offense disposed of, and then to depart in peace." And Mr. Spear considers it "the duty of courts to secure to him, as against all attempts at legal interference therewith, a reasonable opportunity to exercise this right." Spear, Extr. (2d Ed.) 131-145, 557.

I must hold, therefore, upon the principles and authorities approved by the supreme court in the *Case of Rauscher*, that the prisoner, at the time of his arrest, not having had a reasonable time to return to Ireland after his acquittal, was under the protection of the United States, and not subject to arrest in the state or federal courts for any cause arising prior to his extradition, and that the state court, when the prisoner was arrested by the sheriff, "did not have jurisdiction of the prisoner at that time, so as to subject him thereto." 119 U. S. 433, 7 Sup. Ct. Rep. 248. When persons are in custody under process of the state courts, and the same remedies exist there, although it may sometimes be more appropriate to refer the applicants for relief to the state tribunals, (*Ex parte Royall*, 117 U. S. 251, 6 Sup. Ct. Rep. 742; *Ex parte Coy*, 32 Fed. Rep. 911,) yet, in a matter involving personal liberty, and considering the several successive appeals to which the petitioner might be subjected in the state courts, I think the prisoner is entitled to the more expeditious remedy of the federal tribunals. The prisoner is accordingly discharged, and the court fixes a week after his release by the sheriff as a reasonable time under the statute during which he is entitled to exemption from arrest for the purpose of returning to Ireland.

ADEE v. PECK BROTHERS & Co.

(Circuit Court, D. Connecticut. June 27, 1889.)

PATENTS—INFRINGEMENT—PLEADING.

A bill alleging that defendant has infringed a patent owned by complainant, and originally granted to James Foley, for an improvement in waste-valves, and that complainant has sold said valves under the trade name and style of "Foley's" and "Foley's Patent," and "that said trade name, during the life of said letters patent, is identified therewith, and of great value * * * in describing said patented valves as a trade-mark, and that the defendant has sold his infringing valves under the trade name of 'Foley's Patent Valves,' " and praying, *inter alia*, that defendant be enjoined from selling any waste-valves under the name of "Foley's" or "Foley's Patent Valves," states only one good cause of complaint, *i. e.*, for infringement of a patent. The name of the patented device is not properly speaking a trade-mark.

In Equity. On bill for infringement of patent.

Arthur V. Briesen, for complainant.

Edward H. Rogers, for defendant.

SHIPMAN, J. This is a bill in equity, which is brought by a citizen of the state of New York against a corporation created under the laws of the state of Connecticut. The bill alleges, with the usual and necessary

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averments in such cases, that the defendant has infringed upon reissued letters patent No. 6,739, dated November 16, 1875, which were granted to James Foley and George C. Gunning for an improvement in waste-valves and overflows, and are now owned by the complainant. The original patent was issued to James Foley as inventor. The bill also alleges that the complainant has sold said valves under the trade name and style of "Foley's" and "Foley's Patent;" "that said trade name, during the life of said letters patent, is identified therewith, and of great value to your orator in describing said patented valves as a trade-mark, and that the defendant has sold his infringing valves under the trade name of 'Foley's Patent Valves.'" The bill prays, among other things, that the defendant may be enjoined against selling "any waste-valves or overflows known as or under the name of 'Foley's' or 'Foley's Patent' valves and overflows." The defendant has demurred, because the bill exhibits distinct, separate, and unconnected matters, viz.: "The infringement of letters patent of the United States, and the infringement of a trade name or trade-mark."

In my opinion, the bill shows upon its face that an infringement of patented rights only was committed. It will be observed that the defendant is not charged with having done anything which is prohibited by section 4901 of the Revised Statutes, and that the alleged trade-mark is simply the name which is usually or properly given to the patented article. It is not any peculiar form, label, brand, or device which is put upon the article to designate its origin, or the person by whom it is manufactured, and it is not the patent mark which is required to be stamped upon patented articles by section 4900. The name which is given to a patented device to distinguish it as a patented article from other articles of the same character is not, even during the life of the patent, properly speaking, a trade-mark. It designates nothing except that the structure has a definite character, as the structure which was patented, and indicates nothing in regard to the character of the workmanship or the person by whom it is manufactured. A trade-mark "is something different from the article itself which the mark designates," (*Fairbanks v. Jacobus*, 14 Blatchf. 337,) and is a name or a mark or a device which is attached to the article to point out its origin. This alleged trade-mark, "Foley's Patent Valves," signifies that they are the kind of valves which Foley invented and patented, and not that they are the valves which he or his successor is manufacturing. "In all cases where rights to the exclusive use of a trade-mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another, and that it is only when this false representation is made that the party who appeals to a court of equity can have relief." *Canal Co. v. Clark*, 13 Wall. 311. By this bill it appears that the defendant is deceiving no one in regard to the origin of the goods. It is infringing upon the complainant's patent-rights, by making a valve substantially like his, and it is asserting that its valve is the complainant's patented invention. Thus far no false representation is made, but the truth is asserted. But if it is said that the

assertion is that the defendant has a right to make Foley's patent valve, and that thus the public is deceived, this assertion and the act of sale are nothing more than an infringement of the exclusive patent-rights of the complainant. It is not intended to be asserted that if a person manufactures and sells an article which is not an infringement, but which he falsely brands as the patented device, that for such fraud and consequent injury a bill for an injunction may lie, not upon the ground that he is simulating a trade-mark, but because he is committing a continuous fraud for which the preventive remedy by injunction affords the only adequate relief. *Manufacturing Co. v. Haish*, 9 Biss. 141, 4 Ban. & A. 571. Neither is it intended to be asserted that the owner of a patented device may not have a trade-mark affixed to his articles which distinctively declares the origin, in point of manufacture, of his goods. The imitation of the patent mark is another and separate act from the one which is alleged to have been committed. It is evident that the pleader intended in the bill to treat the name as a trade-mark, and to aver that the defendant had not only infringed the complainant's patent-rights, but his rights as the owner of a trade-mark. His theory is that the defendant, by the sale of its valve under this name, has, by one act, infringed two rights of the complainant,—his patent-right and his right to the undisturbed use, during the life of the patent, of the trade-mark which he has adopted. If his theory was true, his bill, perhaps, would not be open to the charge of misjoinder, upon the ground that if two good causes of complaint grow out of one transaction for which the same character of relief is sought, and in regard to which all the defendants have the same claim of right, such causes may be included in one bill, (Story, Eq. Pl. § 284;) but the bill in this case shows only one good cause of complaint. The demurrer is overruled.

THE HENRY BUCK.

STOKES v. THE HENRY BUCK.

(*District Court, D. South Carolina. June 7, 1889.*)

1. DAMAGES—PROXIMATE AND REMOTE.

The owner of a raft of lumber employed a tug to bring it down to C., where it was to be loaded on a schooner under contract with the charterer. Owing to the tug's negligence the raft was wrecked, delaying the loading of the schooner, and causing the charterer to incur demurrage, which the owner of the raft had to pay. On libel by the latter against the tug he testified that when he engaged it he told the master: "I had a vessel that was delivering with demurrage, and I wanted him to bring this lumber to town with dispatch." The master testified that libelant merely told him that he was in a hurry for the lumber, and wanted it brought down as soon as possible. *Held*, that demurrage was not an item of damages within the contemplation of the parties, and could not be recovered.

2. SAME—ELEMENTS OF DAMAGE.

Libelant having made diligent efforts to save the raft after it was wrecked, respondent is liable not only for the lumber lost, but also for all proper expenses in saving the remainder.

In Admiralty. Libel for damages.

For former opinion, see 38 Fed. Rep. 611.

J. P. K. Bryan, for libelant.

J. N. Nathans, for respondent.

SIMONTON, J. The libel in this case sought damages consequent upon negligent performance of a contract of towage of a raft of lumber. After a review of the testimony the court in a former decree held as follows: "This was negligence for which the tug is responsible. As to the amount for which it is responsible, counsel will be heard on this point, especially as to the liability of the respondent for the demurrage paid to Mr. Halsey by libelant under his contract with him." Counsel have been heard on these points.

It is necessary to recall the facts. The tug Henry Buck was engaged by Halsey, as agent of libelant, to go after a raft of lumber on its way from Edisto river to Charleston. The tug found the raft, towed it on its way, and left it after night-fall in Wappoo cut. The raft was not made fast, and drifted through the cut into Ashley river, thence down Charleston harbor, and was wrecked on Sullivan's island, at the mouth of the harbor. The tug made no effort to rescue it or any part of it. Libelant did. He saved 190,000 feet out of 220,000. He caused that which was salvaged to be brought to Charleston, and delivered to Halsey. He had a contract with Halsey to deliver to him the whole raft. Halsey was then loading a schooner with lumber, and relied on the fulfillment of this contract. In consequence of the delay Halsey was charged with demurrage, which he charged to libelant, who paid it. The latter seeks to recover from the tug the value of the lumber lost, the expenses incurred in saving that which was rescued, and the demurrage so paid by him. The tug engaged to go for the raft on Saturday night, went on Monday morning, met the raft the same day, lost it on Monday night, could have gotten it to Halsey on Tuesday morning. Libelant went after it that morning, worked on it that day, Wednesday, Thursday, and part of Friday. It reached Halsey on Friday afternoon. The items are as follows: Labor of his hands, \$110; extra labor, \$40; labor in making up the raft anew, \$25; time of libelant himself, 6 days, at \$10, \$60; a tug for towing remains of raft to Charleston, \$30; ropes, \$60; 30,000 feet of lumber, at \$8, \$240; demurrage, seven days, at \$30, \$210. The raft having gotten adrift by the negligence of respondent, he was responsible for its value at the Charleston market. This was, as we have seen, \$8 per M. But it was the duty of libelant to use all proper efforts in reducing the loss as much as practicable. He fulfilled this duty, and saved all but 30,000 feet. This was a great saving to respondent. He should pay not only for the lumber lost, but also all proper expense incurred in saving the remainder. Examining these items, the amount charged for labor seems very large,—\$110, \$40, \$25, \$175, for four days. No serious question is made of these items by respondent. They are allowed. The charge of \$10 per day for services of libelant is not unreasonable. He is engaged in large saw-mill business in Colleton. But there is

an error in the number of days charged. He went after the raft on Tuesday, 18th December. Halsey says it reached him on 21st, (Friday.) Four days is a liberal estimate. Of this item \$40 are allowed. The main question, however, is as to the items of demurrage charged by Halsey to libellant, and paid by him,—seven days, at \$30 per day. In making up his seven days Halsey began on Tuesday 18th, so the lay-days had expired before that time. The respondent could not at the earliest have gotten the raft to Halsey before Tuesday. It is difficult to understand how he could be made responsible for the demurrage of Tuesday; and, had he put the raft along-side of the schooner on Tuesday, ready for loading, still, during the whole process of loading, the demurrage would have gone on. Be this as it may, we have here an action for damages arising from the negligent performance of a contract. Were we in a common-law court it would be an action on the case in *assumpsit* or an action of tort, but of tort growing out of a contract *quasi ex contractu*. The damages in a case of this kind cannot be varied by the form of action adopted. They are such as naturally and proximately arise from the non-performance of the contract. In other words, the damages to be awarded are such as were in the contemplation of both parties when the contract was made. But for the contract there could be no claim for damages. The legal duty of the respondent to tow and safely care for the raft grew out of the contract, and out of the contract alone. He did not perform the contract. So he did not fulfill the duty assumed by him. This constitutes the breach, and gives the cause of action. The legal consequences which he must suffer depend upon his contract. Mr. Sedgwick, in his book on Damages, (page 112,) gives an excellent summary of the rule:

“Where the contract is to do or to refrain from doing some particular thing, here the rule of the civil law is perhaps the best that can be adopted,—that the party in default shall be held liable for all losses that may fairly be considered as having been in the contemplation of the parties at the time the agreement was entered into; or, in other words, where it appears, or may fairly be inferred, that the party complaining of the non-performance of a contract has, at the time it was entered into, turned the mind of the party whose conduct is complained of to the consequences likely to ensue from default on his part, and such consequences do ensue, he shall be held responsible for them as having stipulated against them.”

See, also, *Bowas v. Tow-line*, 2 Sawy. 30; *Hadley v. Baxendale*, 9 Exch. 353; *Suth. Dam.* 74. Lord COCKBURN, C. J., in *Simpson v. Railway Co.*, L. R. 1 Q. B. Div. 274, puts it thus:

“The principal is now settled that, whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.”

See, also, *Elbinger v. Armstrong*, L. R. 9 Q. B. 473. The question turns, therefore, on a question of fact. Was it brought to the notice of the tug master that the object in sending him for the raft was to save

the libelant from demurrage? Or, put it in another way: Was the circumstance that libelant was dependent upon the arrival of the raft in order to save himself from the consequence of demurrage so known to the tug master that he was compelled to infer that the object in sending him for the raft was to save demurrage? If either of these questions be answered in the affirmative, the tug must pay the demurrage. It seems at first blush extraordinary that the tug master should have undertaken this. He went for the raft on Monday. His pay for towage was \$30. Did he understand that if he failed to reach Halsey's dock on Tuesday he would be liable for demurrage \$30 for that day and for every other day he delayed delivery? Let us examine the testimony on this point. Halsey acted as the agent for libelant. The libelant was under contract to deliver lumber to him. He made the agreement with the tug master, and knew all about the matter. In reply to the question: "Did you state to him [the master of the tug] any necessity why you wished haste and dispatch?" he answered: "I stated I had a vessel I was loading, and it was important I should have the raft with all possible dispatch." To the question: "What, exactly, did you say you wanted him to do?" "I told him I had a vessel that was delivering with demurrage, and I wanted him to bring this lumber to town with dispatch." The tug master on his part gives this account: "He [Halsey] wanted to know if I could go and assist the rafts down. He said he was in a hurry for the lumber, and he asked me when I thought I could get it down. I told him that depended on when I started, and where I found the lumber. He said, 'All right,' do the best I could, and that was all." On the cross-examination, in answer to the question: "You were to aid in propelling that raft to Charleston?" he replied: "He [Halsey] told me to go up and help bring it down; that was his language." In reply to a similar question on the same examination he said: "I undertook to do what I thought would get it [the raft] here in a hurry." I am not able to conclude from this that the tug master knew that libelant had any concern in the demurrage, nor that he knew the rate of demurrage, nor when the demurrage would begin, nor that the object of sending him for the raft was to save the libelant from demurrage incurred or to be incurred. This item is not allowed. Let the tug be credited with the bills for towing and searching for raft,—both items. Let decree be entered accordingly, costs to follow decree.

THE WM. H. BRINSFIELD.

RANSTEAD *v.* THE WM. H. BRINSFIELD.

(District Court, D. Maryland. March 4, 1889.)

1. WHARVES—OVERLAPPING VESSEL—LIEN FOR WHARFAGE.

A foreign vessel which came to discharge cargo into a private dock in the city of Baltimore to a wharf where she could not lie without overlapping on the next adjoining wharf, belonging to the libelant, was notified that if she did so overlap she would be charged wharfage. *Held*, in the absence of any statutory regulation of wharfage, that by lying alongside libelant's wharf for the distance of 20 feet the vessel enjoyed a beneficial use of it, although not made fast to it, and not using it to land cargo; and that for such use the libelant was entitled to compensation and a maritime lien.

2. SAME—AMOUNT OF WHARFAGE.

Held, that libelant was entitled to recover as compensation *pro rata* of the customary rate of wharfage in the proportion which the number of feet of his wharf so used contributed to make up the length of the whole berth occupied by the vessel.

(Syllabus by the Court.)

In Admiralty. Libel *in rem* for wharfage by Lyman T. Ranstead against the schooner William H. Brinsfield, a foreign vessel.

Robert H. Smith, for libelant.

William H. Cowan, for respondent.

MORRIS, J. The libelant is the owner of a wharf fronting 100 feet on a dock made by deepening a canal into the waters of a branch of the Patapsco river, adjoining South Baltimore. This dock is somewhat remote from the customary harbor for vessels in the port of Baltimore, and was constructed by private individual enterprise. The riparian owner of a piece of partially submerged land bordering on a widening of the river, by digging out a canal, and building up its sides, constructed a basin about 100 feet wide, and from 500 to 1,000 feet long, with a street of the city at right angles to its length forming its upper end, and opening out to the river and harbor at the other end. The land on the sides of the dock has been sold and leased in lots, mostly of 100 feet front on the water, to different persons, with the wharf rights appurtenant to each lot. These wharves fronting on this dock, basin, or canal would appear, therefore, to be in the strictest sense private wharves. It is the case of a riparian owner who has cut a canal into his own land so as to allow vessels to come to his own property fronting on it, and then has disposed of portions of the land to different persons. There is nothing in the laws of Maryland or the ordinances of the city of Baltimore granting any privilege to or exacting any duty from such a proprietor, and there is no law or ordinance regulating rates of wharfage, except with respect to the public wharves of the city. So far as any of the land may have resulted from filling up into the contiguous water of the river, it is the law of this state (Code Md. art. 54, § 45) that the proprietor of land bounding on any navigable waters shall be entitled to the exclusive right of improving out into the water in front of his land; and that all improve-

ments and accretions shall pass to the successive owners of the land as incident thereto, provided only that such improvements are so made as not to interfere with navigation. It is further enacted that no patent shall issue from the land-office which shall impair or affect the rights of riparian owners. *Goodsell v. Lawson*, 42 Md. 348; *Railroad Co. v. Chase*, 43 Md. 23; *Mayor, etc., v. St. Agnes Hospital*, 48 Md. 419; *Yates v. Milwaukee*, 10 Wall. 497.

By article 98, § 21, of the Maryland Code, it is enacted that the owner of real estate on any navigable water of the state may construct wharves thereon, and extend the same to such distance into the stream as may be required to admit the safe approach thereto of any vessel navigating said waters. It is a fact that nearly all of the numerous navigable bays and rivers of the state are broad and shallow, and the legislation on this subject shows that the policy of the state is to encourage riparian owners to make improvements out to the deeper water by vesting in them the same exclusive ownership in the land and improvements so made as they have in the original fast land. In the face of this legislation and policy, it does not seem to me that we should hastily adopt rules with regard to such property on our navigable waters which have been established as reasonable and necessary in other countries with regard to deep tidal rivers or narrow sea-ports, but which are not consistent with that private, exclusive ownership which has been granted by express legislation to riparian owners in Maryland. The exclusive character of the ownership of wharves erected by individual enterprise in this country, in other states than Maryland, has been repeatedly recognized by the supreme court of the United States, subject, of course, to the right of any state to interfere when it deems it advisable, and regulate the compensation which may be exacted, so as to prevent extortion. *Cannon v. New Orleans*, 20 Wall. 582. In *Transportation Co. v. Parkersburg*, 107 U. S. 699, 2 Sup. Ct. Rep. 732, it is said:

"It is undoubtedly a general rule of law, in reference to all public wharves, that wharfage must be reasonable. A private wharf—that is, a wharf which the owner has constructed and reserves for his private use—is not subject to this rule; for, if any other person wishes to make use of it for a temporary purpose, the parties are at liberty to make their own bargain. That such wharves may be had and owned, even on a navigable river, is not open to controversy. It was so decided by this court in the case of *Dutton v. Strong*, 1 Black, 23, and in *Yates v. Milwaukee*, 10 Wall. 497."

The supreme court also said in *Ex parte Easton*, 95 U. S. 73:

"Compensation for wharfage may be claimed upon an express or an implied contract according to the circumstances. Where a price is agreed upon for the use of a wharf, the contract furnishes the measure of compensation, and when the wharf is used without any such agreement, the contract is implied, and the proprietor is entitled to recover what is just and reasonable for the use of his property and the benefit conferred. Such erections are indispensably necessary for the safety and convenience of commerce and navigation; and those who take berth along-side them to secure those objects derive great benefit from their use. * * * Such contracts, beyond all doubt, are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat, * * * for which, if the vessel or

water-craft is a foreign one, or belongs to a port of a state other than the one where the wharf is situated, a maritime lien arises against the ship or vessel in favor of the proprietor of the wharf. * * * Water-craft of all kinds necessarily lie at a wharf when loading and unloading; and Mr. Benedict says that the pecuniary charge for the use of the dock or wharf is called 'wharfage' or 'dockage,' and that it is the subject of admiralty jurisdiction; that the master and owner of the ship, and the ship herself, may be proceeded against in admiralty to enforce the payment of wharfage when the vessel lies along-side the wharf, or at a distance, and only uses the wharf temporarily for boats or cargo."

In *Dugan v. Mayor, etc.*, 5 Gill & J. 357, the Maryland court of appeals has said:

"Over wharfage collected at private wharves, or wharves other than those owned by the town or city of Baltimore, or made at the ends or sides of public streets, lanes, and alleys, the town or city officers have no power or control. Its imposition and collection is the exclusive privilege of the wharf-owners. Anchorage or wharfage may be charged for the use of any place held as mere private property to which vessels may come."

The claim for compensation for the use of his wharf, which libellant seeks to enforce against the schooner in this case, arose under the following circumstances: John F. Fahey and the libellant are the owners or lessees of adjoining lots of ground and wharves fronting upon the basin or dock above mentioned. That of Fahey is next adjoining the street which forms the head of the basin, and is 85 feet front. The libellant's adjoins Fahey's, and is 100 feet front. Fahey carries on a coal, wood, and sand business, and the vessels bringing these commodities to his place are discharged at his wharf. These vessels are frequently more than 85 feet long; and, as the solid head of the dock confines his wharf on one side they necessarily lap over onto libellant's premises. In this particular case the proof shows that the stern of the schooner extended along-side of libellant's wharf 18 to 20 feet beyond Fahey's line, and so remained for two days, while discharging a cargo of cord-wood, her hull amid-ship being close against Fahey's wharf. Notice in writing was given by libellant to the master of the schooner before she hauled into the wharf that if she used libellant's wharf by lapping over in that manner, she would be charged wharfage. It is shown on behalf of respondent that the schooner was not made fast to libellant's wharf, and did not make use of his wharf by discharging any of her cargo upon it, but merely as to so much of her length as extended beyond Fahey's line lay in the water a few feet from the wharf, all her lines being carried to Fahey's wharf. On behalf of the respondent it has been very earnestly contended that, conceding the facts to be as I have found them, the libel cannot be sustained. It is contended that the schooner by simply projecting beyond Fahey's line, and lying in front of libellant's wharf without being made fast thereto, was merely lying in the navigable water in which the libellant has no exclusive ownership, and for the use and occupation of which he could make no claim; that, even if it be supposed that the owner of the schooner might be liable as a trespasser for obstructing libellant's wharf, yet such a claim could give no maritime

lien; that to give a maritime lien there must be some actual use of the wharf beneficial to the vessel, as by making fast to or loading or unloading goods over it.

The respondent's counsel argues that the present case is like the use of a street by a vehicle stopping in front of one man's building to deliver goods, and projecting on the street beyond the line of that building in front of an adjoining one. But it does not seem to me the analogy between the use of the water-way of this private basin and the use of a street is very close. The very purpose of the basin is that vessels may lie in it for the profit of the owners of the wharves abutting on it, and the land bounding on it has been acquired by the several purchasers in order that each may enjoy his opportunity in that profit according to the number of feet he has purchased bounding on the water. Rates of wharfage are usually according to the length or tonnage of the vessel, and it would seem that there must be some vice in an argument which would result in allowing a wharf-owner who has only 85 feet front on such a dock to have the same advantage as the owner of a greater frontage, and to discharge at his wharf vessels of any length by subjecting the property of his neighbors to a servitude against their protest. It may often be that it is for the mutual advantage of such adjoining owners that they shall accommodate each other, and it may often be requisite for the general prosperity of a port that by legislation they shall be required to do so, but, in the absence of law or lawful custom, as to owners upon a water which is not so much a public navigable highway as it is a private basin, it seems to me the only legal right is that of unobstructed access, each to his own wharf. It is urged that by the use and occupation such as it was, the libelant suffered no loss, as he had not at the time any vessel he desired to bring to his own wharf, and the schooner would have been removed to make way for any vessel which was intended for libelant's wharf. The proof, however, with regard to frequent previous occurrences shows that the right to have an obstruction removed upon request was not the equivalent of having libelant's premises unobstructed. There is testimony that the presence of the overlapping vessel has a tendency to deter others from coming to the wharf, and that the annoyance of being constantly obliged to make request and await the removal of the overlapping vessel has been found to drive away tenants and others who would make use of libelant's wharf to his profit. It is true that the use made in the present case is not the usual use which gives a claim for wharfage, but I think there is no doubt that it was a use beneficial to the vessel during the two days that she was lying there discharging her cargo. It does not appear to me that making fast to, or landing upon, or passing goods or passengers over, a wharf, are the only possible ways of using its privileges. A vessel, by lying close along-side for safety or protection, or for opportunity of use in emergency, is getting the benefit and advantage of what has cost the owner outlay to construct and maintain, even though the vessel may be held by anchor, or by moorings made fast to another wharf. In the principal ports in this country charges for wharfage are prescribed and regulated by statutes,

so that most of the adjudicated cases turn upon the construction to be given to the words of the statute; but expressions are found in reported cases tending to show that it is recognized that unless controlled by legislation such uses as the present do give rise to a claim for compensation. With respect to the wharves owned by the state of Maryland within the city of Baltimore an act of the legislature directs that the state wharfingers are to demand and collect a prescribed rate per ton on all vessels lying at or opposite to any public wharf of the city. By another act (Public Local Laws of Baltimore, § 360) it is provided that no vessel shall enter Smith's dock or any other private dock, without first ascertaining whether there is a vacant place at the wharf where she can lie, under a penalty of five dollars, to be paid to the harbor master. In the case of *The B. F. Woolsey*, 16 Fed. Rep. 423, and in *The George E. Berry*, 25 Fed. Rep. 780, Judge BROWN, in the Southern district of New York, while admitting that the primary definition of "wharfage" is "the compensation paid for loading goods on a wharf or shipping them off," holds that it may be applied to any vessels afloat enjoying for the purposes of commerce and navigation some substantial benefit, either of protection or safety or in the loading or unloading of cargo. In the case of *The Whitburn*, 7 Fed. Rep. 925, it was held that a vessel which for 24 hours lay across the head of a pier 8 or 10 feet from it, but not attached to it, but attached by cables to the piers next above and below, was liable to the intermediate pier for wharfage. Judge BUTLER said: "The respondent could make no use of the wharf without incurring liability to pay for it." Under the New York statute which fixes the rate per ton which may be charged any vessel which uses or makes fast to any pier, wharf, or bulk-head, it was held by Judge BENEDICT, in the case of *The City of Hartford*, 10 Ben. 150, that where a steam-boat 272 feet long had occupied a bulk-head, different portions of which were owned by three different persons, the total wharfage fixed by the statute should be divided among the several owners in proportion to the number of feet each owned.

Several cases have been cited by respondent's counsel which unquestionably do tend to support the theory of the defense. Most important among them is the judgment of the master of the rolls in *Collieries Co. v. Gibb*, L. R. 5 Ch. Div. 713, in which an injunction was granted in favor of the plaintiff, requiring the defendant, who was the owner of a wharf which he used as the entrance to a dry-dock, to remove a floating raft which he had placed in the river Thames in front of his wharf for the purpose of preventing the plaintiff, who owned the adjoining wharf, from employing a large steamer which was so long that it overlapped in front of the gates of defendant's dry-dock. The raft was undeniably a permanent fixed obstruction interfering with the reasonable use of a great public highway of commerce, and obviously unlawful; but, in delivering his judgment, the learned master of the rolls discussed very fully the reciprocal rights of adjoining wharf-owners, and some of the rules announced by him and relied upon by respondent's counsel in this case are, it seems to me, more applicable to the Thames at London, the use of which has been

for centuries regulated by custom, by statutes, and by various boards of control, than they are to a *quasi* private dock, such as the one now in question, which is more akin to the artificially constructed private docks of London. The master of the rolls, however, is careful to say that the use made of the river by one wharf-owner must be reasonable, and not such as to interfere with the reasonable use by the adjoining owner. He says:

"If this defendant [the owner of the dry-dock] had been carrying on the business of a wharfinger, and using it for vessels coming up, I should have held it most unreasonable for the collier to stand in the way to prevent his carrying on his trade in the regular way. It would be, in fact, an attempt by the plaintiffs to appropriate, without payment, the use of the defendant's wharf."

In the present case, Fahey, by having continually at his 85-foot wharf vessels which are much longer, and considerably overlap on the libelant, and by keeping them there during the time required to discharge from each its cargo of sand, wood, or coal, is in fact appropriating without compensation just so much of libelant's wharf, and deterring others from using it, and depriving libelant of wharfage. It is not true of this dock that it is a public highway in the same broad sense that it is true of the river Thames at London. The owner of the surrounding land constructed the dock, and, if all the present owners agreed, I have no doubt they could lawfully fill it up, and make it fast land.

The testimony with regard to the custom and usage in this port with respect to similar private docks is in support of libelant's claim. Mr. Pendegast, who for 22 years has been the collector of wharfage at Smith's dock states the usage there to be that the wharf-owner on whose wharf any vessel may overlap gets his *pro rata* proportion of the whole wharfage collected from the vessel, which is based upon the vessel's tonnage.

The case of *Easby v. Patterson*, 6 Wkly. Notes Cas. 318, in the supreme court of Pennsylvania, was rather a case of obstruction than of use, and it was held that as the plaintiff had distinctly refused to allow the defendant to use his wharf, and had cast off the attaching ropes, he could not sustain an action of *assumpsit* based on permissive occupation. In the present case distinct written notice was given the master of the schooner, before he came to the wharf, that if he overlapped onto libelant's premises he would be charged for that use. If I am right in holding that this use was such that libelant may claim compensation for it, then there can be no doubt that by so using the wharf after notice there would arise an implied contract to pay the reasonable worth of it, and that such a contract is cognizable in admiralty, and that, the schooner not being a domestic vessel, there is a lien *in rem*. *Ex parte Easton*, 95 U. S. 68; note to *Ouachita v. Aiken*, 16 Fed. Rep. 894.

I will sign a decree in favor of the libelant for his proportionate share of the whole wharfage proved to be customary for a vessel of this size; the libelant being entitled to the proportionate share which his wharf contributed to make up the whole length of the berth occupied by the schooner.

SOUTH CAROLINA STEAM-BOAT CO. v. THE NELLIE FLOYD AND CARGO.

(District Court, D. South Carolina. June 3, 1889.)

1. SALVAGE—WHAT AMOUNTS TO—AWARD.

The three-masted schooner F., in tow of a tug going to sea, went aground on the North breaker, a shoal on the Georgetown bar, about 11 A. M. on Monday. She had on board 2,500 packages of rosin, weighing nearly 400 pounds each, and 42 barrels of turpentine, and was drawing 11 feet 2 inches. The water on the shoal was 7 feet. The tug failing to get her off applied to the steamer P., which was going into Georgetown with a large and valuable cargo. Their efforts failed to move the schooner, and the P. after taking on board some of the rosin, proceeded to Georgetown, secured an extra force, unloaded her cargo, and returned about 10 P. M. The weather in the meantime had become threatening. Her efforts being again unsuccessful, and the tide having fallen, she left for the night, and returned next morning as soon as the tide arose. By the aid of hands procured by the tug, the F. jettisoned about $\frac{1}{4}$ of her cargo, thereby reducing her draft to 9 feet 10 inches. The P. returned on Tuesday, and succeeded in dragging the F. across the shoal into deep water, and getting her to the dock at Georgetown about 1 $\frac{1}{2}$ P. M. The wind was very high, and once at least the F. touched bottom in the swell. She also lost her hawser. The peril of the F. was not extreme, but the tug drew too much water to aid her, and there was no other steamer in the vicinity approaching the power of the P. The schooner could not have got off unaided without reducing her draft by two feet, and waiting until the next day's high tide. The P. was a passenger and freight steamer, not engaged in towing, and was worth \$25,000. The F. was worth about \$12,000, and had left a cargo worth between \$3,000 and \$4,000. *Held*, that the service was a salvage service, and that the P. should be awarded \$1,000 and the price of her hawser.

2. SAME—OFFER TO REBATE.

After the services had been rendered, the master of the P. offered to settle the matter by fixing the salvage at \$1,800, \$600 to be rebated to the F., which offer was refused. *Held* that, as the offer was made after the services were completed, and without the authority of the libellant, the owner of the P., and led to no result, it should have no effect on the right of libellant to recover.

In Admiralty. Libel for salvage.

Smythe & Lee, for libellant.

J. N. Nathans, for claimant.

SIMONTON, J. Although this case presents the contradiction in testimony, which too frequently deforms admiralty causes, it is not difficult to determine the essential facts. The Nellie Floyd, a three-mast schooner, in tow of a tug going to sea, went aground on the North breaker, a shoal on the Georgetown bar. This was about high water, 11 A. M. on 4th February, 1889. The schooner drew 11 feet 2 inches. She is ——— feet long, 33 feet beam. On this occasion she had in her 2,500 packages of rosin, weighing nearly 400 pounds each, and 42 barrels of spirits of turpentine. The tug attempted to get her off the shoal. In these efforts she soon got the assistance of the steamer Planter, one of libellant's line, which at that time was crossing the bar on her way to Georgetown, with a large and valuable cargo. The united efforts of the tug and of the Planter failed to move the schooner. The Planter then steamed along-side, and took from the schooner some 62 or 63 packages

of rosin, and proceeded on her way to Georgetown. The day was calm and clear. Reaching Georgetown, the Planter put on an extra force of hands, discharged all her cargo, including the rosin, and excepting 50 tons of fertilizers, and at 8 P. M. started for the schooner, reaching her at 10 P. M. The weather in the mean time had become threatening and windy. The night was dark. Backing down towards the schooner from the side of the shoal opposite to that on which she had grounded, the Planter took a hawser from her and again attempted to pull her off, but without success. The tide falling, the Planter left the schooner, and spent the night at South island, some four miles distant. She returned early the next morning. Pilot Romley, who had been on the tug when the disaster occurred, and who was on the schooner when the Planter came up, left the former in a small boat, and boarded the Planter, to aid her master with his advice and experience in his efforts to get the schooner off. It was agreed that these efforts should be renewed as soon as the master of the schooner put a flag in his rigging indicating that his vessel had begun to thump on the rising tide. The signal was given. The master of the Planter, having the assurance of the pilot that the depth of water on the shoal was at that time seven feet, (his steamer drew from five to five and one-half feet,) went to the schooner, bent on his own hawser, and again pulled on her. The schooner, thus in tow, was gradually dragged over the shoal to the side opposite to that on which she had struck, and got off into deep water. Just before she reached deep water she put up her spanker and mainsail, and soon afterwards her jibs. While the Planter was engaged in this service, and just about the time the schooner got into deep water, a bridle put on the hawser, and leading to the bow of the steamer, was let go by some of her hands too soon. It got afoul of her wheel and dragged the hawser with it. The latter had to be cut out. As soon as possible the Planter again took the schooner in tow. The schooner furled her sails, and with the Planter she proceeded to Georgetown, reaching the dock about half past 1 P. M. The weather on this second day was blustering. The wind very high from the south-west. The sea was breaking on the shoal. Once at least the Planter touched bottom in the swell. On Monday the tug went to Georgetown with a message from the master of the schooner, for hands and lighters to take cargo from his vessel. She came back in the afternoon with lighters and hands. The lighters could not go on the shoal. The hands went aboard the schooner, and assisted the crew, who had been engaged all day in making jettison of the cargo. This was kept up during a part of the night and of the next day, and 1,000 packages were thrown overboard. The draft of the schooner was thereby reduced to 9 feet 10 inches. Some of this rosin floated away. As the specific gravity of the lower grades of rosin is greater than that of water, and much of the cargo was of this low grade, many of the packages sank. One of the risks of the Planter was from this rosin. The floating packages might foul her paddle wheels; and, tossing on the rough sea of the shoal, her bottom may have come in contact with the staves inclosing the rosin, endangering a leak. The Planter is a

high-pressure side-wheel steamer, with two engines,—one for each wheel. She has about 350 horse-power. She carries passengers and freight, and is not engaged in the towing business. Her regular course, however, is on the shallow and boisterous waters of this coast, and she carries a long and heavy hawser, ready to render assistance by way of salvage. She is worth \$25,000. On the day of successful service she had as cargo 50 tons fertilizers, worth \$1,000. The schooner is 10 years old; cost, when built, about \$24,000. Roughly estimated, she is worth about \$12,000. The cargo left after the jettison is worth between three and four thousand dollars. The evidence is not distinct on these points.

The essential questions in this case are: Was the schooner in peril? Did the Planter contribute to her rescue? The master and mate of the Planter testify strongly in the affirmative of each question. The master and a man who was pilot on the schooner testify in the negative, denying both the peril and the service. There are certain facts, however, which conclude these questions. The Nellie Floyd was aground in the breakers on a shoal of an exposed bar. The greatest depth of water on that shoal with the prevailing tides was 7 feet. She drew 11 feet 2 inches, and, after making jettison of about one-third of her cargo, she drew 9 feet 10 inches. A heavy wind was blowing from the southwest. In his protest, extended after reaching port, the master of the schooner called it a gale. It was so entered on his log. She was on the south side of the shoal. Wind, tide, and waves drove her upon it. The sea was very heavy on the shoal, even at low water. Pilot Romley, who left the schooner in the morning in a small boat to go to the steamer, says that it was dangerous to do so, but that the emergency justified the risk. The master of the schooner, when he got in safely, expressed in warm terms his indebtedness to the Planter for timely, needed, and efficient service. Soon afterwards he called a board of three persons to estimate the value of his vessel in the position on the shoal which he described to them. They agreed on the sum of \$4,250,—about one-third of the estimate put on her after she reached the dock. Two efforts had been made to get her off, without success,—one on Monday, with the tug and steamer; one on Monday night, by the steamer alone. When dragged off she was drawing 9 feet 10 inches in a depth of 7 feet of water. It had taken all Monday afternoon, into Monday night, and a part of Tuesday, to take out one-third of her cargo, lessening her draft 1 foot 4 inches. She was rescued at high water. If she had not had the steamer, and intended to reduce draft and use her sails, she could not attempt to get off until the next tide, 12 midnight. As the bar has no lights on it, no vessel crosses it at night. So she had to wait until the next day's tide, say 12:50 p. m. To reduce draft to 7 feet she had to jettison cargo, and reduce her draft 2 feet 10 inches. The one-third already out reduced it but 1 foot 4 inches. So she was in peril, and the Planter rescued her. As the tug drew too much water to aid her, and as there was no other steamer in Georgetown or its vicinity approaching the Planter in power and capacity, the importance of her service is enhanced. Her peril was not extreme, nor was her destruction certain, unless soon re-

lieved. The Planter also encountered peril in rendering the service,—peril requiring ability and courage. The efficient salvage service was rendered on Tuesday. It was rendered promptly, skillfully, energetically, and successfully. She spent a night and nearly one day in the service, and lost her hawser. After the service was rendered, and the schooner safe at her wharf, the master of the Planter suggested to the master of the schooner that, instead of litigating the matter of salvage, they ought to settle it out of court, and that by way of settlement the salvage be fixed at \$1,800, of which \$600 would be allowed the schooner by way of rebate. This suggestion was at once rejected by the master of the schooner. His proctor insists that this was gross misconduct on the part of the salvor,—such indeed as should diminish, if not forfeit altogether, any award. The practice of requiring and receiving rebates, which pervades so many branches of mercantile life, cannot be too severely rebuked. The rebate is a bribe offered and accepted as an inducement in every instance to disregard, and in very many instances to betray, the interests one or other party is bound to protect. Here the insurer would have been the victim. Had this arrangement been made during the performance of the salvage service; had it been used as an adjustment after the service was rendered; had the offer been made by the authority, sanction, or confirmation of the libellant,—the award would have been seriously affected. It was made long after the service was completed, without any authority or confirmation on the part of libellant, and led to no result. From the high character borne by the master of the Planter I feel sure that he was unconscious of the full meaning of the suggestion. After full consideration of the matter I award for the salvage services in this case the sum of \$1,000, besides the price of the hawser,—\$125. The testimony of libellant showed some danger of life on the part of the crew of the Planter. They are not parties to this proceeding. At the hearing it was stated that libellant would arrange with them. Let a stipulation in writing to this effect be filled before the award is paid out to the libellant. The salvage award must be paid by the vessel and cargo proportionately. If this proportion needs adjustment the parties have leave to apply at the foot of this decree for any further order necessary. Costs to be paid by respondent.

BISSELL v. CANADA & ST. L. RY. CO. *et al.*

(Circuit Court, D. Indiana. May 31, 1889.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

To an action against a railroad company by one asserting an indebtedness claimed to be a first lien on the defendant's track, a mechanic's lien claimant and the mortgagee of the company were made parties. The mechanic's lien claimant filed a cross-petition, asserting his lien, to which the mortgagee was made a party. The mortgagee, in his petition for removal, claimed that his lien was prior to each of the lien claimants, and that the mechanic's lien claimant was estopped to assert a lien superior to that of the mortgage. *Held*, that the controversy presented was simply the question of priority of liens, and that the petition failed to show a separable controversy between the mortgagee and either of the lien claimants, which could be determined without the presence of the railroad company.

On Motion to Remand.

Turner, McClure & Ralston, A. C. Harris, and H. A. Gardner, for petitioner.

T. M. Marquette, Thos. C. Windes, and Baker & Baker, for Fitzgerald.
Wilson & Davis, for Bissell.

WOODS, J. Briefly stated the case is this: Bissell, by the original bill, asserts an indebtedness of the railroad company to him, and upon the facts stated claims a first lien upon a part of the track of the defendant company's road. Fitzgerald, one of the defendants to that bill, by cross-bill asserts an indebtedness of the railroad company to him for work done and materials furnished in the construction of the road, and claims a statutory lien in the nature of a mechanic's lien. The petitioner, the Farmers' Loan & Trust Company of New York, is made a defendant in both bills, and in the petition for removal claims a lien by mortgage upon the road, which it asserts to be prior to the rights of Bissell and of Fitzgerald, respectively, and particularly alleges an estoppel against Fitzgerald to assert any claim inconsistent with or superior to the mortgage; and so claims that it has a separable controversy in the case, with Fitzgerald, who is a citizen of Nebraska, and also with Bissell, who is a citizen of Indiana. In respect to this subject the present statute is the same as that of 1875, and I think the motion to remand must be sustained. Aside from the question of separable controversy, the original bill affords no ground for the assertion of jurisdiction here, because the demand and prayer for relief are for less than \$2,000; and, if it be conceded that the right of removal may arise under a cross-bill,—a proposition disputed by counsel in argument,—the petition, in my judgment, fails to show that the petitioner has a controversy with either Bissell or Fitzgerald which could be heard and determined without the presence as a party of its co-respondent, the railroad company, or of the receiver of that company. The controversy here claimed to be separable is simply a question of priority of liens, and is determinable as an incident to the issues tendered by the bill and cross-bill,—each involving and proposing as the subject-matter of controversy the question of the existence,

character, and amount of the indebtedness and lien sought to be established. To such a bill the alleged debtor is a necessary party, and complete relief thereon cannot be administered without the presence of junior lienholders and of all who assert conflicting or inconsistent rights; and, if there are questions of priority between defendants, or between any defendant and the complainant, they are determinable as incidents to the principal controversy, but not, as it seems to me, in a separate action between the lienholders, without the presence of the debtor. I suppose it to be unknown to practice, and not permissible, that lienholders, whose claims remain unadjudicated as against the debtor, shall bring one another into court, in an action to which the debtor is not made a party, merely to settle a question of priority; and, this being so, it cannot well be contended that, all the parties being in court under a bill to establish and enforce the complainant's lien, one of the defendants can claim to have in such action a separable controversy in respect to that which he could not have litigated in an independent action. If, as in the *Removal Cases*, 100 U. S. 469, the questions between Bissell and Fitzgerald, and between each of them and the railroad company, had been fully determined before the trust company was served with process or had appeared to the action, the case would be held, as that was, to be removable; but the material facts here are entirely different. Nothing has been adjudged here between any of the parties, while there, the rights of the complainant against the debtor company having been completely determined before the petitioner for removal was made party, the court treated the debtor company as having become a nominal party only, and held the entire remaining controversy to be one between citizens of different states, and accordingly removable under the first clause of the section, and reserved consideration of the second clause (in respect to separable controversies) "until the case requiring it" should arise. There having been an actual separation of the question of priority between lienholders or claimants from the principal cause of action, the question of separability was not up. See *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. Rep. 90.

The decision in *City of Galesburg v. Water Co.*, 27 Fed. Rep. 321, seems to support the assertion of jurisdiction in this court; but, as appears from the opinion, that ruling was predicated upon the proposition "that the holders of the bonds (or their trustee) may have another and different answer in this litigation to the original bill from that which could be put in or relied upon by the water company,"—the co-respondent of the petitioner in the case; and it has become now well settled "that separate defenses do not create separate controversies within the removal act." *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. Rep. 735; *Fidelity Ins. Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733. The last-named case was upon a creditors' bill to enforce payment of a judgment. The Fidelity Company was made defendant, and sought, as does the petitioner here, to remove the case into the federal court; and on the question of separability the court says:

"The judgment sought against the Fidelity Company is incident to the main purpose of the suit, and the fact that this incident relates alone to this com-

pany does not separate this part of the controversy from the rest of the action. What Huntington wants is not partial relief * * * against the Fidelity Company alone, but a complete decree, which will give him a sale of the entire property, free of all incumbrances, and a division of the proceeds as the adjusted equities of each and all the parties shall require. The answer of this company shows the questions that will arise under this branch of the one controversy, but it does not create another controversy. The remedy which Huntington seeks requires the presence of all the defendants, and the settlement not of one only, but of all, the branches of the case."

The language here used—and the like may perhaps be found in other cases—seems to imply that the presence on the same side with the petitioner of any party necessary to the granting of the complete relief sought by the opposite party will defeat a removal under the second clause of the statute; but this, as I suppose, is so only when the alleged separable controversy is determinable, and, in order to the granting of complete relief to the complainant, must be determined as an incident to the principal action. In *Ayres v. Wiswall*, *supra*, it is said:

"The rule is now well established that this clause in the section refers only to suits where there exists a separate and distinct cause of action, on which a separate and distinct suit might have been brought, and complete relief afforded as to such cause of action, with all the parties on one side of that controversy citizens of different states from those on the other. To say the least, the cause must be one capable of separation into parts, so that in one of the parts a controversy will be presented with citizens of one or more states on one side and citizens of other states on the other, which can be fully determined without the presence of the other parties to the suit as it has been begun." *Fraser v. Jennison*, 106 U. S. 194, 1 Sup. Ct. Rep. 171.

It is evident that neither Bissell nor Fitzgerald has any separate and distinct cause of action which he might prosecute to complete or even partial relief against the petitioner; and it is equally clear that the petitioner has no cause of action which he can maintain against Bissell or Fitzgerald without the presence as a party of the railway company, or of its representative in the person of the receiver appointed by the Elkhart circuit court, from which removal is sought. Other questions discussed need not be considered. Cause remanded.

COHN v. LOUISVILLE, N. O. & T. R. Co.

(Circuit Court, S. D. Mississippi, W. D. July 6, 1889.)

1. REMOVAL OF CAUSES—LOCAL PREJUDICE—ALIENS.

A cause to which an alien is a party is not removable to the United States circuit court under the "local prejudice" clause of the removal act of 1887, which provides for the removal of controversies between citizens of the state in which the suit is brought and citizens of other states, on the ground of local prejudice.

2. SAME—CORPORATIONS—CITIZENSHIP.

A corporation created by the consolidation of several corporations existing in different states, by an act of the legislature, which provided that such cor-

poration should be treated as a corporation created by the laws of the state authorizing the consolidation, is, as concerns a suit against it by an alien, a citizen of that state, and not entitled to a removal of such suit under the local prejudice clause of the act of 1887.

At Law. On motion to remand to state court.

Phelps & Skinner, for motion.

Yerger & Percy, *contra*.

HILL, J. This is an action at law, brought by the plaintiff to recover damages for alleged personal injuries inflicted on him while a passenger on defendant's train, and alleged to have been caused by the negligence and carelessness of defendant's employés. The cause was removed from the circuit court of Washington county into this court, upon the petition of defendant under the fourth clause of the second section of the act of 1887, known as the "Prejudice Clause" of the removal act. The questions now for decision arise upon plaintiff's motion to remand the cause to the circuit court of Washington county, from whence it was removed into this court. It is agreed on the hearing of this motion that the plaintiff is not a citizen of the United States, but is a subject of the emperor of Austria. It is further agreed that the defendant corporation, as it now exists, and did exist when the injuries complained of occurred, was created by the consolidation of different railroad corporations, created by the acts of the legislatures of Louisiana, Mississippi, and Tennessee, respectively, and that the consolidation was authorized by the respective acts of the legislatures of these several states. It is further admitted that the act of the legislature of this state, authorizing this consolidation, provided that by whatever name the consolidated company should be called in the future, it should be held, deemed, and treated as a corporation created by the laws of this state, and liable to all the responsibilities, and entitled to all the rights of such as though said consolidation had not been made. The petition for removal avers that the defendant is a corporation created by the laws of Tennessee, and has its principal office and place of business in that state. While this is true in the state of Tennessee, it is clear from the admitted facts, as well as the act of consolidation of this state, that it is equally a corporation created under the laws of this state, and must be held and treated as such, so far as it relates to its contracts and liabilities incurred in this state. The grounds of the motion for remanding the cause to the court in which the suit was brought are,—*first*, that the plaintiff is an alien, and not a citizen of this state or district; and, *secondly*, that the defendant is a citizen of this district and state, and that for the want of necessary citizenship of the parties this court has no jurisdiction of the cause under the clause of the act of 1887, under which the removal of the cause was sought to be made. This clause reads as follows:

"And where a suit is now pending, or may hereafter be brought, in any state court in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant being such citizen of another state may remove such suit into the circuit court of

the United States for the proper district at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court, to which the said defendant may, under the laws of said state, have the right, on account of such prejudice or local influence, to remove said cause."

There is no provision in this clause, nor was there any provision in the act of 1875, of which this act is an amendment, where an alien is a party, for the removal of causes from a state court, whether the alien be a plaintiff or defendant; and if there was no other reason, the motion to remand the cause to the circuit court of Washington county must prevail. But if this were not so, it is clear that the defendant is a citizen of this state, so far as this suit is concerned, and was sued as such, and under the provisions of the fourth clause of the second section of the act of 1887, is not entitled to a removal of the cause, and for this reason, the motion to remand must prevail, and such will be the order of the court.

SUNFLOWER RIVER PACKET CO. v. GEORGIA PAC. R. CO.

(Circuit Court, S. D. Mississippi, W. D. July Term, 1889.)

FEDERAL COURTS—JURISDICTION—NAVIGABLE WATERS.

The federal courts have jurisdiction of an action by a steam-boat company to recover damages of a railroad company for obstructing a navigable river of the United States by building a bridge across it, regardless of the citizenship of the parties.

At Law. Motion to dismiss.

Albert M. Lea, for plaintiff.

Yerger & Percy, for defendant.

HILL, J. This is a suit brought by the plaintiff against the defendant to recover damages for the obstruction to the navigation on Sunflower river, by placing a bridge across said stream. The declaration alleges that the Sunflower river is one of the navigable streams of the United States, and has long been used as such for the transportation of persons and freights on steam-boats plying upon said river for many miles above the point where said bridge is built, and that the plaintiff, as a corporation created under the laws of this state, is engaged in transporting persons and freight upon steam-boats from the port of Vicksburg to points on said Sunflower River as high as the same is navigable, and that its boats are duly enrolled and licensed for the coasting trade, conformably with the provisions of title 50 of the Revised Statutes of the United States; that the defendant corporation obtained an act of the congress of the United States to place a bridge across said river, provided it should not interfere with the navigation by steam-boats upon said river; that the defendant, in the construction of said bridge, has so constructed

it that it does prevent and obstruct the plaintiff from running its steam-boats above and beyond said bridge, to the damage of the plaintiff the sum of \$5,000. The defendant moves the court to dismiss the suit for the want of jurisdiction in this court to try and determine the controversy between the parties, upon the ground that both the plaintiff and defendant are citizens of this state, and that there is no federal question involved in the suit, as shown by the declaration. Whether there is or is not such federal question is the only question now to be determined.

It is not controverted that the Sunflower river is one of the navigable water-courses of the United States, and was so used at the point where said bridge has been built across said river, and for a considerable distance above said point, and was before the construction of said bridge navigated by plaintiffs, by their steam-boats, under a license from the United States. This right and privilege is certainly derived from the United States; and, for any unlawful obstruction or interference with the right to navigate the said river, this court certainly has the jurisdiction to try and determine the injuries done the plaintiff, and afford the proper remedy, if established as alleged in the declaration. I am satisfied that this court has full jurisdiction of the controversy stated in the pleadings, and that the motion to dismiss the cause must be overruled, and it will be so ordered.

UNITED STATES *v.* AMERICAN BELL TEL. CO. *et al.*

(Circuit Court, D. Massachusetts. July 2, 1889.)

EQUITY—REFERENCE TO EXAMINER.

On a motion for the appointment of an examiner to take testimony in an equity case, the court will not restrict the testimony to the single issue of fraud which is raised by the plea.

In Equity. Motion to appoint examiner.

G. A. Jenks, C. S. Whitman, and O. A. Galvin, for complainant.

C. Smith and B. F. Thurston, for defendants.

COLT, J. The plaintiff moves the court for the appointment of an examiner to take testimony. The defendant Bell also moves for the appointment of an examiner to take testimony upon the issue raised by his plea filed in this case. The defendant company have answered generally to the bill. The defendant Bell has filed a plea and an answer in support of the plea. To the answer of the defendant company and to the plea the plaintiff has filed replications. The cause, therefore, is at issue, and it is proper for the court to appoint an examiner to take testimony. The defendants' motion seeks, in effect, to restrict the testimony by order of court to the single issue of fraud which is raised by the plea. It is certainly unusual, upon a motion made in the ordinary way for the appointment of an examiner, to ask the court by an interlocutory order to

limit in advance the scope of the testimony to be taken. It is probable that no appeal would lie from such an order. But, however this may be, such action on the part of the court seems to be contrary to established equity practice. Objections may be taken to the evidence on the grounds of incompetency or irrelevancy, and these objections properly come before the court at the final hearing of the cause, but I find no precedent for limiting or restricting the taking of testimony in advance. The court should not be called upon at this stage of the case to determine what is proper testimony and what is not, nor to determine the scope of the decision of the supreme court upon the demurrer in this case. Upon a motion in the ordinary way for the appointment of an examiner it is not for the court to settle questions which cannot be properly and intelligently passed upon at this time. The fact that this is an important, and in some respects an exceptional, case, should not prevent the court from following the usual and ordinary course of equity practice. The defendants' motion is denied and the plaintiff's motion is granted, and Henry L. Hallett is hereby appointed examiner.

FIRST NAT. BANK OF ELKHART v. ARMSTRONG.

(Circuit Court, S. D. Ohio, W. D. July 12, 1889.)

1. BANKS AND BANKING—COLLECTIONS—INSOLVENCY.

By agreement and custom the Fidelity Bank received drafts from its correspondent bank at E., and credited them to it as cash, with the understanding that any draft which was unpaid should be charged back to the correspondent. The latter forwarded drafts which were credited to it, but were not collected before the Fidelity Bank failed. The drafts were paid after the appointment of a receiver, and the moneys actually came into his hands. The drafts were indorsed payable to the Fidelity Bank "for collection for the" bank at E. *Held* that, as the drafts were, when received, credited as cash to the bank at E., which had the right at once to draw against them, the indorsement for collection did not affect the result, and the bank had only the rights of a general creditor.

2. SAME—PROOF OF CLAIM.

The Fidelity Bank, when it failed, owed \$5,361.40 to the bank at E., which had collected \$1,873.97 on drafts of other banks sent to it by the Fidelity Bank for collection, and had credited the proceeds to the Fidelity Bank. The proceeds were claimed both by the banks which had sent them and by the receiver of the Fidelity Bank. *Held*, that the bank at E. should be allowed to prove up its claim before the receiver for whatever amount it saw fit, and the receiver should be allowed to accept the proof and pay a dividend thereon, without prejudice as to any claim he might have on the proceeds of the drafts collected by the bank at E.

In Equity.

Agreed statement for instructions in the matter of the First National Banks of Elkhart, Ind., against David Armstrong, receiver of the Fidelity National Bank of Cincinnati, Ohio.

J. M. Van Fleet, for complainant.

Kittredge & Wilby and *W. B. Burnet*, for defendant.

SAGE, J., (*orally*.) This case is before the court on an agreed statement for instructions under the banking law. The case stated is that these two banks had mutual dealings. The First National Bank of Elkhart claims that the Fidelity National, at the time of its failure, owed the Elkhart Bank a large sum of money, which is unpaid. The First National Bank of Elkhart sent to the Fidelity National Bank, for credit and advice, certain sight drafts and checks (charging them to the Fidelity Bank on the date they were sent) on certain persons and banks, as appears by the agreed statement of facts. The total amount of these drafts is \$1,106.70. Each of them was indorsed as follows: "Pay Fidelity National Bank of Cincinnati, Ohio, or order, for collection for the First National Bank of Elkhart, Ind. WILLIAM H. KNICKERBOCKER, Cashier." Each of these drafts, upon its reception by the Fidelity National Bank, was credited to the First National Bank as cash, and that gave the Elkhart Bank the right to draw upon the same as cash, as had been agreed between said banks, as shown by a letter of the counsel of the Elkhart Bank, which is attached to the agreed statement of facts, and made a part thereof. This was the uniform custom and understanding of both banks. It was also their uniform custom and understanding that, when any draft should be returned to the Fidelity Bank unpaid, it should be charged back to the Elkhart Bank, and returned to it. The statement then sets forth the facts, which need not be given in detail, of the failure of the Fidelity National Bank on the 20th day of June, 1887, at the close of business on that day, the appointment of a receiver, and the dates when these drafts were sent out to its correspondents,—that is to say, the drafts making up the total of \$1,106.70. These dates run from June 15th up to about the date of the failure of the Fidelity National Bank, the 20th of June; and all the drafts were paid after the failure of the Fidelity Bank, or, at least, all received at Cincinnati after the date of the failure, and after the bank had passed into the hands of the examiner, and they actually came into the hands of the receiver, and are in his possession now. On the 8th of January, 1888, the First National Bank of Elkhart demanded these moneys of the receiver, and he refused to comply with the demand. That is the first branch of the case, and the question presented is whether the Elkhart Bank, as to the proceeds of those drafts, stands in the position of a general creditor, or whether those proceeds, having been received, not by the Fidelity Bank, but by the receiver, should be treated as trust funds which he should, therefore, pay in full to the Elkhart Bank. It appears from the letter of counsel for the Elkhart Bank, which is attached to the statement of facts, and referred to as a portion thereof, that, prior to the negotiations between the Elkhart Bank and the Fidelity Bank, a circular was mailed to the Elkhart Bank by the Fidelity Bank, offering to collect drafts, and, upon their receipt for collection, to credit the amounts as cash to the banks sending the drafts, with the understanding that, if any draft was not collected, the amount thereof should be charged back

to the sending bank. Upon that understanding the Elkhart Bank sent drafts, including those above referred to, to the Fidelity Bank for collection. But it is insisted that, inasmuch as these particular drafts were indorsed, not generally, but in terms, "for collection," the restrictive indorsement prevented the title to the drafts passing to the Fidelity, and, therefore, that the receipt of the proceeds, upon collection, by the receiver was a receipt on account of the Elkhart Bank, and the money must be paid over. If the premises are correct, the conclusion follows as a matter of course. But let us analyze the transaction, and see where it places these parties. Upon the receipt of the drafts they were credited as cash to the Elkhart Bank, and the Elkhart had the right to draw against them. Now, suppose that the Fidelity National Bank had not failed, upon the collection of the drafts, to whom would the proceeds belong? Could a creditor of the Elkhart Bank have reached them by process in attachment in the hands of the collecting bank, before they were transmitted to the Fidelity Bank? Clearly not. The Fidelity National Bank had given the Elkhart Bank credit for the amount of the drafts as cash, and, if the drafts were paid, that ended the transaction as between the Fidelity Bank and the Elkhart Bank. No other entry would be necessary in the account between the two banks, and I am not able to see that the indorsement "for collection," under these circumstances, affected the result, or reserved to the Elkhart any title to the proceeds of the drafts. The agreement that the drafts should be charged back if not paid did not operate to change this result, for the indorsement and the arrangement for credit to the Elkhart Bank must be taken together; and, while it is true that the indorsement "for collection" did not of itself transfer the title, I am quite clear that the credit to the Elkhart Bank, together with the indorsement, did transfer the entire interest in the proceeds of the drafts to the Fidelity Bank, and that the agreement to charge back if any draft was not paid did not affect the character of the transaction. That was nothing more than would have resulted without any such agreement, unless the indorsements to the Fidelity were expressly without recourse. If the drafts were purchased by the Fidelity out and out with a general indorsement, the case would differ from the case presented to the court only in the respect that, upon the failure of the drawee to meet the draft, protest would have been necessary, whereas it may be that, by virtue of the agreement, protest was not necessary. The conclusion of the court is, therefore, that as to these drafts the First National Bank of Elkhart must take its place in the list of general creditors.

The second branch of the case presents a different question. It may be stated as follows: The Fidelity National Bank is indebted to the First National Bank of Elkhart, Ind., including the \$1,106.70 above mentioned, in the sum of \$5,361.40, about which there is no dispute. There is also a further sum of \$1,873.97, composed of four collections, as follows: Fidelity, No. 60,304. Maxon & Darling note, \$831.54. Due July 2, 1887. Old National Bank, Grand Rapids, Mich. Fidelity, No. 60,305. Maxon & Darling note, \$729.38. Due January 26, 1887. Old National

Bank, Grand Rapids. Fidelity, No. 67,403. Davis & Co. note, \$101.50. Due January 28, 1887. Third National Bank, Detroit. Fidelity, No. 67,404. Bradford note, \$211.55. Due January 27, 1887. Third National Bank, Detroit. The Fidelity National Bank owes these amounts, either by way of set-off to the First National Bank of Elkhart, or to the Old National Bank of Grand Rapids, Mich. and the Third National Bank of Detroit. These claims arose in this way: The Old National Bank of Grand Rapids, Mich. and Third National Bank of Detroit sent drafts and notes to the First National Bank of Elkhart, which collected and credited them to the Fidelity National Bank. The Old National Bank of Grand Rapids now claims the sum of \$1,560.92, being a part of the proceeds of said collections, and the Third National Bank of Detroit claims the sum of \$313.05, being the residue of the proceeds of said collections, and both banks threaten to sue said First National Bank therefor. The receiver claims that the banks for whose account the drafts were collected are entitled to the proceeds, and he refuses to allow the First National Bank of Elkhart to retain the same and have credit in account therefor, and refuses to allow said First National Bank to prove up its claim for the undisputed debt of \$5,461.40 above referred to, unless it will also include said \$1,873.97, which said First National Bank refuses to do. Said First National Bank has not yet proved up any claim, nor received any dividend. Now, said First National Bank claims that the receiver should pay over to it, at once, said sum of \$1,106.70,—that is to say, the amount of the first claim considered in this opinion,—and allow it to prove up its claim for the balance due, less said \$1,873.97,—that is to say, prove up its claim for \$4,354.70,—and that he should pay it its dividends thereon, and that the said sum of \$1,873.97 should be left open until it is determined to whom the same is due and payable. As to some of the questions arising upon this branch of the case, it is not so presented that the court can give any intelligent and complete answer. There is no showing in the statement of facts what were the indorsements by which these drafts and notes were transferred to the Fidelity National Bank. For all that appears, they may have been so transferred as to vest the title in the Fidelity precisely as the court has held with reference to the first class of claims already considered. On the other hand, the notes and drafts may have been indorsed "for collection only," and in that case, as the proceeds were not received by the Fidelity during its existence, and are now in the hands of the First National Bank of Elkhart, they would belong to the banks which sent them to the Fidelity for collection, so that, in the absence of a more specific statement, the court cannot say to whom the proceeds of these notes and drafts belong. But it is evident that the First National Bank of Elkhart is seeking to make a move which may result in giving it a set-off, or allowing it a counter-claim for the amount of these notes and drafts. The court is not at all disposed, in the present aspect of this case, to permit anything of the sort. On the other hand, there seems to be no reason why, if the Elkhart Bank is between two fires, (the receiver claiming these proceeds on the one side, and the banks which forwarded the notes and drafts on the

other,) it should be required to pay this money over at this time to the receiver of the Fidelity Bank; and I see no reasonable objection to allowing the Elkhart Bank to prove up its claim for whatever it choses to prove up. But the receiver must be allowed to accept that proof and pay the dividend on the claim presented, expressly without prejudice, as to his claim, whatever it may be, upon the proceeds of the drafts and notes collected by the Elkhart Bank. If those notes and drafts were indorsed "for collection only," the proceeds belong to the banks that furnished them; but, if the notes and drafts were so indorsed, there really seems to be very little practical importance in the question, for, if the Elkhart Bank pays them over to the receiver, he would be compelled to pay them over to the banks claiming them, and of course that would relieve the Elkhart Bank. The Elkhart Bank will be allowed to prove its claim for the balance, less said \$1,873.97, but without prejudice to the receiver, as above indicated.

LEE v. SIMPSON.

(Circuit Court, D. South Carolina. May 18, 1889.)

POWERS—EXECUTION.

Testatrix bequeathed property in trust to her daughter for life, and provided "that my daughter Anna is hereby authorized and empowered by her last will and testament, duly executed by her, to dispose of this bequest * * * as she pleases." The daughter, in her will, recited: "Whereas, I am entitled to legacies under the last will of my deceased mother, * * * and to a distributive share in the several estates of my deceased sister * * * and my brother," and devised "the entire property and estate to which I am now in any wise entitled, and which I may hereafter acquire, of whatever the same may consist, to my beloved husband." *Held*, that this was a valid execution of the power.

In Equity. On final hearing.

On May 13, A. D. 1854, Mrs. Floride Calhoun was seised and possessed of the plantation or tract of land situate, lying, and being in that part of Pickens district, which is now Oconee county, in the state of South Carolina, on the east side of Seneca river, known as the "Fort Hill Place," containing 1,110 acres, more or less; and on that day the said Floride Calhoun and her daughter, Cornelia M. Calhoun, sold and conveyed this plantation or tract of land, together with certain negro slaves and other personalty, to Andrew P. Calhoun for the sum of \$49,000; Cornelia M. Calhoun having no interest whatever in the real estate so sold and conveyed. Andrew P. Calhoun duly executed his certain bond, under seal, to Floride and Cornelia, conditioned for the payment of \$40,200 to Floride Calhoun, and the remaining \$8,200 to Cornelia M. Calhoun, and to secure the payment of the bond representing the purchase money, and as a part of the same transaction, at the same time duly executed and delivered to Floride and Cornelia his certain conveyance, by way of mortgage, and thereby granted, bargained, sold, and re-

leased the plantation or tract of land upon the condition that if he should well and truly pay, or cause to be paid, the sums of money in the said bond mentioned to be paid, according to the true intent and meaning thereof, the conveyance should be null and void, otherwise to remain in full force and virtue. On the 27th day of June, A. D. 1863, Floride Calhoun duly made her last will and testament in writing, wherein and whereby, among other things, she devised and bequeathed as follows:

"*Second.* To my daughter Anna Maria, wife of Thomas G. Clemson, of Maryland, I give, devise, and bequeath during her life, and for her sole and separate use, the following property: My house and lot in Pendleton, and the land attached and belonging thereto, purchased by me from Mrs. William Adger, together with the furniture and everything in the house and upon the premises, reserving, however, the silver and such other articles as I may hereinafter specifically give to others; also all my jewelry, and the silver cup and prayer-book, presented to me by the church at Newport, Rhode Island. At Anna's death I devise and bequeath all the above-mentioned property to her daughter, Floride Clemson, and at the death of Floride, if she dies without issue, I devise and bequeath it to my sons John and William's children, then living, equally among them; or, if they be dead, to their issue then living. * * *" "(19) I am possessed still of a large residue of property, consisting principally of a debt due me by my son Andrew, for the purchase of Fort Hill, amounting to about forty thousand two hundred dollars, secured to me by bond and mortgage. I have also an unsecured interest in a gold mine in Dahlonega, Georgia, belonging to the estate of my late husband, and also an interest in the estate of my second son, Patrick, and second daughter, Cornelia, besides other property. Whatever real or personal property I may possess at my death, and not hereinbefore specifically or otherwise disposed of, I direct my executors to sell whenever they shall deem it advisable. I direct my executors to collect, as fast as possible, the above-mentioned residue of my estate, and, after paying off my debts and the legacy to Calhoun Clemson, the remainder I wish divided into four parts, which I dispose of as follows: (20) One part, being the fourth of the above residue, I give and bequeath to my daughter Anna during her life, and for her sole and separate use, and at her death I will and bequeath it to her daughter, Floride, and at Floride's death, if she die without issue, I will and bequeath it to the children of my deceased sons John and William, then living, equally among them, or to their issue, if they be dead, issue to represent the parents. The better to effect my intentions in regard to the property in this and in the second clause, given to Anna, I appoint Edward Noble, of Abbeville, trustee for it, and vest in him the legal title. Should Anna at any time wish to sell the house and lands in Pendleton, or all or any portion of the property given to her for life, the trustee, provided it meets with his approval, is authorized to dispose of it according to the wishes of my daughter, upon having her written request for so doing. The proceeds of such sale the trustee shall hold subject to the trusts and limitations declared in reference to the original property. The trustee is authorized and required to invest the proceeds, and also the fourth part of the residue herein given to her, in such property or in such way as she may in writing direct, provided it meets with his approval. The trustee is authorized and required from time to time to change such investments as often as he may be directed so to do by my said daughter in writing, provided it meets with his approval, holding always the substituted property or reinvestments subject to the trusts and limitations aforesaid. If from death or any cause there is no trustee, or if Anna shall at any time shall desire to change her trustee, she shall have the power so to do, and to appoint another by any instru-

ment in writing, under seal, executed by her in the presence of two subscribing witnesses; and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described. (21) One-fourth part of said residue of my said estate I give and bequeath to my granddaughter, Floride Clemson; but if Floride should die without living issue, I give and bequeath it at her death to the children of my sons John and William, or the issue of them if they be dead, the issue to take by representation. (22) The remaining two-fourths I dispose of as follows: To Kate P. Calhoun, my daughter-in-law, I give and bequeath the one-half of the one-fourth of said residue of my estate, to be enjoyed by her during widowhood. At her death or marriage, whichever first happens, I give and bequeath the same to such of her children, being my grandchildren, as may then be alive. But should either of my said grandchildren die under twenty-one years of age, leaving no child or children, the share of such deceasing grandchild shall go to the survivors or survivor of them, or their issue, the issue representing the parent. If Kate should die before me, what I have given her in the will is not to revert to my estate, but is to go to her children, my grandchildren, living at my death, subject to the conditions and limitations above expressed. (23) The remaining fourth and half of a fourth of the above-said residue of my estate I give and bequeath to my grandsons, John C. Calhoun and Benjamin A. P. Calhoun, sons of my deceased sons John and William Lowndes Calhoun, child of my second son, William, equally among them; and, should either of them die under twenty-one years of age, leaving no issue, the share of such deceased child shall go to the survivor or survivors."

On the 22d day of January, A. D. 1866, Floride Calhoun duly made, published, and declared a codicil to her last will and testament, wherein, among other things, she revoked the devise of the real property in Pendleton, made to Anna Clemson, in the second paragraph of her last will and testament, and devised the same to other persons, and provided as follows:

"(2) By the nineteenth clause of the will I direct the said bond debt on my deceased son Andrew, secured by mortgage on Fort Hill, together with all other property possessed by me, and not before disposed of, to be collected by my executors, and the proceeds to be divided into four parts. One part I gave to Anna, one part to her daughter, Floride, and the other two parts to Kate and her children, as will appear by clauses 20, 21, 22, and 23 of the will. I desire now to change the disposition of the said bond and mortgage debt, and do now give and bequeath it in the following manner: Three-fourths of my interest in said bond and mortgage debt, amounting to about forty thousand two hundred dollars, I hereby give and bequeath to my daughter Anna M. Clemson, to be enjoyed by her under clause twenty of the will, and according to the provisions of that clause to vest in the same trustee, and to be subject to all the powers, trusts, conditions, and limitations of that clause precisely as the bequests therein made were subject to them, with this exception and alteration: that my daughter Anna is hereby authorized and empowered by her last will and testament, duly executed by her, to dispose of this bequest of three-fourths of said bond and mortgage debt as she pleases. If she does not thus dispose of it at her death, I give and bequeath it, the said three-fourths, to her daughter, Floride, and, should the said Floride die without leaving issue, I give and bequeath it at her death to her brother, Calhoun Clemson; but, nevertheless, Floride shall likewise have power to dispose of it at her death as she pleases, by a last will and testament duly executed by her. By clause 2d of the will I gave the furniture and every article of the property in my house in Pendleton, and upon the premises, with certain reservations, and also my jewelry

and some other small articles, to my said daughter Anna. I now confirm to her the bequests of aforesaid furniture, and all other personal property embraced in said 2d clause, which it is my will that she shall enjoy for life, as her sole and separate estate, and at her death I give and bequeath all this personal property to her daughter, Floride, absolutely. To Anna I also give and bequeath the oil portrait of my mother, which by clause 5th of my will I gave to my daughter-in-law Kate. (3) The remaining one-fourth part of my interest in said bond and mortgage debt against the estate of my deceased son Andrew I give and bequeath to Floride E. Clemson, my granddaughter; but if she dies without leaving issue I give and bequeath it to her brother, John Calhoun Clemson. She, nevertheless, is hereby authorized and empowered to dispose of said fourth part as she pleases by her last will and testament duly executed. * * * (4) Should my granddaughter Floride's death occur before mine, what I have given her in the will and codicil shall not fall into the residue of my estate, but I give and bequeath it to her mother, my daughter Anna, who shall take it subject to all the trusts, powers, and limitations imposed upon the direct bequest to her; and, should my daughter Anna's death occur before mine, what I have given her in the several clauses of the will and codicil shall not fall into the residue of my estate, but I give and bequeath the same to her daughter, Floride, who shall take and enjoy it as her mother would have done if living, subject to the same trusts, powers, limitations, and conditions; and should both Anna and Floride die before me, what has been given them in the several clauses of the will and codicil shall not fall into said residue, but I give and bequeath the whole to my grandson, John Calhoun Clemson. (5) Should I at any time collect the aforesaid bond and mortgage debt, or any part of it, or should Fort Hill be purchased with it, or the money be invested in any other property, or be retained in hand, the property thus purchased, the property thus obtained by investment, and the money thus retained, shall be considered and held to be in place of and the same as the aforesaid bond and mortgage, and shall pass under this codicil as if the same were still in the form of said bond and mortgage; that is to say, shall pass to my daughter Anna and granddaughter Floride, as aforesaid bond and mortgage debt is directed to be divided between them."

On the 12th day of March, A. D. 1866, Floride Calhoun and Thomas G. Clemson, to whom letters of administration had been granted in February, A. D. 1866, on the personal estate of Cornelia M. Calhoun, who had departed this life intestate, and unmarried, in that year, as administrator of the personal estate of said Cornelia, exhibited their bill in the court of equity for the district of Pickens, state of South Carolina, against Andrew P. Calhoun and others, for the foreclosure of the mortgage of the plantation or tract of land known as the "Fort Hill Place," executed to secure payment of the bond aforesaid, and for the sale of the plantation for that purpose, and at the July term, A. D. 1866, of the court a decree was made whereby it was adjudged that the mortgage be foreclosed and the mortgage realty sold, which decree, on appeal, was affirmed by the supreme court of the state of South Carolina, and the cause remanded to the circuit court for further proceedings in accordance therewith. During the pendency of that suit, to-wit, on the 25th day of July, A. D. 1866, Floride Calhoun departed this life, leaving in full force her last will and testament, as modified by the codicil aforesaid, and thereafter, on the 7th day of August, A. D. 1866, the said last will and testament and codicil thereto were duly admitted to probate, and Edward Noble, one of the per-

sons mentioned as executors therein, duly qualified as such on the same day. In August, 1869, Floride E. Clemson intermarried with Gideon Lee, of the state of New York, and complainant, Isabella Lee, is the only child of the marriage, and on the 27th day of August, A. D. 1871, the said Floride E. Lee, formerly Clemson, died intestate, leaving surviving her, as her sole heirs at law and distributees, her husband, Gideon Lee, and her daughter, Isabella Lee. On the 29th day of September, A. D. 1871, Anna C. Clemson made her last will and testament, as follows:

"In the name of God, amen. Whereas, I am entitled to legacies under the last will of my deceased mother, Floride Calhoun, and to a distributive share in the several estates of my deceased sister, Cornelia Calhoun, and my brother, Patrick Calhoun, and, notwithstanding my coverture, have full testamentary power to dispose of the same: Now I, Anna Calhoun Clemson, the wife of Thomas G. Clemson, of the town of Pendleton, in the county of Anderson, and state aforesaid, being of sound and disposing mind, memory, and understanding, do make this my last will and testament in manner following: I will, devise, and bequeath the entire property and estate to which I am now in anywise entitled, and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee-simple; but should my husband, Thomas G. Clemson, depart this life leaving me his survivor, or should he survive me and then die intestate, in either event I will, devise, and bequeath my entire property and estate, as well as that which I may hereafter acquire, of whatever the same may consist, to my granddaughter, Isabella Lee, the child of Gideon Lee, of the state of New York, absolutely and in fee-simple. I hereby nominate and constitute Thomas G. Clemson executor of this my will."

On the 13th day of December, 1871, the said Thomas G. Clemson was substituted as trustee of Anna M. Clemson, under the will of Floride Calhoun, in the place and stead of Edward Noble, by the following instrument in writing:

"Whereas, by the will of the late Mrs. Floride Calhoun, of Pendleton, dated June 27, 1863, and by the codicil thereto attached, dated 22d January, 1866, the undersigned, Anna M. Clemson, her daughter, is entitled to considerable legacies, the legal title of which is by the will vested in Edward Noble, Esq., of Abbeville county, in said state, as trustee. By the twentieth clause of the will, confirmed by the second clause of the codicil, the testatrix provides for a change of trustee in the following manner, viz.: 'If from death, or any cause, there is no trustee, or if Anna at any time shall desire to change her trustee, she shall have the power so to do, and to appoint another by any instrument in writing, under seal, executed by her in the presence of two subscribing witnesses; and as often as she may desire to change her trustee she shall have the power so to do by observing the form and solemnity above described.' And whereas, the said will and codicil are in the office of the probate judge for said county of Anderson, having been duly probated on the 7th of August, 1866, and letters testamentary granted to the said Edward Noble, as executor, on same date: Now, be it known that, in accordance with the power in me vested by the above-recited passage of my mother's will, I, Anna M. Clemson, of the said county of Anderson, do hereby nominate and appoint my husband, Thomas G. Clemson, of Pendleton, Anderson county, as trustee, under the will, for the property therein bequeathed to me, and also for the property bequeathed me in the codicil, in the place and stead of the said Edward Noble, who desires to be relieved from the trust."

Executed in the presence of two subscribing witnesses, and the acceptance of the trusteeship by Mr. Clemson appended.

The proceedings for foreclosure against said Andrew P. Calhoun duly went to decree, Noble, executor, having been substituted as one of the complainants, under which the Fort Hill property was sold, and purchased by Thomas G. Clemson, January 1, 1872, and on June 10, 1875, title was made for the same in pursuance of order of court to said Thomas G. Clemson, as trustee of Anna M. Clemson, under the will of Floride Calhoun. The consideration for said purchase and conveyance appears to have been the mortgage debt of Andrew P. Calhoun, and Mr. Clemson, it is alleged, also discharged legacies and demands to the amount of \$6,964.93 in the purchase and redemption of said property. On the 5th day of November, 1873, a partition in kind was made of the said Fort Hill plantation between the said Anna M. Clemson and Thomas G. Clemson, as her trustee, on the one part, and the complainant and Gideon Lee, as her guardian, on the other part, by which one-fourth part thereof, amounting to 288 acres, was allotted and set off to complainant, and the remainder, amounting to about 814 acres, was allotted and set off to said Anna M. and Thomas G. Clemson, and complainant thereupon entered into possession of said parcel so allotted to her, and has ever since remained in possession thereof. On the 12th day of September, 1875, Anna M., otherwise known as Anna C. Clemson, died, leaving in full force, and unrevoked, her said last will and testament, bearing date September 29, 1871, which was duly admitted to probate, and from September, 1875, to the time of his death said Thomas G. Clemson remained in quiet, open, and continuous possession of said property, claiming to hold the same as his individual property in fee-simple. On April 6, 1888, Thomas G. Clemson departed this life, leaving in full force, and unrevoked, his last will and testament, bearing date the 6th day of November, A. D. 1886, together with a codicil thereto, bearing date the 26th day of March, 1887, which will and codicil were duly admitted to probate on the 20th day of April, 1888. In and by the said codicil the defendant, Simpson was named and constituted the sole executor of the said last will and testament, and the Fort Hill property was devised to him on certain trusts, fully set out therein, in virtue whereof said defendant entered into, and now remains, in possession of the said Fort Hill plantation. The bill was filed November 26, 1888, asserting title in complainant to the property in question, and asking a decree to that effect, and that defendant held the legal title in trust for her, and for injunction and accounting.

J. P. Carey and Bachman & Youmans, for complainant.

Wells & Orr and Smythe & Lee, for defendant.

Before FULLER, Chief Justice, and BOND and SIMONTON, JJ.

FULLER, Chief Justice, (*after stating the facts as above.*) In respect to jurisdiction, we are satisfied with the conclusions reached by the district judge when this cause came up on demurrer, and do not consider it necessary to add anything to the views then expressed. *Lee v. Simpson*, 37

Fed. Rep. 12. The main question for determination is, then, whether the property passed by the will of Mrs. Clemson as in due execution of the power under the will and codicil of Mrs. Floride Calhoun. By that will and codicil three-fourths of the testatrix's interest in the bond and mortgage of A. P. Calhoun was bequeathed to Mrs. Clemson for her sole and separate use during her life, the legal title being vested in a trustee, to be disposed of and the proceeds invested as she might direct, but to be held upon like trust, with power in her to change her trustee as she might desire; and she was also authorized and empowered to dispose of said bequest by will as she pleased, whatever form it had assumed, as by purchase of the Fort Hill property, or otherwise. The rule established by the weight of English authority prior to the statutes of 7 Wm. IV., and 1 Vict. c. 26, § 27, was that a will could not be held to be the execution of a power unless it referred to the power, or described the property subject to it, or would be inoperative if not acting upon such property; but the general rule in this country is more liberal, and the intention of the testator as the donee of the power to execute it, however manifested, whether directly or indirectly, positively or by just implication, is held to prevail, even though the will does not refer to the power, nor designate the property, and the donee has other property upon which the will may operate; so that "the question is in every case a question of the intention of the donee of the power, taking into consideration not only the terms of his will, but the circumstances surrounding him at the time of its execution, such as the source of the power, the terms of the instrument creating it, and the extent of his present or past interest in the property subject to it." GRAY, C. J., *Sevall v. Wilmer*, 132 Mass. 134; *Warner v. Insurance Co.*, 109 U. S. 357, 3 Sup. Ct. Rep. 221. And a general devise or bequest may be construed as including real or personal estate, of which the testator has a general power of appointment, unless a contrary intention appears by or can be deduced from the will. *Funk v. Eggleston*, 92 Ill. 515; *White v. Hicks*, 33 N. Y. 383; *Blagge v. Miles*, 1 Story, 427; *Andrews v. Brumfield*, 32 Miss. 108. In *Blake v. Hawkins*, 98 U. S. 315, 326, Mr. Justice STRONG, speaking for the court, said:

"On the other hand, if the will contains no expressed intent to exert the power, yet, if it may be reasonably gathered from the gifts and directions made that their purpose and object were to execute it, the will must be regarded as an execution. After all, an appointment under a power is an intent to appoint, carried out, and, if made by will, the intent and its execution are to be sought for through the whole instrument."

In *Bilderback v. Boyce*, 14 S. C. 528, the supreme court of South Carolina expresses its concurrence with the rule followed in the English chancery, with the modification, indicated by Mr. Justice STORY in *Blagge v. Miles*, *supra*, that if the intention to execute is, under all the circumstances, apparent and clear, so that the transaction is not fairly susceptible of any other interpretation, the execution should be sustained. By her will Mrs. Clemson declares herself "entitled to legacies under the last will of my deceased mother, Floride Calhoun," and to a
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distributive share in the estates of her sister and brother, and to have, "notwithstanding my coverture, full testamentary power to dispose of the same," and she then proceeds to "will, devise, and bequeath the entire property and estate to which I am now in anywise entitled, and which I may hereafter acquire, of whatever the same may consist, to my beloved husband, Thomas G. Clemson, absolutely and in fee-simple." If, however, she survives him, or he, surviving, dies intestate, then the entire property and estate is devised and bequeathed to her granddaughter, the complainant. The will is dated September 29, 1871, and upon the 13th of December following Mrs. Clemson exercised the power of appointing a new trustee; the instrument reciting that by the will and codicil of her mother, Mrs. Floride Calhoun, she "is entitled to considerable legacies, the legal title of which is, by the will, vested in Edward Noble, Esq., of Abbeville county, in said state, as trustee," and proceeding to appoint Thomas G. Clemson "as trustee under the will for the property therein bequeathed to me, and also for the property bequeathed me in the codicil," in the place of said Noble. Clearly, the "legacies" to which Mrs. Clemson, by the instrument of appointment, stated she was "entitled," and of which she appointed her husband trustee, were the same legacies to which, by the will, she declared herself entitled, and which she thereby devised and bequeathed to him. Having the right to the enjoyment, during life, of the property so held in trust, and the absolute power of disposing of it at her death, she treated it as being as much hers as the alleged distributive share; and, even if she possessed only a power over, and not an interest in, the property, it would be altogether too narrow and technical a construction, under the circumstances, to so limit the language, "I will, devise, and bequeath the entire property and estate to which I am now in anywise entitled, and which I may hereafter acquire, of whatever the same may consist," as to exclude the exercise of the power. It is true that the mention of the distributive share allows it to be said that the instrument might have some effect by means of that interest, but this would not be all the effect the words import; and, if the intention to pass all can be discovered, it would seem that such intention ought to prevail. 2 Chance, Pow. p. 72, § 1597. The intent to dispose of all the estate here is apparent upon the face of the will, and, as the will plainly refers to the property covered by the power, its words cannot be satisfied unless the instrument operates as an execution of the power. Mrs. Clemson also asserted "full testamentary power to dispose of the same," "notwithstanding my [her] coverture," and it is ably argued by counsel that this assertion was made by way of emphasizing the fact that, shortly before, married women in South Carolina had been enabled to dispose of their property by will, and that therefore the assertion tends to sustain the contention that she regarded herself as dealing solely with property absolutely owned by her in her own right. But as such statement would, in that view, have been wholly uncalled for, and this particular property could only be disposed of by Mrs. Clemson by will, while she could alienate her own property in any way she chose, the more reasonable inference seems to

us to be that she referred to the power of disposition given by her mother's testament, rather than to her legal capacity. In short, we think that, in addition to the reference to the property which was the subject of the power, there is reference to the power itself, and upon the whole case we can entertain no doubt that it was the intention of Mrs. Clemson to dispose of the property in question by her last will and testament, and that this intention was carried out in due execution of the power. The result, therefore, is that the bill must be dismissed, and it is so ordered.

BOND and SIMONTON, JJ., concurred.

BRIGHT v. BUCKMAN *et al.*

(Circuit Court, N. D. Florida. April 15, 1889.)

1. MORTGAGES—LIEN—NOTICE OF PRIOR GRANTEES.

At the time of the execution of a mortgage persons were in possession of several of the parcels of the land mortgaged, claiming under contracts of purchase from the mortgagor, and had paid part of the purchase money. Some had built fences around their lots, and were cultivating them. Others had built houses on theirs, and were living in them. *Held*, that their possession was sufficiently open and patent to put the mortgagee on inquiry, and to charge him with notice of all that he might have learned by such inquiry.

2. SAME.

Nor is the mortgagee entitled to a lien for the portion of the purchase money unpaid at the time the mortgage was recorded, in the absence of actual notice of the mortgage to the purchasers, as under McClel. Dig. Fla. p. 215, § 6, the recording of a mortgage is only notice to subsequent purchasers and creditors.

3. SAME—MORTGAGEABLE INTEREST.

The mortgagor had purchased the land conveyed by the mortgage, but the vendor retained the deed subject to the payment of the purchase price. At the time of the execution of the mortgage he had neither title nor possession. Afterwards he offered to sell the land to D., as the property of his vendor, giving no notice of the mortgage, but furnishing an abstract showing the title in the vendor. D. purchased the land, and received upon payment of the purchase money the unrecorded deed to the mortgagor and a deed from the latter, both of which were recorded. *Held*, that the mortgagor had no mortgageable interest in the land, and that D. was not bound by the record of the mortgage.

4. SAME—DESCRIPTION—REFORMATION.

A mortgage described two lots as "lots 13 and 14 of Burbridge's addition." The bill for foreclosure alleged that it was the intention to convey "lots 13 and 14 of block 1, in Burbridge's addition to Jacksonville." It appeared that there were 10 blocks in Burbridge's addition to Jacksonville, each containing lots numbered 13 and 14. While the record showed that the mortgagor had title at the time of the mortgage to lots 13 and 14 of block 1, it also showed that he had in some manner dealt with lots 13 and 14 in block 2, and had at one time given a mortgage on them. *Held*, that the description was too indefinite to afford any notice to a subsequent *bona fide* purchaser of lots 13 and 14 in block 1, and that the mortgage would not be reformed as against him.

In Equity. Bill for foreclosure of mortgage.

In September, 1883, Elwood H. Buckman executed a mortgage to one Haynie to secure a loan of \$1,500, which, in November, 1886, Haynie assigned to complainant. This mortgage covered 400 acres of land in Sumter county, Fla. In March, 1884, said Buckman executed another mortgage to one Hayes, to secure a loan of \$6,000, which was assigned by Hayes to complainant in September, 1884. This mortgage covered the same 400 acres of land; certain lots therein described as in Jacksonville, eight acres of land on St. John river near Jacksonville, and two lots in a suburb of Jacksonville, described in the mortgage as "lots 12 and 14, Burbridge's addition," all in Duval county, Fla., save said 400 acres. Said mortgages were duly recorded. After the execution and recording of these mortgages Buckman conveyed to the other defendants different portions of said mortgaged premises. As to the 400 acres there is practically no controversy. A portion of the 400 acres is subject to the lien of both mortgages. Certain of the defendants, who purchased lots in Jacksonville from Buckman, resist the foreclosure of the Hayes mortgage on their lots upon the ground that they were in possession of the several lots claimed by them under contracts to purchase them from Buckman before and at the time of the execution of the mortgage by Buckman to Hayes. The defenses set up by the other defendants are fully noticed in the opinion of the court. Buckman died after this bill was filed, and the suit revived against his personal representative.

Cooper & Cooper, for complainant.

J. W. Archibald, Geo. I. Kain, Jos. E. Lee, and Walker & L'Engle, for defendants.

TOULMIN, J. "The possession of land by a third person is said to put a purchaser upon an inquiry; and he is charged with notice of all that he might have learned by a due and reasonable inquiry. A purchaser who is thus put upon inquiry is bound to inquire of the occupant with respect to every ground, source, and right of his possession. Anything short of this would clearly fail to be "due and reasonable inquiry." 2 Pom. Eq. Jur. § 616, and note at bottom of page 55; 1 Jones, Mortg. § 601; *Kerr v. Day*, 14 Pa. St. 112; 2 Pom. Eq. Jur. § 607, and note at bottom of page 45; *Witter v. Dudley*, 42 Ala. 616. Actual possession of land is constructive notice of ownership, or of an interest, and such notice is sufficient to put creditors and purchasers on inquiry. *McRae v. McMinn*, 17 Fla. 886; *Hyer's Ex'rs v. Caro's Ex'r*, 18 Fla. 694. "The possession must be actual. It must be marked by acts of dominion, such as the erection of houses, making valuable improvements, claiming ownership, or by some other act evidencing that the possession is under claim of right. Actual possession is an open, patent fact, and it is notice to all men contracting in reference to the property thus possessed, and is equivalent to actual notice of title, legal or equitable, or of the claim under which such possession is held." *Bernstein v. Humes*, 71 Ala. 260; *Doolittle v. Cook*, 75 Ill. 354. The testimony shows that defendants, William Young, James Calhoun, Lawrence Ely, James W.

Caswell, Anthony Grayson, and Gus Jackson, had actual possession of their respective lots, claiming title to the same prior to, and at the time of the execution of, the mortgage on said lots, which it is here sought to foreclose. Ely had received a deed for his lot, and had built a fence around it. Caswell had had his lot staked off for him by his vendor, E. H. Buckman, (who is the mortgagor,) and had inclosed it with a fence. All the other said defendants had built houses on their lots, and were living in them, except one, and he had his lot inclosed with a fence, and was cultivating it in growing vegetables thereon. Hayes, the mortgagee, says in his deposition that "he did not speak to the men in possession of the lots in regard to them." He further says that he "really considered other property included in his mortgage good enough for his loan, without anything else, and paid no particular attention to the lots in question. Nothing more than just riding around with Buckman, but made inquiries as to the other property, viz., 4 houses and lots near the new Episcopal church. Went more on these four houses than anything. These were sure and tangible." And J. G. Long, the attorney and representative of the complainant, Bright, in taking the assignment of the Hayes mortgage, says he "visited and looked at the property, and found each piece of it occupied," and he "did not ask the tenants anything about the property, but took Buckman's statement altogether." The evidence satisfies me that the possession of these defendants was an open, patent fact, and that Hayes and his assignee, the complainant, had notice thereof, and that they did not make "due and reasonable inquiry." They are charged with notice of all that they might have learned by "due and reasonable inquiry." Subsequent to the execution of the mortgage these defendants, except Lawrence Ely, received from Buckman deeds to their respective lots. Irrespective of the testimony of the defendants as to their transactions with said Buckman, the evidence is sufficient to show that they were in possession of the lots under agreements to purchase, and had paid a part of the purchase money at the time the mortgage was executed. They continued to make payments to Buckman until the purchase money was all paid up and deeds were executed by Buckman to them. But it is contended by complainant that he is, at all events, entitled to a lien on said lots to the extent of the purchase money unpaid at the time of the recording of the mortgage; that the payments made to Buckman subsequent to the mortgage should have been made to him or to his assignor, Hayes. This would be true if the defendants had notice of the execution of the mortgage at the time of making such payments. But the proof shows they had no such notice. They had no actual notice, and without this they might lawfully complete their payments to Buckman without becoming liable to the mortgagee. It is true, the mortgage was recorded before many of the payments were made. But "the recording of a mortgage affords no notice whatever to a prior purchaser of the land, who is in possession under a bond for a deed, so that the mortgagee had constructive notice of his rights." 1 Jones, Mortg. § 562; *Doolittle v. Cook*, 75 Ill. 354; *Trustees, etc., v. Wheeler*, 61 N. Y. 88. Under the statutes of Florida

the recording of the mortgage is notice to subsequent purchasers and creditors only. McClel. Dig. p. 215, § 6.

As to the lot claimed by the defendant Andrew Gibson, it appears from the evidence that he was not in possession of the lot at or before the execution of the mortgage and that he received his deed long subsequent thereto. The mortgage described two lots of land as "lots 13 and 14 of Burbridge's addition." The bill alleges that the intention was to mortgage "lots 13 and 14 of Block 1, in Burbridge's addition to Jacksonville." The answer of defendant Cook, who is now the owner of said last-described lots, denies this allegation, and that the mortgage covered these lots. The proof shows that there are 10 blocks in Burbridge's addition to Jacksonville, each containing lots numbered 13 and 14, and that there are 6 blocks in Burbridge's addition to La Villa, each containing lots numbered 13 and 14. The evidence tends to show that, so far as is disclosed by the public records, E. H. Buckman had, at the time he executed the mortgage, title to no other lots numbered 13 and 14 except lots 13 and 14, in block 1, of Burbridge's addition to Jacksonville, but it further tends to show that he had in some manner dealt with lots 13 and 14, in block 2, of Burbridge's addition to Jacksonville, and had at one time given a mortgage to other parties on the last-named lots. A bill for the foreclosure of a mortgage should so describe the mortgaged property that if a sale is ordered the officer of the court may with certainty and safety execute the decree, and that the purchasers may be informed of the particular premises which are exposed to sale, and which they can acquire. *Hurt v. Freeman*, 63 Ala. 335. The mortgage is not certain in its description of the lots in question, and, construing it in the light of the testimony in the record on the subject, I do not think it sufficiently identifies the property. The bill seeks a foreclosure as to lots 13 and 14 of block 1 in Burbridge's addition to Jacksonville, treating these lots as the lots intended to be mortgaged by Buckman by his mortgage of "lots 13 and 14 of Burbridge's addition," and the bill alleges that these were the only lots owned by Buckman when he executed the mortgage answering the description contained in the mortgage, and that this must have been known to Cook when he bought the property. And the contention of complainant is that there was enough in the record to put Cook upon notice and inquiry, and to charge him with notice of what lots were intended by the description in the mortgage. The bill prays for a decree of foreclosure against these lots as they are described in the bill, and complainant suggests that if a reformation of the mortgage is necessary, the court will grant such reformation in the decree of foreclosure, the prayer for general relief being sufficient for that purpose. As my opinion is that the mortgage is not sufficiently certain to identify this property, a reformation is needed to carry out the specific relief prayed, which is foreclosure and sale. The mortgagee may ask for a reformation of the mortgage in a bill to foreclose it. 1 Jones, Mortg. §§ 98, 99; 2 Jones, Mortg. § 1464; *Alexander v. Rea*, 50 Ala. 450. A mistake in the description of the land may be corrected as between the parties to the mortgage, and courts of equity can grant relief as against

one who purchased the property with notice of the mistake; for a purchaser with notice stands in no better position than the mortgagor himself. But in the exercise of this jurisdiction the court must proceed with the utmost caution, imposing on the party complaining the burden of proving the alleged mistake by clear, exact, and satisfactory evidence, and resolving against him whatever of doubt or uncertainty the evidence may generate. *Campbell v. Hatchett*, 55 Ala. 548; *Hinton v. Insurance Co.*, 63 Ala. 488. And when such proof is made the relief cannot be granted as against one who had purchased *bona fide*, and for a valuable consideration; that is, for a valuable consideration without notice of the alleged mistake. The proof shows that Cook purchased for a valuable consideration. It does not show, and it is not claimed, that he had actual notice of the mistake or error; but the contention is that there was enough on the record to charge him with notice, and that, besides this, he bought the lots at an inadequate price, which of itself was a suspicious circumstance sufficient to put him upon an inquiry as to the reasons for selling the property at less than its apparent value. I do not think the inadequacy of price, as shown by the evidence, was sufficient notice, or was sufficient to put him upon an inquiry. The description of the property upon which the mortgage is an incumbrance must be such as reasonably to enable subsequent purchasers to identify the land; otherwise the record of the mortgage is not notice of any incumbrance upon it. If the description in the mortgage is erroneous, and it is apparent what the error is, the record is constructive notice of the mortgage upon the lots intended to be described; but if it is not apparent what the error is, then the record is not constructive notice. And while parol evidence is admissible to identify the land intended where there is an ambiguity or uncertainty in the description, yet a purchaser, who is not able from his knowledge of the property to interpret an erroneous description and give it the meaning intended, is not charged with notice from the record of it. The premises should at least be so described or identified that a subsequent purchaser would have the means of ascertaining with accuracy what and where they were. The language both of the mortgage and of the record of it must be such that if a subsequent purchaser should examine the instrument itself he would obtain thereby an actual notice of all the rights which were intended to be created or conferred by it. See 1 Jones, *Mortg.* §§ 528, 529; 2 Pom. *Eq. Jur.* § 654, and note 1; *Youngs v. Wilson*, 27 N. Y. 351; *Babcock v. Bridge*, 29 Barb. 427. I find that the mistake or error in the description of the lots in question is not apparent on the face of the mortgage, and hence that the record of it was not constructive notice of the mortgage upon the lots intended to be described as is claimed; and it does not appear from the testimony that Cook had such knowledge of the property as to enable him to interpret the erroneous description, and give it the meaning intended. The lots were not so described or identified that Cook had the means of ascertaining from the mortgage with accuracy what and where they were. Besides this, the evidence that there was a mistake or error, and what it was, is not clear, exact, and satisfactory. In the

absence of such evidence a court of equity will not reform the mortgage.

The mortgage which is here sought to be foreclosed covers eight acres of land owned by one Jos. E. Dritina, purchased by him from the mortgagor, Buckman, in October, 1885, being about 18 months subsequent to the execution of the mortgage by Buckman to Hayes. The facts are that in 1880 the title to these eight acres was in one H. Bisbee, and he contracted to sell them to one Whitney, allowing him two years within which to pay the purchase money. In 1881, not having paid the purchase money, Whitney contracted with Buckman to sell to him this land, giving a year for payment. In 1883 Bisbee, at Whitney's request, executed a deed to Buckman, but retained it in his possession subject to Buckman paying him \$900 for the land. In 1884, not yet having paid Bisbee, and without title or possession of the land, so far as the evidence shows, Buckman gave Hayes the mortgage, and it was recorded. In 1885 Buckman showed Dritina the land, and proposed to sell it to him, giving him no notice of the mortgage, but furnishing him an abstract showing the title in Bisbee, telling Dritina that the property was Bisbee's, and that he (Buckman) wished to make a commission on the sale. Dritina, after some delay, bought the land, paying Buckman \$1,500 for it, and at the same time received Buckman's deed to him and Bisbee's unrecorded deed of April, 1883, to Buckman, (both warranty deeds,) which he placed on record. It appears from the evidence that Dritina gave Buckman the \$1,500. Out of this Buckman paid Bisbee the \$900, and then received Bisbee's deed, and executed and delivered his own deed to Dritina, as aforesaid. My opinion is that on the undisputed facts Buckman had no mortgageable interest in the land at the time he executed the mortgage, and that Dritina is not bound by the record of the mortgage made by Buckman before he had title to or a mortgageable interest in the land, and, as it is conceded that the statute of 6 Anne does not apply in this case, it follows that complainant is not entitled to relief as against defendant Dritina and his grantees, defendants Gifford and Pearce. 1 Jones, Mortg. § 576, and note 3; 2 Pom. Eq. Jur. § 761. The deed of defendant Mathews to a portion of the 400-acre tract of land is subject to the first mortgage of \$1,500, but anterior to second mortgage of \$6,000. If the 400 acres bring more than enough to satisfy the first mortgage, this defendant's lot will be let out. If not, it must be sold. A decree will be entered in accordance with the foregoing opinion.

BUCK *et al.* v. POST *et al.*, Dock Commissioners.

(Circuit Court, S. D. New York. July 5, 1889.)

WHARVES—DOCKS.

In 1819 the common council of New York city authorized the owner of a sunken crib-dock to rebuild it, and "to add thereto one block and one bridge." A map made in 1828 showed the dock rebuilt and largely extended, the whole consisting of three sections, and complainants' expert testified that the extension was a bridge, *i. e.*, a pier built on piles. Defendants' expert testified that there were traces of an addition, consisting of a bridge connecting the original crib with another, which corresponded with the map. *He d.* that there was no authority in 1843 to build a broad platform on piles, which was not a "block," and could only be a "bridge."

In Equity. On bill for injunction.

Solon P. Rothschild and John M. Bowers, for complainants.

F. A. Irish, Wm. H. Clark, and Thomas P. Wickes, for defendants.

BROWN, J. The complainants seek to enjoin the dock department of this city from a threatened destruction of a platform landing adjoining the southerly side of pier 24, and connecting that pier with the West Washington market. The platform is built on piles, and is several rods in length and breadth, occupying a considerable part of the slip in front of and out from the bulk-head to the south of pier 24. Unless the complainants prove that they have some vested property right in the platform by grant from the corporation, the defendants have a right to remove the structure; since any mere license to occupy, or acquiescence in occupation, has been terminated. The special grounds stated by the department for requiring the removal of the structure now have reference to the public health, which is alleged to be imperiled by the great accumulations of sewage filth beneath the structure. The complainants offer to do anything required to cleanse the premises, and claim that the alleged cause is but a pretext for interference with their right of occupation. I do not consider that branch of the case, however, since, whatever the reasons for interference may be, the complainants have no right to an injunction unless there is at least probable ground for their claim of a property right in the premises. If they have not, then their occupancy is an invasion of the public rights of dockage and wharfrage facilities within that slip. The plaintiffs' only claim of right rests upon a resolution of the common council, in 1819, as a part of a contract made with Joshua Jones, (who was then owner of a sunken crib-dock, or "block," forming the base of the present pier 24,) whereby the common council authorized him "to rebuild the aforesaid sunken block, and to add thereto one block and one bridge." An accurate map of 1828 shows that dock at that time largely extended, and its previous connection with the old corporation dock at the foot of Vesey street gone. About 1843 the platform was built, which the complainants allege was the "bridge" authorized by the resolution of 1819. The defendants contend that the structure built prior to the map of 1828, as an extension of the sunken

crib or block rebuilt, forming altogether a pier of about 140 feet in length, exhausted the authority of the resolution and contract of 1819. On a partial hearing of this matter on the 8th of June it appeared to me that the complainants did not make out their title as alleged; but, considering the importance of the question, and in order to avoid any possible injustice to the complainant, a reference was ordered to Commissioner Lyman to take further proofs in regard to the nature of the structure in question and the meaning of the above-quoted terms in the resolution of the common council. Careful and repeated examination of the testimony confirms the impression of the previous hearing, and satisfies me entirely that the structure in question was not authorized by the resolution and contract between Jones and the common council; that the "platform" is not a "bridge," within the meaning and intent of that resolution; and that it was not built nor designed as a bridge, but for different uses. The complainants' expert, through his whole examination, testifies that the extension of pier 24 beyond the rebuilt crib or "block" (the terms meaning the same thing) is a bridge; that is, in his sense of the term "bridge," viz., a pier built upon piles. If that opinion is sound, then the building of the extension of the original crib or block to some 90 or 100 feet additional during the 9 years following the resolution of 1819 plainly exhausted the authority to "add a bridge thereto;" and only the power to add "one other block," that is, crib, remained; and the platform built in 1843 is certainly not a crib or "block." The defendants' expert, however, testifies that there are clear traces of an addition to the rebuilt sunken dock, consisting of two parts, namely, another crib or block at the western extremity of the pier, and an intervening "bridge" of 66 feet in length, connecting the two cribs or "blocks." This corresponds precisely with the three divisions of the extended pier, as shown by the map of 1828, and with the length of the different sections of the pier as there marked in figures. This work was done some time between 1819 and 1828, and imports a full use of the grant or privilege contained in the contract of 1819. This map of itself affords very strong presumptive evidence of the facts. But the evidence of both experts, although they differ in some points, makes it impossible to find room for any authority for building the broad platform in question, which was erected in 1843. As I do not entertain any doubt about the matter, and there appears to me no probability that the complainants could succeed in establishing a title, I ought not to continue the injunction, which is therefore dissolved.

UNITED STATES v. DEWEY *et al.*

(Circuit Court, S. D. New York. July 15, 1889.)

ABATEMENT AND REVIVAL.

A cause of action against an assignee in bankruptcy for wrongfully paying the assets in his hands to other creditors of the bankrupt than plaintiff does not abate on the assignee's death.

At Law. On demurrer to complaint.

Stephen A. Walker, U. S. Atty.

Wing, Shoudy & Putnam, (Joseph H. Choate, of counsel,) for defendants.

WALLACE, J. The complaint alleges that the defendants' testator, Barnes, was the assignee in bankruptcy of Vetterlein and another, who were on the 7th of February, 1871, duly adjudicated bankrupts; that the bankrupts were jointly and severally indebted to the plaintiff in the sum of \$99,000; that their estate was insufficient to pay all their debts; that said Barnes had notice of the demand of the plaintiff at a time when he had in his hands of the estate of the bankrupts the sum of \$32,000; that thereafter he paid that sum to the creditors of the bankrupts other than the plaintiff; and that the remaining assets of the bankrupts are insufficient to pay the debt of the plaintiff by more than \$32,000. The complaint then alleges the death of Barnes, and the appointment and qualification of the defendants as his executor. The demurrer to the complaint presents the single question whether the cause of action against the deceased assignee of the bankrupts survives against his executors. The action is in *assumpsit* for money had and received, and is founded upon a breach of duty of the assignee, and therefore does not abate. At common law, even when the cause of action originates in tort, and trover or case would lie, but the facts permit an action of *assumpsit*, if the plaintiff elects to bring *assumpsit*, the action does not abate. *Hambly v. Trott*, 1 Cowp. 373; *Wheatley v. Lane*, 1 Saund. 217, note; *Sollers v. Lawrence*, Willes, 421. The property of the bankrupts that came to the hands of the assignee was by force of the statute (section 3466, Rev. St. U. S.) a trust fund in his hands for the payment of the debt of the plaintiff, and he was bound, as a trustee for the plaintiff, to pay its debt first out of the proceeds of the property. The cause of action is not in the nature of a penalty, but is one which may be enforced as a trust in equity or at law, by an action for money had and received. *Beaston v. Bank*, 12 Pet. 102; *Lewis v. U. S.*, 92 U. S. 618; *Bayne v. U. S.*, 93 U. S. 642; *Field v. U. S.*, 9 Pet. 182. The demurrer is overruled, with leave to the defendants to answer within 20 days upon payment of costs.

SEELEY v. MISSOURI, K. & T. Ry. Co.

(Circuit Court, S. D. New York. July 13, 1889.)

1. ATTACHMENT—WHEN LIES—RAILROAD COMPANIES—BONDS AND MORTGAGES.
Code Civil Proc. N. Y. § 635, authorizes an attachment to be granted "in actions to recover a sum of money only," whether "for breach of contract, express or implied, other than a contract of marriage," or for the wrongful conversion or other injury to personal property. *Held*, that an attachment may be issued in an action against a railroad company to recover upon coupons and scrip certificates representing interest payable semi-annually out of the company's net or surplus income.

2. SAME—MOTION TO DISSOLVE—PENDENCY OF ANOTHER ACTION.

The fact that the plaintiff had, prior to the institution of the attachment proceedings in the state court, instituted a suit in equity in the federal court, as a holder of the same coupons and scrip certificates, to compel an accounting by the company of its net income, and to recover the unpaid interest, which suit had proceeded to an interlocutory decree and an accounting, is not sufficient to justify the granting of a motion to dissolve the attachment. Whether the pendency of the former suit is a defense is a question to be determined on the trial. It seems that a prior suit pending in equity does not afford a good plea in abatement to a suit at law between the same parties to recover the same demand.

At Law. On motion to dissolve attachments.

Davenport, Smith & Perkins, for plaintiff.

E. Ellen Anderson and Simon Sterne, for defendant.

WALLACE, J. This is a motion by the defendant to vacate two attachments in favor of the plaintiff, which have been levied upon its property, and which were granted, one in the state court in which this action was originally brought, and one in this court after the action had been removed here. The action is brought to recover upon certain coupons and scrip certificates owned by the plaintiff, representing interest payable semi-annually out of the net or surplus income of the defendant. At the time the action was brought there was pending in this court, in equity, a suit prosecuted by the plaintiff and others, as holders of these and other coupons and scrip certificates, to compel an accounting by the defendant of its income, and to recover the amount due of unpaid interest. The cause had proceeded to an interlocutory decree, and an accounting was pending before one of the masters of this court, and in that proceeding the plaintiff had proven before the master the coupons and certificates upon which the present action is brought. Soon after the present action was brought, and before pleading, the defendant removed the action to this court, and thereupon, in due time, interposed as a defense a plea of the pendency of the suit in equity between the same parties. Subsequently, and on the 29th day of December, 1888, the equity suit was prosecuted to a final decree, which determined the amount owing by the defendant to the several holders of coupons and scrip certificates up to the 1st day of October, 1886, and adjudged a recovery therefor. Among other things, this decree contained a provision authorizing the plaintiff to apply to the court for a further discovery and ac-

counting of earnings which should be made by the defendant after October 1, 1886, applicable to the payment of his coupons and certificates, and for a further decree therefor. Thereafter, the plaintiff filed a supplemental complaint in the present action, pursuant to section 544 of the Code of Procedure, setting up the recovery, since the commencement of the action, of the decree in the equity suit, and alleging that by said decree the amount of interest due and payable according to the terms of his coupons and certificates, arising from the income of the defendant earned prior to October 1, 1886, was adjudicated and fixed. The present motion by the defendant proceeds upon two grounds. It is insisted (1) that the Code does not authorize the granting of an attachment in an action like the present; and (2) that the attachment should be dissolved because the plaintiff cannot recover in the action.

Section 635 of the Code authorizes an attachment to be granted "in actions to recover a sum of money only," whether "for breach of contract, express or implied, other than a contract to marry," or for the wrongful conversion or other injury to personal property. There is nothing in the language of the section which confines the remedy to actions to recover liquidated damages. It does not authorize an attachment in actions for equitable relief, such as for the dissolution of a partnership and an accounting, although the violation of a contract may be the basis of the claim asserted, because such actions are not to recover money only, although incidentally a money judgment may be recovered. The present action is to recover a sum of money only, and is unequivocally within the terms of the section; as distinctly so as is an action for breach of warranty, or breach of contract for the delivery of goods, in which classes of actions it is well settled by the decisions of the state courts that an attachment may be granted.

If it is plain that the plaintiff has brought an action in which he will be unable to obtain a judgment against the defendant, there is no propriety in allowing him to subject the defendant to the inconvenience of a levy upon its property in advance of a trial. The only office of the provisional remedy is to afford the plaintiff a security for the collection of his demand; and, in a case where it is entirely clear that it cannot be of any ultimate advantage to the plaintiff, it should not be granted, or, if granted upon an *ex parte* application, should be dissolved when the facts are shown. Ordinarily, however, the court should not undertake to decide doubtful questions of this kind upon an interlocutory motion. If the case turns upon questions of fact which go to the merits of the controversy, the disposition of such questions should be reserved for the trial. In this case, if there are no disputed questions of fact, the questions of law are novel. If it should be held now that the plaintiff cannot maintain his action, and the attachment should be dissolved upon that ground, the decision could not as to the dissolution of the attachment be reviewed; and, however erroneous the conclusion may hereafter appear to have been, the plaintiff would be remediless. But an erroneous ruling upon the trial of the action can be reviewed by the party prejudiced, and all his rights saved. Much of the argument of counsel has been addressed

to the question whether the decree in the equity cause is a bar to the further prosecution of this action. The case will be simplified, and the real question more clearly presented, by ignoring that decree, and eliminating it from consideration as quite unimportant. If the plea or defense of a former suit pending upon the same cause of action between the same parties was good when it was interposed, it is good now. Certainly, the circumstance that the plaintiff has continued to prosecute the former suit, has prosecuted it successfully, and has obtained thereby all the relief to which he is entitled against the defendant, arising from the non-payment of the coupons and scrip certificates in controversy, does not supersede the plea, or nullify the defense. No doubt is entertained that that decree merges the cause of action upon the plaintiff's coupons and certificates to the extent of the recovery adjudged, and that to that extent the decree can be used as a bar to the present action; but, as regards the plaintiff's demand for interest earned by the defendant subsequent to the period covered by the accounting, the only question in the case is whether the pendency of the suit is a defense. *Bank v. Bank*, 7 Gill, 415; *McGilvray v. Avery*, 30 Vt. 538; *Barnes v. Gibbs*, 31 N. J. Law, 317. If the present action had been brought originally in this court, and the prior suit had been brought on the law side of this court, unquestionably the plea would have afforded a complete defense to the action. It is because a second action between the same parties, for the same cause, is regarded as unnecessary and vexatious, that the pendency of the first is allowed to be pleaded in abatement of the second. But a second action is not always an unnecessary and merely vexatious proceeding. Sometimes the property of the defendant in one territorial jurisdiction is insufficient to enable the plaintiff to obtain satisfaction of his demand there, and sometimes the assistance of the different remedies afforded by the same tribunal, when exercising its different jurisdictions over subject-matter, may be essential to enable the plaintiff to successfully enforce his right. While it would be a hardship to a defendant to permit him to be vexed twice for the same breach of duty when the first suit supplies an adequate remedy to the plaintiff, it would be an equal or greater hardship to a plaintiff to deny him the privilege of instituting a second suit and prosecuting it to a judgment when it is apparent that he can obtain but a partial satisfaction of his claim unless he is permitted to resort to both actions. This is well illustrated by the present case, where the plaintiff adopted first the more convenient and adequate remedy of a suit in equity to enforce his demand, and by an accounting ascertained what money had been earned by the defendant applicable to the payment of interest during a period of years; and, when he was about to obtain a decree for that part of his demand which had accrued at the time of the accounting, he found that he could secure his claim for another part, which had accrued subsequently, by bringing an action at law in which he could obtain an attachment against the property of the defendant. He could not, before bringing his suit at law, dismiss his bill in equity without losing the benefit of all his proceedings; and if he were required to abide by his remedy in equity exclusively, and

apply for a further accounting as to earnings subsequently made, he would lose the remedy of an attachment against the property of the defendant. It is well settled that the pendency of a prior suit between the same parties for the same cause of action in the court of another state is not pleadable in abatement to a second action. So, also, it is well settled, although there are authorities to the contrary, that the pendency of a suit between the same parties for the same cause of action in a federal court is not a defense to a second suit brought in a state court; and, when the second action is brought in the federal court, the pendency of such a suit in a state court is not a defense. *Stanton v. Embrey*, 93 U. S. 548; *Insurance Co. v. Brune's Assignee*, 96 U. S. 588. Probably the reason of this doctrine is found in the consideration that under such conditions the second action cannot be assumed to be unnecessary or merely vexatious. It has never been decided that the pendency of a prior suit in equity is a good plea in abatement to a subsequent suit at law between the same parties. The contrary doctrine has been intimated in *Laflin v. Brown*, 7 Metc. 576; in *Blanchard v. Stone*, 16 Vt. 234; in *Hatch v. Spofford*, 22 Conn. 485; in *Graham v. Meyer*, 4 Blatchf. 129; *Hughes v. Elsher*, 5 Fed. Rep. 263. See, also, *Harmer v. Bell*, 7 Moore, P. C. 267. It is not intended, by what has been said, to indicate an opinion that the plea in abatement in the present case is not a good defense. Whether it is or is not is a question which under the circumstances should be reserved until the trial of the action. The defendant can obtain a discharge of the attachment by giving an undertaking, authorized by section 688 of the Code, to pay the plaintiff the amount of any judgment he may obtain. It is safer to put the defendant to the inconvenience of obtaining the discharge in this way than to dissolve the attachment now, upon the ground that the plaintiff cannot maintain the suit, when there is a debatable question of the correctness of such a conclusion. The motion is denied.

PIKE v. GRAND TRUNK RY. CO. OF CANADA.

(Circuit Court, D. New Hampshire. May 15, 1889.)

1. DAMAGES—PROXIMATE CAUSE—VOLUNTARY ACT.

Plaintiff's intestate left the house where she lived, and went 40 or 50 rods, to where there was a fire set by defendant's locomotive. In attempting to extinguish the fire she was fatally burned. The house where she lived was not then in danger, nor did she have any interest in the property which was on fire. *Held*, that the proximate cause of her injury was her own voluntary act, and there could be no recovery.

2. SAME—PROVINCE OF COURT.

Where the facts are undisputed, it is the province of the court to determine the question of proximate cause.

At Law. On motion to direct verdict.

This was an action of tort to recover for injuries received by plaintiff's intestate at Groveton, N. H., in May, 1885. The writ contained three

counts,—two at common law, and one to recover under the provisions of section 8 of chapter 162 of the General Laws of New Hampshire. Plaintiff claimed that a fire was set by a locomotive of defendant on the land of one William W. Pike, upon which stood a house in which plaintiff's intestate lived in the family of plaintiff; that she had reasonable cause to fear its destruction, and went in company with a child of six years of age to extinguish it. The distance from the house to the place of the fire was 52 rods. In attempting to extinguish the fire, it was communicated to her cotton dress, and she was so severely burned that she died in about three hours afterwards. At the close of the testimony defendant moved for a verdict, upon the ground that the setting of the fire was not the proximate cause of the injury, and that the damages did not accrue by reason thereof.

Ladd, Aldrich & Remich, for plaintiff.

A. A. Strout and Ossian Ray, for defendant.

COLT, J., (*orally*.) The motion made by the defendant, at the close of the testimony for the plaintiff, was left undecided, and the counsel for the plaintiff suggested at the time that the motion was made that it might be well to wait before passing upon it until the whole evidence was in, and, the question raised by the motion being somewhat complicated, I decided to allow the case to proceed. I have now reached the conclusion, after careful consideration, to direct a verdict for the defendant. The ground upon which I shall direct a verdict for the defendant is that, upon the uncontradicted evidence, it was the voluntary act of Mrs. Pike which was the proximate cause of her death. It being the established rule of law that the proximate, and not the remote, cause determines the question of liability, if upon the uncontradicted evidence the proximate cause was Mrs. Pike's voluntary act, then it is the duty of the court to direct a verdict for the defendant. If upon the question of proximate or remote cause the evidence is contradictory, or the question is in doubt, then it would be the duty of the court to submit the question to the jury.

It is undisputed that Mrs. Pike went out from her house of her own free will, and walked up the railroad track, to put out a fire from 30 to 40 rods distant, and that she met her death in the attempt. The rule of law is that a person is liable for all the consequences which flow in ordinary natural sequence from his negligence, or, according to another view, he is liable for all the consequences which could be foreseen as likely to occur; but he is not liable for the independent act of an intelligent stranger, because that would not follow as an ordinary natural sequence from his negligence, and such interference by a stranger could not be foreseen. The spontaneous action of an independent will is said, therefore, to break the causal connection. This is in truth the intervention of a new force outside of the regular natural sequence of the primary cause, and which cannot be a subject of precalculation. It is elemental law, therefore, that when such new, independent, and intelligent force intervenes, it breaks the train of causation, and it becomes the proximate

cause, and the original act of negligence the remote cause. The statement of the principle is easier than its application. Each case must be governed by its own facts and circumstances, but, if the case comes clearly within the rule, the court should not hesitate to enforce it.

We have stated the rule, and have said that in our opinion Mrs. Pike comes within its general terms, but does not her case come under some of the exceptions or limitations to the rule which have been recognized by the courts? The intervening cause is not the proximate cause, unless the person acted of his own free will. The first cause does not cease to be the proximate cause if such intervening stranger is imbecile, or acts under compulsion, or under a sense of imminent peril; or, in other words, under such circumstances, produced by the first cause, as would give no opportunity for the exercise of free volition on the part of such stranger. Now, to my mind, there is no evidence going to prove that Mrs. Pike's act was not a strictly voluntary one. There is no evidence going to prove that her act was one of compulsion, or that she acted under the fear of imminent peril to herself, or that the circumstances were such as to destroy her power of volition. Each case must be controlled by its own circumstances. Upon the evidence it cannot be doubted that Mrs. Pike had every opportunity to escape. Neither the direction of the wind, nor the proximity of the fire, nor the dryness of the season, upon the plaintiff's own evidence, placed the intestate in peril for the time being. Instead of escaping from the danger, whatever it was, she voluntarily advanced towards it, going a distance of about 50 rods towards and into the place where the fire was burning. Her act may have been praiseworthy, but it was not the less voluntary, and it does not relieve her from the consequences which ensued. Mrs. Pike had no legal or equitable interest in this property, and consequently in this action her administrator cannot invoke the principle that it was her duty to approach the fire, and endeavor to put it out. Even in a supposed action brought by the owner of the property against the railroad company, for damage caused by fire, the failure of this lady, 72 years of age, though she was active and strong for her age, to voluntarily endeavor to put out a fire 30 or 40 rods distant from the dwelling, could hardly be urged as contributory negligence on the part of the owner of the property. In the present case, I can see nothing in the situation of Mrs. Pike towards the property which was on fire which called for the action she took.

The plaintiff's counsel in their argument have cited *Page v. Bucksport*, 64 Me. 51; *Stickney v. Maidstone*, 30 Vt. 738,—as supporting a right of recovery under the facts disclosed in this case. But these cases do not meet the present one. There the plaintiff was in duty bound to act as he did; besides, his act grew immediately out of and was a part of the original act of negligence. The plaintiff in those cases was acting under the immediate force of the first cause. What took place was but a single happening or event, which was directly and immediately occasioned by the first cause. There was no such element present, as in this case, of a party voluntarily and deliberately putting herself in a dangerous position. 39F.no.4—17

tion, which did not result directly and immediately from the first cause. The plaintiff also relies upon *Railway Co. v. Kellogg*, 94 U. S. 469, but that case distinctly recognizes the doctrine of proximate cause, which the leading cases in this country and England have established. Mr. Justice STRONG in that opinion says:

"We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or non-feasance. They are not when there is sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury."

I cannot hold that the *Kellogg Case* is an authority to the position taken by the plaintiff that the question of remote or proximate cause must, under all circumstances, be submitted to a jury for decision. If upon the facts presented there is any question as to what was the proximate cause, then the case should go to the jury; but if the undisputed facts show, under well-established rules of law, what the proximate cause is, then manifestly the court should act accordingly. This position is recognized in the later case of *Scheffer v. Railroad Co.*, 105 U. S. 249, where the supreme court held, as a matter of law, that the proximate cause of the suicide or death of the intestate was insanity, and that it was not due to the negligence of the company, whereby he suffered an injury eight months before. In the time allowed me I have given such consideration as I was able to this motion. It has been my effort to discover, if possible, some question which could fairly be submitted to the jury in this case. The court should be clearly satisfied before granting a motion of this character, but, if so satisfied, it becomes just as clearly the duty of the court not to hesitate in granting it. In revolving in my mind what charge to give to the jury, I did not see, under the evidence and the law, how I could frame one which would not substantially direct them to bring in a verdict for the defendant; and in the light I now have I do not see how, if the jury should find for the plaintiff, I could hesitate in setting the verdict aside on motion of the defendant. Such being the situation of the case, and such my views, I feel it my duty now, upon the close of the whole evidence, to direct the jury to return a verdict for the defendant.

UNITED STATES v. ONONDAGA COUNTY SAV. BANK.

(District Court, N. D. New York. July 5, 1889.)

1. NEGOTIABLE INSTRUMENTS—DRAFTS—INDORSEMENT.

False vouchers, purporting to be signed by W., (who was then dead,) and fraudulent affidavits and proofs in due form were presented to a pension agent of the United States, and he drew two drafts on the treasury in favor of W., the drafts having a notice on the back that the "payee's indorsement on this check must correspond with signature to the voucher for which the check was given." The drafts, with forged indorsements of W.'s name, were in good faith cashed by defendant, and by it indorsed and paid by plaintiff, the United States. Two years later plaintiff discovered the fraud, and within three days notified defendant, with a demand for the amount of the drafts, but refused to return the drafts to defendant when paid. *Held*, that plaintiff could recover the amount.

2. SAME—LIABILITY OF INDORSER—LACHES.

Plaintiff was not chargeable with negligence in not discovering the fraud immediately, nor in failing to discover the death of W. prior to issuing the vouchers and drafts.

3. SAME—REPRESENTATIONS AS TO PAYEE.

There was no implied assertion, in the act of issuing the drafts, that the payee was living.

4. SAME—SPECIAL PROVISIONS.

The notice on the back of the drafts did not change the legal character of defendant's indorsement.

5. SAME—RETURN OF DRAFT TO INDORSER.

Plaintiff was under no legal obligation to return the drafts to defendant on an offer of payment thereof by the latter.

At Law. On motion for new trial.

This is an action to recover money paid by plaintiff to defendants under a mistake of fact. On the 25th of July, 1882, a pension certificate was issued to Alma Wood, as mother of Elias A. Wood, who died in the war of the Rebellion. On the 3d of August false vouchers, purporting to be signed by Alma Wood, and accompanied by a fraudulent affidavit and certificate, were presented to the United States pension agent at Syracuse. On the same day the pension agent drew two drafts, for \$1,000 and \$924.80, respectively, upon the assistant treasurer of the United States, payable to the order of Alma Wood, and mailed them to her address at Constantia, N. Y. On the back of the drafts is the following indorsement:

"Payee's indorsement on this check must correspond with signature to the voucher for which the check was given. If the payee cannot write, his or her mark should be witnessed, and the witness state his or her residence in full."

Alma Wood died July 8, 1882. Her signature upon the vouchers and drafts was forged. On the 8th of August the drafts with the forged indorsements, and bearing also the indorsement of Sylvester Wood, the husband of Alma Wood, were presented at defendants' bank, and cashed by them. On one of the drafts appears an indorsement indicating that the signature of Alma Wood was identified by one John O'Brien, an attorney, who was interested in obtaining the pension, and who at the time

was a depositor in the bank. The money was paid to Sylvester Wood, who received \$924.80 in cash, and was given credit on the books of the bank for the remaining \$1,000. On the following day the drafts were paid at the sub-treasury to the defendants, having been indorsed by them. In the spring of 1884 the officers of the pension department discovered the forgery. The defendants were notified three days thereafter, and demands were made for a return of the money. The defendants offered to refund, provided the drafts were surrendered. This offer was declined. The defendants insist that the plaintiff was negligent in issuing the drafts after the pensioner's death, and that they had a right to rely upon the implied assertion that the payee of the drafts was a living person. They also insist that the publication of the notice upon the drafts operated to limit the effect of defendants' indorsement to that of a simple guaranty that the payee's signature on the drafts and on the receipt corresponded. It is further argued for the defendants that the plaintiff cannot recover because of the refusal to surrender the drafts which were necessary to enable them to collect from those responsible for the forgery. The action was tried at the May term, and a verdict *pro forma* was directed for the plaintiff. The defendants now move for a new trial upon the exceptions taken, and on the ground that the verdict is against the evidence, inequitable and contrary to law.

William B. Hoyt, Asst. Dist. Atty., for plaintiff.

Charles L. Stone, for defendants.

COXE, J., (*after stating the facts as above.*) The law applicable to this controversy is plain. Money paid under a mistake of fact may be recovered back. Negligence of the plaintiff in making the mistake does not give the defendant the right to retain what is not his, unless such negligence has so misled and prejudiced him that it would be inequitable to require him to refund. A party who transfers a bill of exchange by indorsement warrants that the instrument is genuine, and is liable upon the warranty if any of the names prior to his own are forged. *Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 211; *White v. Continental Nat. Bank*, 64 N. Y. 316; 1 Edw. Bills, §§ 242, 273, 274; 2 Pars. Notes & B. 597. There are exceptions to this rule, but the facts do not bring the defendants within any of them. The rule itself has long been recognized as a fundamental principle of commercial law, and should not be departed from upon slight and unsubstantial grounds. The burden of proving facts which take the case out of the general rule is upon the defendants. *Mayer v. Mayor*, 63 N. Y. 455. Negligence in discovering and giving notice of the forgery is pleaded in the answer, but the point is not argued orally or in the brief. The forgery was of such a character that the plaintiff could not have discovered it immediately. Within three days after it was discovered notice was given. The plaintiff discharged its obligation to the defendants in this regard. The plaintiff was no more in fault than the defendants in failing to ascertain the truth. "Where each party enjoys only the same chance of knowledge, no case demands anything more than reasonable

diligence in giving notice, after a discovery of the forgery. * * * Both parties are equally ignorant, the one being no more guilty of neglect than the other. Indeed, neither being negligent, but both being imposed upon under the exercise of ordinary diligence." *Canal Bank v. Bank of Albany*, 1 Hill, 287; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Weisser v. Denison*, 10 N. Y. 68; *Welsh v. Bank*, 73 N. Y. 424; *Ellis v. Insurance & Trust Co.*, 4 Ohio St. 658. *Bank v. Ellinge*, 40 N. Y. 391; 2 Daniel, Neg. Inst. § 1372; 2 Pars. Notes & B. 599; *U. S. v. National Park Bank*, 6 Fed. Rep. 852. The proposition that the defendants might have recovered the amount of the conspirators had they been informed of the forgery by the plaintiff at the time, is answered, therefore, by the suggestion that the plaintiff was under no more obligation to discover it than the defendants were; and also by the absence of proof that the conspirators were not liable and responsible to the defendants at the time the notice was actually given. *Troy Bank v. Sixth Nat. Bank*, 43 N. Y. 452. The pension was granted, the vouchers were signed, and the drafts issued in the usual course of business. Every requirement of the law was fulfilled. Rev. St. §§ 4764, 4765. The officials of the pension-office were not guilty of negligence in failing to discover the death of Alma Wood prior to issuing the vouchers and drafts. They were justified in accepting and acting upon the vouchers and accompanying proofs, signed and verified according to the minute and technical requirements of the statute. They could not be expected to anticipate the formation of an infamous conspiracy, involving several individuals, and consummated only by forgery and fraud of the boldest character. There was no implied assertion that the payee was living. The legal character of the transaction is not changed because the actors were government officers. It would be a novel proposition that a debtor who mails a draft to the order of his creditor must lose the amount if the draft is paid on a forged indorsement, should it transpire that the creditor died prior to the mailing. The notice on the back of the drafts does not change the legal aspect of the transaction. It was intended to insure greater accuracy and precision. It was for the benefit of all who might thereafter deal with the drafts. The plaintiff lost no rights because of the endeavor to have the signature on the voucher and the check correspond, and is not estopped from asserting that both signatures are forgeries. Besides, the defendants did not rely upon the notice, and were not misled by it. They required the identification of the payee's signature, and indorsed a minute of the fact that it was so identified on the draft immediately below that signature. Both the plaintiff and the defendants were bound to inquire into and satisfy themselves of the genuineness of the indorsement. The defendants recognized this obligation, and proceeded to make the inquiry, and, by indorsing the draft, warranted the prior signatures. The demands for the return of money are proper, and sufficient in form. The refusal to surrender the drafts after the defendants had agreed to repay the money, was, perhaps, ill-advised and discourteous, but the defendants lost no advantage by reason thereof. There was no legal obligation to return the drafts. The defendants had

a right of action against the conspirators independent of the drafts. *U. S. v. National Park Bank*, 6 Fed. Rep. 852. After a diligent search no authority has been found where a recovery has been refused upon the facts here presented. Two cases are reported in which the defendant succeeded. *U. S. v. Clinton Nat. Bank*, 28 Fed. Rep. 357, and *U. S. v. Central Nat. Bank*, 6 Fed. Rep. 134. But in the former case there was a delay of 12 years in giving notice after knowledge of the forgery, and in the latter case there was no notice of any kind. The motion to set aside the verdict is denied. The plaintiff is entitled to judgment for \$1,924.80, and interest from September 15, 1884.

COFFIN v. SPENCER *et al.*

(Circuit Court, D. Indiana. July 20, 1889.)

NEGOTIABLE INSTRUMENTS—NEGOTIABILITY—CERTAINTY AS TO TIME OF PAYMENT.

A promissory note stipulated that "the payee or holder of this note may renew or extend the time of payment of the same from time to time as often as required, without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties, and indorsers, and each of them, parties hereto, at any time, when the same may be due and payable." *Held*, that the note was not negotiable.

At Law. On demurrer to answer.

The action is upon an instrument of the following tenor:

"\$1,941.58.

RICHMOND, IND., Sept. 15th, 1884.

"Four months after date I promise to pay to the order of Turner W. Haynes, nineteen hundred and forty-one 58-100 dollars, at the First National Bank of Richmond, Indiana, value received, without any relief from valuation or appraisal laws, with interest at the rate of eight per cent. per annum after maturity, and five per cent. attorney's fees. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest, and non-payment of this note. And the payee or holder of this note may renew or extend the time of payment of the same from time to time, as often as required, without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties, and indorsers, and each of them, parties hereto, at any time when the same may be due and payable.

WILLIAM F. SPENCER.

"Indorsed: F. W. HAYNES."

If this is a promissory note negotiable as by the law-merchant, the defense alleged, it is conceded, it is not good; but, if the paper is non-negotiable, the answer is sufficient.

Burchenal & Rupe, for plaintiff.

D. M. Bradbury and Fox & Robbins, for defendants.

WOODS, J., (*after stating the facts as above.*) The question presented is whether or not the instrument sued upon is a negotiable promissory note,

and the solution of the question depends upon the meaning and force of the stipulation for renewal or extension of time of payment, which it is claimed makes the time of payment or maturity uncertain. The stipulation is in these words:

"And the payee or holder of this note may renew or extend the time of payment of the same from time to time, as often as required, without notice, and without prejudice to the rights of such payee or holder to enforce payment against the makers, sureties, and indorsers, and each of them, parties hereto, at any time, *when the same may be due and payable.*"

By transposition of the italicized clause two readings, quite different in effect, are possible, as follows: (1) "And the payee or holder of this note, *when the same may be due and payable*, may renew or extend the time of payment from time to time," etc.; or, (2) "And the payee or holder of this note may renew or extend the time of payment, etc., without prejudice to the rights of such payee or holder, *when the same is due and payable*, to enforce judgment against the makers, sureties, and indorsers, and each of them, parties hereto." The latter I think the true reading, and it means that at any time before or after the maturity of the note by its terms or by the terms of any agreement for renewal or extension, the holder, whether the payee or any assignee, may by agreement with the maker, or with an indorser or other party liable on the paper, renew or extend the date of payment, "from time to time," that is to say, definitely, without prejudice ultimately to his remedies against any of the parties. Every successive taker of the paper is, of course, bound to take notice of this stipulation, and, instead of looking only to the face of the instrument for the time of its maturity, as in case of commercial paper he must, is put upon inquiry whether or not any agreement for a renewal or extension of time has been made by his proposed assignor or by any previous holder. "A bill of exchange always implies a personal general credit, not limited or applicable to particular circumstances and events, which cannot be known to the holder of the bill in the general course of negotiation." Story, Bills, § 46. And in *Hartley v. Wilkinson*, 4 Maule & S. 25, Lord ELLENBOROUGH says: "How can it be said that this note is a negotiable instrument for the payment of money absolutely, when it is apparent that the party taking it must inquire into an extrinsic fact in order to ascertain if it be payable." See, also, *Insurance Co. v. Bill*, 31 Conn. 534. The note in suit, it seems clear enough, cannot be deemed negotiable. It follows that the third paragraph of answer is good, and the demurrer thereto should be overruled; and, I suppose, too, that the complaint fails to show jurisdiction of this court over the parties, in that the payee and indorser of the note, being a citizen of this state, and not entitled to have sued in this court, the assignee cannot. And for this reason the demurrer might be carried back, and sustained to the complaint.

In re WATIES & Co.

Ex parte CHICK *et al.*

(District Court, D. South Carolina. June 22, 1889.)

BANKRUPTCY—PREFERRED CLAIMS—WAGES OF LABORERS.

In computing the time under Rev. St. U. S. § 5101, giving priority to the wages of operatives, clerks, etc., to the amount of \$50, "for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy," the period intervening between the institution of the proceedings and the final adjudication is to be disregarded.

In Bankruptcy. Report on final dividend.

Clark & Muller, for assignee.

John Bauskett, for petitioners.

SIMONTON, J. A petition in involuntary bankruptcy was filed against John Waties & Co. on 26th October, 1875. The registrar, before whom the case was brought, granted the prayer of the petition. His ruling was set aside by the district judge. The circuit court, reviewing the matter, revised the decree of the district court, and the firm were adjudicated bankrupts on 8th February, 1877. The estate has been administered and a scheme for final dividend made. The petitioners except to the scheme prepared by the registrar on the ground that they were operators and clerks of the bankrupts within the period of six months before the institution of the proceedings in bankruptcy, and as such entitled to a preference to the estate of \$50 each, and that this has not been allowed to them by the registrar. Section 5101, Rev. St. provides: In the order for a dividend the following claims shall be entitled to priority, and to be first paid in full in the following order: (1) Fees and costs of the proceedings; (2) debts to the United States; (3) debts to the state; (4) wages due to any operator, clerk, or house servant to an amount not exceeding \$50 for labor performed within six months next preceding the first publication of the notice of proceedings in bankruptcy. Under a literal application of this provision the petitioners could have no claim. The first publication of the notice of the proceedings in bankruptcy was made after the adjudication in February, 1877, 16 months after petition filed instituting the proceedings. Indeed, a literal application of the provisions of this subdivision would exclude similar charges in very many cases of involuntary bankruptcy, certainly in all contested cases. Between the filing of the petition and the final decision in contested cases six months will frequently elapse. When it is considered that these claims are highly favored by the act, being in the same category with the expenses attending the proceedings, and with debts due the public, coming next after these last, a construction making them a dead letter in so many instances cannot be the correct one. Proceedings in involuntary bankruptcy generally come on the respondents suddenly, and without warning. No time is given for preparation. The business is

shut down at once, and all operators and laborers, a class who live from day to day, are thrown out without resources. The purpose of this provision is to protect them. The literal construction defeats this intent. Again, everything relates back to the filing of the petition. Only debts existing then are provable, and no claims can be paid out of the assets which did not exist at that time. So these petitioners are without remedy. Pending the proceedings they cannot sue their claims, and if they did, and the adjudication be subsequently declared, their action would be nugatory. See cases collected by Bump on Bankruptcy, 172. The true construction of this section is that in computing the time the period intervening between the institution of the proceedings and the final adjudication must be disregarded. This is in analogy with the rule prevailing in like cases. Whenever there is a legal inability to sue, the period of such inability is never reckoned in the currency of the statute of limitations. *The Protector*, 9 Wall. 687; *Adger v. Alston*, 15 Wall. 555; *In re Eldridge*, 2 Hughes, (U. S.) 256; *Hanger v. Abbott*, 6 Wall. 532; *Montgomery v. Hernandez*, 12 Wheat. 129. The assets largely exceed the preferred claims. It is ordered that the scheme of the dividend be amended, and that each of the petitioners whose claim is \$50, or less, be paid in full, and that to such of them as hold claims exceeding \$50 there be paid, respectively, the sum of \$50, with leave as to the remainder of his claim to come in *pro rata* on the amount for general distribution. Costs of these proceedings payable out of the estate.

DALY v. BRADY *et al.*

(Circuit Court, S. D. New York. June 19, 1889.)

COPYRIGHT—FILING TITLE.

There is no copyright in a dramatic composition entitled "Under the Gas-Light: A Drama of Life and Love in These Times," when the printed copy of title filed under the copyright act reads, "Under the Gas-Light: A Romantic Panorama of the Streets and Homes of New York."

In Equity. Application for injunction.

S. H. Olin, for complainant.

A. J. Dittenhofer, for defendants.

WALLACE, J. It is to be regretted that it must be held that the complainant has not a valid copyright to his dramatic composition, "Under the Gas-Light: A Drama of Life and Love in These Times," because the copy of the title deposited by him in the clerk's office of the district court reads, "Under the Gas-Light: A Romantic Panorama of the Streets and Homes of New York." The title to a copyright is purely statutory, and a performance of the conditions imposed by the laws of congress is indispensable to its creation, and to the existence of any literary prop-

erty in the published work. *Wheaton v. Peters*, 8 Pet. 591; *Merrell v. Tice*, 104 U. S. 557. Among these conditions the statutes require the deposit of a printed copy of the title of the work before publication in the proper office,—formerly the office of the clerk of the district court of the district of the residence of the author, and now the librarian of congress. A literal compliance is not requisite; a substantial compliance is. *Callaghan v. Myers*, 128 U. S. 617, 9 Sup. Ct. Rep. 177; *Donnelley v. Ivers*, 20 Blatchf. 381, 18 Fed. Rep. 592; *Baker v. Taylor*, 2 Blatchf. 82; *Jackson v. Walkie*, 29 Fed. Rep. 15. A verbal difference between the registered title and the published title would not necessarily invalidate the copyright; but when the variance is so material that the substantial identity between the two titles is doubtful, and might deceive the public into the belief that they refer to different publications and themes, it is fatal. It is patent that there is such a material variance in the present case unless all the title, except “Under the Gas-Light,” can be disregarded. This is not permissible. It will hardly do to segregate what the author has designated and deposited for registry as the title of his work as a unit into parts, and treat one part as the name and the other as descriptive matter, and eliminate the latter as a part of the title. If such an analysis were ever permissible, it could not well be made in the present case, because it is impossible to discriminate between what is the descriptive matter and what is the name. The drama might have been called “Under the Gas-Light,” or “A Drama of Life and Love in These Times,” or “A Romantic Panorama of the Streets and Homes of New York,” and either designation would be equally appropriate as a name or as descriptive matter. When two such names or descriptive terms are incorporated into the title, each becomes an integral part of it, and it may be as reasonably contended that one part of the title can be dropped out as that the other can be. The motion for an injunction is denied.

SANBORN MAP & PUB. CO. v. DAKIN PUB. CO. et al.

(Circuit Court, N. D. California. June 10, 1889.)

1. COPYRIGHT—INFRINGEMENT.

Complainant sold a copyright insurance map to H. & M., who employed defendants to correct it, by reason of changes from time to time in buildings, etc., affecting risks. Defendants, in making such corrections, used pasters on complainant's map, and retraced portions of said map, and in some instances reproduced whole sheets of said map, by relithographing it. Held that, while defendants could correct the map by putting thereon their pasters of such corrections, nevertheless it was an infringement to retrace any material part of complainant's map, or to reproduce any material part thereof in making such corrections.

2. SAME—INJUNCTION—ACCOUNTING.

Complainant, in such case, is entitled to an interlocutory decree enjoining further infringements, and to an accounting for damages.

In Equity. Infringement of copyright. Application for injunction.

Langhorne & Miller, for complainant.

Van Ness & Roche, for defendants.

SAWYER, J., (*orally*.) This is a suit for the infringement of a copyright of a map showing the improvements on property and on the surrounding property as affecting the risks for the benefit of fire insurance companies, so that they can have the map at hand in their offices, and know the character of their risks, which are noted on the map. This map is copyrighted by the Sanborn Map & Publishing Company. That company sold a copy of its map, or book of maps, I should say, (each page covers one or more blocks,) to Hutchinson & Mann. Hutchinson & Mann made corrections on it, as the risks changed from time to time, and they procured (the defendant) the Dakin Publishing Company to go over the field, note the changes, and make the corrections on the map. That company made the corrections by putting on pasters, showing the changes made, on the map which Hutchinson & Mann had purchased from the Sanborn Map & Publishing Company, and often by retracing and reproducing portions not changed by pasters. It is claimed that defendants, at the request of Hutchinson & Mann, had a right to do that. The owners certainly had a right to do anything they pleased with the map purchased from complainant so far as making changes and putting on pasters is concerned; but they did more than that. They reproduced portions of the map, sometimes nearly a whole sheet. When the corrections were so many that they found it cheaper and better to make out a sheet than to make the corrections on it by pasters in the book, they did so, and then relithographed it, and reproduced the page, multiplying the copies, and often, doubtless, supplying the copies to other companies having complainant's maps or book of maps. While they had a right to put on pasters, cut the map to pieces, and destroy it, they had no right to retrace or reproduce and multiply any material part of the map. In some instances they took whole sheets, made several changes in them, relithographed those sheets so amended, and used them and doubtless furnished them to others to use. If they can do that on one sheet, they can do it on two, three, or four, and finally reproduce the whole book, availing themselves of the plaintiff's works as to all except the changes. If they can reproduce it once, they can do it a dozen times. If they can do it for one man they can do it for every insurance company, and multiply the work indefinitely to the great injury of the owner of the copyright. In my judgment the reproduction, the retracing, or relithographing of any material part of the map is an infringement of the copyright. To the extent of the reproduction of complainant's work, defendants are liable for an infringement, and there must be a decree restraining them from so infringing. There will be a reference to the standing master to ascertain the profits in pursuance of these suggestions. It is an infringement to retrace or reproduce any material portion of the map. The mere putting on of the pasters and destroying the sheet, without reproducing any part of it, I do not think is an infringement. An accounting will be taken in accordance with that principle.

GUARANTEE TRUST & SAFE-DEPOSIT Co. *et al.* v. NEW HAVEN GAS-LIGHT Co.

(Circuit Court, D, Connecticut. July 8, 1889.)

PATENTS FOR INVENTIONS—NOVELTY—ILLUMINATING GAS PROCESS AND APPARATUS.

Letters patent No. 167,847, issued September 21, 1875, to Thaddeus S. C. Lowe, for an "improvement in process of and apparatus for the manufacture of illuminating or heating gas," contain a process for the manufacture of water-gas, containing but little nitrogen. The presence of nitrogen in illuminating gas is deleterious, and when it amounts to 9 per cent. or more, it amounts to a serious fault. The feature of the process consists in producing the gas in a close chamber,—that is, one from which the air is excluded,—or by an alternating, as distinguished from a continuous, process. All of the essential apparatus was old, except the fixing chamber, which is so arranged as to be heated internally by the products of combustion that escape from the generator and envelop the refractory material. *Held* that, as the invention introduced a very desirable advantage into the process of making illuminating gas, by which the expense is greatly lessened, the facts that the older inventions, which are now claimed to be susceptible of being modified by mere mechanical skill into the one in question, remained without modification until the patentee made it, and that his improvement at once commended itself to those skilled in the art, are sufficient to show patentable invention.

In Equity. Bill for infringement of letters patent.

B. F. Thurston and E. N. Dickerson, Jr., for complainants.

John R. Bennett, for defendant.

WALLACE, J. This suit is founded upon the patent granted to Thaddeus S. C. Lowe, No. 167,847, dated September 21, 1875, for "improvement in process of and apparatus for the manufacture of illuminating or heating gas." The complainants allege infringement by the defendant of the first claim of the patent. That claim is as follows:

"(1) For the manufacture of illuminating and heating gas, the process of which consists of dropping or otherwise admitting in limited quantities, continuously or intermittently, hydrocarbon oils or other carbonaceous substances, liquid or solid, onto the top of a thick mass of coal or other carbonaceous substance, in a state of incandescence, in a close chamber previously heated by direct internal combustion, with or without the introduction of steam, and then, for the purpose of superheating and fixing the gases of said chamber, passing them from said chamber into and through a second chamber, which also has been previously heated by direct internal combustion, substantially as set forth."

This claim includes two inventions, each of which is a process in the sense that it involves the treatment of materials by successive steps conducted by means of a combination of devices. Each process involves the use of apparatus which consists essentially of a cupola or generator, a superheater or fixing chamber having specified characteristics, and certain pipe connections for introducing air, or air and steam, into the generator, and carrying the gases generated there to the superheater. The superheater is filled with refractory material, such as loosely-laid fire-brick, and is heated by the hot gases which are produced in the gener-

ator. One process of the claim, and the process which it is alleged is employed by the defendant, is for the manufacture of water-gas. This is an intermittent process. In this process, anthracite or bituminous coal, or other solid carbonaceous substances, are introduced into the generator and brought to a high state of incandescence by the passage through it of a current of air. The products of combustion which are there generated pass down through a pipe underneath the fixing chamber and then proceed upward through the fixing chamber, enveloping the refractory material therein by the aid of an air supply introduced at its base. When the carbonaceous matter in the generator has reached a high state of incandescence, the currents of air are discontinued, both at the generator and the fixing chamber, and steam is introduced at the base of the generator. The steam, acting upon the incandescent carbon, is decomposed, and a gas composed of hydrogen and carbonic oxide is evolved. At the upper part of the generator, or anywhere on the passage of this gas to the fixing chamber, a liquid hydrocarbon is introduced into it, and becoming volatilized passes with the other gaseous vapors through the pipe into the fixing chamber, where they are converted into permanent gas. After a time, the action of the steam upon the incandescent carbon in the cupola will have so lowered the temperature that the manufacture of gas cannot be successfully continued, and it becomes necessary to discontinue the current of steam, and to renew the supply of air, in order to again bring the carbon in the cupola to a high state of incandescence and heat up the contents of the fixing chamber. The gas made by this process consists of hydrogen, carbonic oxide, and a variety of hydrocarbon gases, and contains but little nitrogen. The presence of nitrogen in illuminating gas is deleterious, and when it reaches the extent of 9 per cent. becomes so objectionable as to be a serious fault. The feature of the process therefore, which consists in producing the gas in a close chamber,—that is, one from which the air is excluded,—or by an alternating, as distinguished from a continuous, process, is of controlling importance. The second process of the claim is one for producing an oil-gas. This process differs from the other in that no steam is introduced into the generator. This process is included in the claim, because the claim contains the words “with or without the introduction of steam.” This language has no sensible meaning unless it is intended to embody a process in the claim which is referred to in the specification as follows: “In case where gas extremely rich in carbon is desired, the same will be best produced by omitting the steam and generating the gas from oils alone, using the generator, *a*, either alone or in conjunction with the superheater.” It is not alleged that this process is employed by the defendant, and the question of the novelty of the process has not been referred to in the testimony of the expert witnesses. If it were void for want of novelty, it would be necessary for the complainants to file a disclaimer, and by doing so their right to recover for infringement of the other invention of the claim would not be affected, except as respects costs. *Tuck v. Bramhill*, 6 Blatchf. 95; *Taylor v. Archer*, 8 Blatchf. 315. As the point has not been made, and as it is

not charged that the defendant uses this process, this process does not require further consideration. It is plain upon the proofs that the defendant does employ the first process of the claim. The issue is upon its patentability. The gist of the invention in controversy consists in the use of a new apparatus for the treatment of the materials from which the gas is made. The same materials had previously been treated by the same series of steps, in the same order of succession, to produce a similar product. It was old to make illuminating water-gas by first producing a non-illuminous gas by the action of steam upon incandescent fuel, then adding to this gas hydrocarbons, and converting them into vapor or gas, and then passing this mixture through a fixing chamber; and apparatus of various kinds for performing these operations was old. All the essential apparatus of the patent was old, and had previously been used for carrying out these several steps, except the fixing chamber; and that differs only from previously used fixing chambers in that it is so constructed and arranged, in relation to the generator, that it is heated internally by the products of combustion that escape from the generator and envelop the refractory material, instead of being heated by an external fire. Under these circumstances, the novelty of the invention consists in the novelty of combining the fixing chamber of the patent with the other devices with which it is to be employed. It is plain, upon the proofs, that the patentee was the first to employ a fixing chamber in combination with the other parts, which enabled the products of combustion that escape from the generator during the operation of "blowing up" to fix or render permanently gaseous the mixture of hydrocarbonic oxide and hydrocarbon vapors produced in a close chamber.

A number of prior patents are relied upon by the defendant to defeat the novelty of such a combination. The case would have been much simplified, and the court relieved of much unnecessary labor, if all but two of these patents had been omitted from the record. The patent to Harkness of 1874 describes a process which is in all essentials the process and apparatus in controversy, except that the fixing chamber is a retort fired by external heat. The English patent to Siemens of 1864 describes apparatus for converting carbonaceous matter into combustible gases, and for their application to the heating or fusing of metals and other substances. The apparatus contains a superheater which is a chamber in which fire-bricks are loosely piled, to which the gas produced in the generator escapes, communicating heat which will be communicated to the next portion of gas which passes through the superheater. The gas made by this process contains 61 per cent. of nitrogen, and the superheater of the apparatus is not intended or used as a fixing chamber in the sense of that term as used in the complainants' patent. It is used to superheat a gas produced by combustion, on its way to a furnace where it is to be used in heating or fusing metals, etc. The other patents relied upon by the defendant are more remote from the invention than the Harkness patent. The patent to Arbos of 1863 describes apparatus in which the fixing chamber is heated externally, and the gas is made by

a continuous process in which air is constantly blown into a bed of coals. The British patent of 1868 to Benson & Valentine describes apparatus in which there are employed two distinct and separate fires. The first of these is a fire in which air is admitted at the bottom of the combustion chamber. The products of combustion are passed through a second fire, maintained by a separate current of air. The product of the first fire is a mixture of nitrogen, carbonic acid, carbonic oxide, and hydrocarbon gases and tarry matters. The object of the second fire is to destroy the tarry matters which are present. The process is a continuous one, and the gas made by it is not a practical gas for illuminating purposes, on account of the quantity of nitrogen which it inevitably contains, derived from the two fires supplied with air; and the products of the first fire are not passed through a second chamber which has been previously heated by direct internal combustion. The patent to Lowe of 1872 involves the use of a generator in which bituminous substances are maintained in a state of slow combustion by the action of currents of air. A distillation of the bituminous matter takes place above the fire, and the combustible gases result. These gases, mixed with the products of combustion, pass to a superheater which is heated externally. The process of this patent is an air process in which the fixing chamber is heated externally, and the product is a gas which is very rich in nitrogen. It suffices to say of the other patents which have been relied on in the argument for the defendant that the Blair patent describes an air process and an externally heated fixing chamber; and, in the apparatus of the Kirkham patent and of the Saunders patent, there is no fixing chamber. None of the patents, except the Harkness patent, describe inventions for making the product of the complainants' process. They were all directed to the production of gas differing essentially in the quantity of the nitrogen present, and involve the air process, or the continuous, as distinguished from the intermittent, process. But the process of the Harkness patent was directed to the production of the gas of the complainants' patent, made in a close chamber after the air has been excluded, and, as has been said, involves every essential step and detail of the process of the complainants' patent, except the use of a different fixing chamber. The patent-office rejected the claim now in controversy as void for want of novelty, until it was so amended as to limit it to a process in which the fixing chamber used was one "previously heated by direct internal combustion." Very plainly, the prior state of the art required this limitation to be made, in order to confine the claim to the real invention of the patentee. The novelty of the claim accordingly turns upon the question whether novelty is present or absent in the substitution of the fixing chamber described. If it did not involve invention to introduce such a fixing chamber in the apparatus of Harkness, there is no novelty in the invention claimed.

It cannot be safely affirmed that those skilled in the art, having the Siemens patent before them, would derive any material assistance from it in devising the fixing chamber of the complainants' patent. The Siemens apparatus is designed and used in a process of gas-making in which

the gas has no hydrocarbon vapors to be broken up and fixed. Hydrocarbon gases and vapors are destroyed if exposed to a too high temperature; and the Siemens patent does not seem to offer a suggestion to assist an expert to ascertain that the superheater could be practically employed in treating hydrocarbon gases as they are required to be treated in the fixing chamber of the Harkness process, or the process of the complainants' patent. One of the experts for the complainants testifies, in substance, that the Siemens superheater was not designed to perform the functions of a fixing chamber; that "fixing" in gas-making is a term which is unquestionably limited to cracking up condensable hydrocarbon vapors into permanent hydrocarbon gases to effect a chemical decomposition, destroying one set of substances not suitable for illuminating gas, and creating another set of substances extremely valuable in illuminating gas; and that no such materials or products occur in the Siemens operation, and no such chemical changes result in the regenerating chamber of the Siemens apparatus. The patent is no more an anticipation of the present invention than the Harkness patent is. Any prior apparatus which would not produce the same results as the apparatus of the present invention cannot be substantially the same apparatus. The patent shows that a secondary chamber through which gas from a generator passes can be heated by placing refractory material within it to be enveloped by the gas. To this extent it is of some value, as showing the use of appliances, in principle like those of the complainants' patent, for a cognate purpose; and beyond this it is not valuable. The Harkness patent exhibits the present invention more nearly than does the Siemens patent, but the Harkness patent is not an anticipation of it, because the parts of the apparatus in combination do not operate in the same way to produce the same results. Invention was not necessarily absent in making the substitution of the fixing chamber of the patent for the fixing chamber of Harkness' because Siemens had previously used his device to superheat a different gas. It would have been absent if the Siemens device had been obviously adapted to supply the place of the externally heated fixing chamber in the Harkness apparatus. But the inquiry is whether the adaptability of the Siemens superheater to fix the gas of the Harkness patent was self-evident to the intelligence of those skilled in the art. If it had been, why was not the substitution made? It introduced very desirable advantages into the process of making illuminating water-gas. The experts on both sides concede that the fixing chamber of the patent can be heated more economically and more quickly than the fixing chambers which were previously used as in the Harkness apparatus, or in similar apparatus. If the making of this change had been an obvious thing, falling within the range of ordinary mechanical adaptation, it is probable that those skilled in the art would have sought to avail themselves of its advantages; yet, as appears by the prior patents in the record, the more expensive method of fixing the gas in retorts heated by external fires was everywhere followed. The various manufacturers in this country who were making gas according to the Tessie du Motay process, and using the externally fired retort, did not discover

what it is now asserted was an obvious thing. The fact that the older organizations which it is now claimed were susceptible of being modified by mere mechanical skill into the apparatus of the patent remained without any such modification until the patentee made it, and his improvement when made was so useful and valuable as to commend itself at once to those skilled in the art to which it relates, is sufficient to resolve any doubt whether the improvement embodies invention in favor of the patent. A decree is ordered for the complainants.

PHILADELPHIA NOVELTY MANUF'G Co. v. ROUSS.

(Circuit Court, S. D. New York. July 8, 1889.)

1. PATENTS FOR INVENTIONS—REISSUE—HAIR-CRIMPERS.

Complainant's original patent embraced hair-crimpers of two kinds,—one in which the fabric is stitched to the soft metal core; the other in which the fabric is fastened to the core by a metal fold, made by turning over the thin edges of the core, or of a strip of sheet-lead inside the fabric over the core. The original contained the clause: "I also modify my invention in various other equivalent ways, such as would suggest themselves to any intelligent mechanic," etc. The reissued patent contained claims for fastening the fabric to the core by cementing them together. *Held*, that the reissue was invalid, being an expansion of the original, and embracing a new, invention.

2. SAME—REISSUE—LACHES.

If it be conceded that the inventions claimed in the reissue were described in the original, then, such claims being expansions, and more than three years having elapsed after the original was granted before the reissue was applied for, the doctrine of laches applies, and the delay must be held unreasonable in the absence of explanatory averments in the bill.

In Equity. Bill for infringement of patent. On demurrer to bill.

Joshua Pusey, (*H. F. Fenton*, of counsel,) for complainant.

John J. Jennings, for defendant.

WALLACE, J. All of the claims of the reissued patent in suit are for inventions not shown or suggested in the original patent, with the exception of claims 5 and 6. The invention of the original patent embraced hair-crimpers of two kinds,—one in which the fabric is applied to the soft metal core by stitching, and another in which the fabric is fastened to the core by a metal fold made by turning over the thin edges of the core, or of a strip of sheet-lead inside the fabric over the core. Two of the claims (the third and sixth) were for the core separately, with modifications, and all the others were for the core with the fabric attached to it in one of these specified ways. The specification of both the original and the reissued patent closes with this clause: "I also modify my invention in various other equivalent ways, such as would suggest themselves to any intelligent mechanic to meet special requirements." It is insisted now for the complainant that fastening the fabric to the core by cementing them together is an equivalent mode of fastening them to stitching or turning

in the lateral edges of the core or its supporting strip. Claims 1, 2, 3, 4, and 7 are expansions of claims of the original, apparently intended to embrace the cemented fastening in the claims, as well as the fastening by stitching or turning over the edges of the metal. If it is true, as argued, that this is only the introduction of an equivalent into the claims, it was wholly unnecessary; and it may reasonably be assumed that the patent-office did not so consider it. It must be held that these claims were designed to expand the claims of the original, and take in inventions which are not found in the original, and are therefore invalid. If it should be conceded that the inventions now claimed were described in the original patent, then, as the claims of the reissue are expansions, and more than three years elapsed after the original was granted before the reissue was applied for, the doctrine of laches applies; and the delay must be held unreasonable in the absence of any explanatory averments in the bill accounting for it. *Wollensak v. Reiher*, 115 U. S. 96, 5 Sup. Ct. Rep. 1137. The special demurrers to the bill are sustained. As the principal controversy has been upon the matters raised by these demurrers, costs are allowed to the defendant. The general demurrers are not sustained because, unless the patent is invalid for want of novelty, the fifth and sixth claims are good, and entitle the complainant to a decree for infringement; and the court cannot decide as matter of law upon the face of the patent without the aid of extrinsic evidence that those claims are destitute of inventive novelty.

THOMPSON *et al.* v. AMERICAN BANK-NOTE CO.

(Circuit Court, S. D. New York. June 28, 1899.)

PATENTS FOR INVENTIONS—STAPLE-DRIVING MACHINE—INFRINGEMENT.

Complainants' patent was a combination of an inclined and retreating anvil to sustain the wire of a staple while being bent, and to sustain the staple while being driven, with the bender-foot and driver, in a wire-stapling machine. The bender-foot boxed the prongs of the staples on all but their inner sides, while the inclined and retreating anvil filled the space between the prongs, retreating from the crown as it was driven, and thus the prongs were supported at all points while being driven. *Held* infringed by a machine in which the anvil was the same in shape and operation except that it did not fill the space between the prongs entirely to the crown, where support was unnecessary.

In Equity. On bill for infringement of patent.

Horace Barnard, for complainants.

H. D. Donnelly, for defendant.

WHEELER, J. The patent in this case was before this court in *Thompson v. Gildersleeve*, 34 Fed. Rep. 43, and the validity of the third claim was there sustained. It was again before this court, on the same question of infringement that is here now, in *Thompson v. Bank-Note Co.*, 35

Fed. Rep. 203. On account of doubts expressed in other cases, as to whether the device in question is an infringement of the combination of that claim, the matter has been fully heard and considered again now. *Thompson v. Supply Co.*, 38 Fed. Rep. 112. That combination is of an inclined and retreating anvil, so called, to sustain the wire of the staple while being bent, and to support the staple while being driven, with the bender-foot and driver, in a wire-stapling machine, operating substantially as described. By the operation of these parts, wire staples are bent and driven through the material being stapled, without having holes first punched for the prongs of the staples. This had not been done before this invention. The bender-foot and driver, operating as in former machines, are here without question. The presence of the inclined and retreating anvil of the combination only is denied. The bender-foot boxed the prongs of the staples on all but their inner sides, and prevented their crippling in any other direction. The inclined and retreating anvil of the patent, after supporting the wire for bending by the bender-foot, by filling the space between the prongs, and retreating out of the way of the crown as the staples are driven home by the driver, supports the prongs on their inner sides, and prevents their crippling in that direction. Thus the prongs of staples of very slender wire are steadied in place and driven into the material. This invention underlies the use of the anvil for this purpose, and covers all forms of it based upon the invention. *Railway Co. v. Sayles*, 97 U. S. 554. In the machine of *Thompson v. Gildersleeve* the anvil was in two parts, one for supporting the wire while being bent and the other for supporting the prongs while being driven. Both were inclined in shape, and one retreated in one direction after supporting the wire in being bent; and the other retreated in the opposite direction, supporting the prongs as it went, both making room for the crown of the staple. Together these two parts constituted the inclined and retreating anvil of the patent, different in form, but accomplishing the same result in the same way. In the machine of this case now in question, the part of the anvil which supports the wire while being bent is precisely the same in shape and operation. The other part fills the space between the prongs in width, and supports them on their inward sides, and prevents them from crippling in that direction in precisely the same manner, and retreats out of the way of the crown of the staple in the same way. It does not fill the whole space between the prongs of the staple in height to the crown, and does not support the prongs in that place while being driven. Support in that place is not necessary, and this difference appears to be wholly immaterial. All the support against inward crippling of the prongs furnished is by the same means, operating in substantially the same way. This is none the less an infringement, because more support is not furnished, especially when all that is useful is furnished. The conclusion reached, after going over the whole ground again, is the same as that reached before.

Let there be a decree for a continuance of the injunction, and for an account, with costs.

DOBSON *et al.* v. CUBLEY.

(Circuit Court, S. D. New York. June 19, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

Banjos made under letters patent issued April 3, 1883, to E. J. Cubley for improvement in banjos, in which the parchment rests directly on a rim consisting of a metal shell, in form like the old wooden rim, but differing from any rim previously made, and producing by such rim distinctive musical properties, do not infringe letters patent issued May 17, 1873, to C. E. Dobson, for an improvement consisting of a ring, either of metal or wood, to ease the wear of the parchment against the rim, and improve the tone of the instrument; nor do they infringe letters patent issued November 18, 1881, to Henry C. Dobson, whose improvement consists of a metal ring between the parchment and a rim of wood and metal, and which eases the parchment, as does the ring in the first patent, and produces a metallic musical sound.

In Equity. Bill to restrain infringement of patent.

Arthur S. Brown and *Albert Comstock*, for complainants.

Edward P. Wilder and *Howard Henderson*, for defendant.

WALLACE, J. The question in this case is whether banjos made conformably to the patent to Edwin J. Cubley, dated April 3, 1883, are an infringement of the patents granted one to Charles E. Dobson, dated May 14, 1873, and one to Henry C. Dobson, granted November 18, 1881, for improvements in banjos. The banjo of the first Dobson patent contains a dome-shaped ring, interposed between the parchment and a wooden rim. The ring may be of metal or of wood, and serves to ease the wear which the parchment is subjected to when the rim has an angular edge, and to improve the tone or resonance of the instrument. When the ring is made of metal, it imparts a metallic tone to the instrument. If made of wood, as it may be by the patent, it is doubtful whether the musical properties of the instrument would be improved. Whether the ring is made of metal or wood, the amount of material used will affect these properties. In easing the wear upon the parchment what is done by the ring was as well accomplished practically by the wooden rims, which were previously used, having the edge rounded where it came in contact with the parchment. The banjo of the second Dobson patent has a metal ring formed with two downwardly projecting flanges, interposed between the parchment and a rim composed of wood and metal. The ring is curved at the part which comes in contact with the parchment, and therefore serves to ease the wear upon the parchment similarly with the ring of the first patent. So much of the ring is out of contact with the parchment that it has a vibratory movement, and the ring thereby imparts a bell-like tone to the instrument; and the further this free portion extends beyond the point of contact with the parchment the more emphatic will be the metallic ringing or bell-like quality of the sound. Not only is the ring an element of each of the claims in controversy in both of the Dobson patents, but its peculiar form is essential in each invention in producing peculiar musical properties of the instru-

ment. These are varied in each by the dimensions and form of the ring, and in the banjo of the second patent the combination of wood and metal in the rim is a factor. The banjo of the defendant does not infringe either of these patents, because it has no ring. In this banjo the parchment rests directly on the rim. The rim consists of a metal shell, made by turning over the edges of a piece of sheet metal. If a piece of sheet metal were turned over the old round-edged wooden rim, so as to completely inclose it, the rim of the defendant's banjo would be produced. As respects form, it is the old round-edged wooden rim. As, however, it is made of metal, and is hollow, it differs from any rim which had been devised previously. It cannot be doubted that these differences impart distinctive musical properties to the instrument. Of necessity, such an instrument differs as essentially in the character and quality of its musical tones from either of the Dobson banjos as the Dobson banjos differ from one another. There is no identity of parts or of result in the several instruments. The invention of Cubley has as much originality as either one of Dobson. The hollow rim of his banjo is not an equivalent for the solid rim and the ring of Dobson, because it was not a known mechanical substitute for them, and does not effect the same result. The bill is dismissed, with costs.

CONSOLIDATED BUNGING APPARATUS CO. *et al.* *v.* H. CLAUSEN & SON
BREWING CO.

(Circuit Court, S. D. New York. June 21, 1889.)

1. PATENTS FOR INVENTIONS—PROCESSES FOR MAKING BEER—NOVELTY.

The first and second claims of letters patent No. 215,679, granted to George Bartholomae, May 20, 1879, are as follows: "(1) The process of preparing beer for the market, which consists in holding it under controllable pressure of carbonic acid gas when in the '*krausen*' stage, substantially," etc. "(2) The process of treating beer when in the *krausen* stage, which consists in holding it in a vessel under automatically controllable pressure of carbonic acid gas, substantially," etc. *Held*, that these processes are invalid for lack of novelty. The vent-bungs known as the "Shaefer Bung," the "Guth Bung," the "Bachman Bung," and others are the vent-bung of this patent, in the sense that they have the same functions, and are automatic valves designed to control the pressure of the gas, and were used commercially in many breweries between 1861 and 1876; being applied to shavings casks after the beer had reached the *krausen* stage, and, before the end of that stage, for controlling the pressure of the gas.

2. SAME—INFRINGEMENT.

The third claim of the patent, viz., "the process of preparing and preserving beer for the market, which consists in holding it under controllable pressure of carbonic acid gas from the beginning of the *krausen* stage until such time as it is transferred to kegs and bunged," etc., must be limited to the application of the apparatus at the beginning of the *krausen* stage, and is not infringed by defendant's apparatus, which, though the same vent-bung as that of the patent, is not applied until several days after the *krausen* has been introduced; the beer in the interval being allowed to work out of the bung-hole of the shavings cask.

In Equity. Bill for infringement of letters patent No. 215,679. On final hearing.

For a full description of this patent, see the opinion of the supreme court in *Fermentation Co. v. Maus*, 7 Sup. Ct. Rep. 1304. See, also, same case in 20 Fed. Rep. 725.

Banning & Banning & Payson, for complainants. *Josiah Sullivan, C. P. Jacobs, and B. F. Thurston*, for defendant.

WALLACE, J. This suit is founded upon letters patent granted May 20, 1879, to George Bartholomae, as assignee of Leonard Meller and Edmund Hofman, inventors, for an improvement in processes for making beer. The application for the patent was filed February 12, 1879. The patent has eight claims, four of which are in controversy in this suit. These claims are as follows:

"(1) The process of preparing beer for the market, which consists in holding it under controllable pressure of carbonic acid gas when in the '*kraeusen*' stage, substantially as set forth. (2) The process of treating beer when in the *kraeusen* stage, which consists in holding it in a vessel under automatically controllable pressure of carbonic acid gas, substantially as described. (3) The process of preparing and preserving beer for the market, which consists in holding it under controllable pressure of carbonic acid gas from the beginning of the *kraeusen* stage until such time as it is transferred to kegs and bunged, substantially as described. (4) The method herein described of preserving beer in a marketable condition after it has passed the *kraeusen* stage, which consists in holding it under pressure of carbonic acid gas; said pressure being automatically regulated by a counteracting hydrostatic pressure, substantially as described."

These claims relate to the treatment of the beer in the shavings cask after it has been drawn from the *ruh* casks, and after the *kraeusen* in the beer has been added to produce the secondary fermentation during which the beer is to be ripened and clarified and prepared for market use. The term "*kraeusen* stage," as that term is used in the claims, is the period of active fermentation in the shavings cask induced by the introduction of the *kraeusen* into the old beer, and this period ends when the beer becomes clarified and brilliant. It begins as soon as the active secondary fermentation commences. The "holding" the beer "under controllable pressure," mentioned in the claims, describes the means by which the pressure is controlled, consisting of a vent-bung applied to the shavings cask, which vent-bung is of the kind particularly described in the specification, or any other self-acting valve adapted to control the gas and permit or prevent its escape at any predetermined degree of pressure.

Aside from the language of some of the claims themselves, the general statement of the nature of the invention, and the description of the bunging apparatus, the patent does not point out specifically how the processes of the claims in controversy are to be practiced. The specification seems to assume that it is only necessary to describe the apparatus used in order to enable any person skilled in the art of beer-making to use it so as to carry out the processes claimed. Inferentially, the specification suggests that the processes claimed involve holding the beer un-

der the gas pressure during the whole period of the shavings cask stage, beginning as soon as the secondary fermentation becomes sufficiently active to cause the beer to flow through the bung-hole of the cask and the gas to escape, and ending when the beer is ready to be drawn off for market. This is to be implied because the specification states that, the "cask being closed, none of the beer wastes by running over, and the foul smell and washing of the casks and cellars are avoided," and "the escaping carbonic acid gas does not settle in the brewing cellars to endanger life." Referring to this part of the specification when the patent was considered by the supreme court in *Fermentation Co. v. Maus*, 122 U. S. 413, 7 Sup. Ct. Rep. 1304, the court said: "This is fairly to be read as a statement that the beer is to be thus treated during the whole of its subjection to the shavings cask stage of the process, whether in one closed cask or in two or more closed casks connected together. The statement is that the cask or casks are to be closed; that is, closed throughout the shavings cask stage of the process, and kept during that process under automatically controllable carbonic acid gas pressure, generated either by the mild fermentation of the beer, or artificially. It is also stated that none of the beer wastes by running over, and that the foul smells and washing of the casks and cellars are avoided, and that the escaping carbonic acid gas is conducted to the open air. These consequences cannot follow, nor can the advantages of the invention set forth be fully availed of, unless the casks are closed from the beginning of the shavings cask *kraeusen* stage."

There is nothing in the specification to restrict the scope of the first or second claims to a process for holding the beer under pressure at any particular period of the *kraeusen* stage, or for any length of time during that stage, or for treating the beer according to any special conditions. They are broad claims for processes, respectively, in which the controllable pressure is applied at any time during the *kraeusen* stage; the only difference between them being that the first includes pressure, whether applied automatically or not, while the second is restricted to automatic pressure. The limitations expressed in the third and fourth claims emphasize the interpretation of the first and second as claims for processes without any limitation or condition in respect to the pressure period. These claims must therefore be deemed as claims for the process of treating the beer whenever it is in the *kraeusen* stage, by holding it under the pressure of carbonic acid gas, by means of the vent-bung applied to the shavings cask. The third claim is for a process of like treatment, in which the pressure is applied at the beginning of the *kraeusen* stage,—that is, as soon as the fermentation is active,—and is maintained until the beer is ready to be drawn off for market. The fourth claim is capable of two interpretations. It may be construed as one for the process of the third claim continued after the beer has become ready for market, to preserve it in good condition, or as a claim for a process of treatment which does not begin until the end of the *kraeusen* stage. The latter seems the better construction.

It is doubtful whether the first two claims are not invalid upon the

face of the patent, as being merely for the functions of the bunging apparatus. Unless the method of using such apparatus was so well known as not to require to be pointed out to those skilled in the art, the specification is insufficient; and, if it was so well known that description was not necessary, there is no novelty in the claims. However this may be, these claims are invalid upon other grounds. Their novelty is negatived by evidence which establishes beyond any reasonable doubt the prior public use in this country of the respective processes claimed more than two years before the application for the patent was filed. The evidence is overwhelming that the vent-bungs known in the record as the "Shaefer Bung," the "Guth Bung," the "Bachman Bung," and others, which are the vent-bung of the patent in the sense that they have the same functions, and are automatic valves designed to control the pressure of the gas, were used in many breweries during the period between the years of 1869 and 1876. Some of them were used in large numbers, and they were applied to shavings casks after the beer had reached the *kraeusen* stage, for controlling the pressure of the gas. The proofs establish that in some instances these vent-bungs were used before the end of the *kraeusen* stage, but generally they were used after the active fermentation had subsided, when it was desired to hold the beer in the shavings cask for some period of time before drawing it off for market. The testimony of Mr. Sturm, a highly intelligent witness, shows the use of an equivalent vent-bung as early as 1861 in two breweries in Indianapolis. The bungs were designed and made by him at the request of the brewers by whom they were used; they were used, not experimentally, but commercially; were applied to the shavings casks before the active fermentation had subsided in the beer; and were intended and used to prevent the gas from escaping into the cellar, and the foam and yeast particles from running over the cask.

This evidence not only defeats the novelty of the first and second claims, but also the novelty of the fourth claim, unless that claim is merely a restatement of the third claim in different phraseology.

The complainants have failed to establish infringement by the defendant of the third claim of the patent. The Eureka vent-bung which the defendant employs differs in details of construction from the vent-bung particularly described in the patent, but is the vent-bung of the claim, because it performs the function of holding the beer under automatic gas pressure. But the testimony for the complainants does not show that the defendant has applied this apparatus in its brewery at the beginning of the *kraeusen* stage in the treatment of the beer, and the testimony for the defendant is explicit that the apparatus as it has always been used there is not applied until several days after the *kraeusen* has been introduced, during which time the beer is allowed to work out of the bung-hole. The direct testimony for the defendant is consistent with probability, because it appears that, as commonly used by brewers, the bunging apparatus particularly described in the patent, and equivalent apparatus, is not applied until the beer has been allowed to clean itself for a few days of the *kraeusen* stage. Mr. Schwartz, one of the expert witnesses

for the complainants, states that, as a practical brewer, he would not use the apparatus of the patent until the *kraeusen* stage is somewhat advanced; and that it is desirable to allow the beer to work out of the cask for a few days, and thereby eliminate the bulk of the impurities, before applying the apparatus. He states that, although some brewers apply it at the beginning of the *kraeusen* stage, brewers generally do not, but find the best results are obtained by allowing the active fermentation to proceed a few days before doing so. There is considerable other testimony in the record to the same effect as respects the use of this apparatus and of the several other equivalent devices. The proof seems clear that the defendant has used the Eureka device in just the same way in which the Guth vent-bung was used in its brewery in 1875, and just as the Meller and Hofman vent-bung was used in its brewery during the time it was authorized to use that device. The bill is dismissed, with costs.

ROOT v. THIRD AVE. R. CO.

(Circuit Court, S. D. New York. July 8, 1889.)

1. PATENTS FOR INVENTIONS—CABLE-GRIP—INFRINGEMENT.

Letters patent No. 160,757, granted to William Eppelsheimer, March 16, 1875, are for "an improvement in clamp apparatus for connecting street-cars, etc., with endless traveling devices," (cable-car grip.) Claim 2 is as follows: "In combination with the lower jaw, I, the transverse bar, O, with its vertical rope supporting pulleys, P, substantially as described,"—the transverse bar being simply a pulley carrier. *Held* infringed by defendant's device, which is the same combination except that there is no transverse bar, the lower jaw taking its place as a pulley carrier, the pulleys being connected with the lower jaw instead of the upper, as in the patent, and except a merely formal difference in the movement of the lower jaw.

2. SAME—ANTICIPATION.

Complainant's patent, construed as a combination in which the jaw and transverse bar are substantially such as are described, and in which the pulleys and jaw co-act by the same mode of operation to perform their function, is not anticipated by the Hallidie patent No. 129,130, granted July 16, 1872, which embraces the jaws and transverse bar, and in which the jaws are moved towards each other by means of a wedge and hand-wheel.

In Equity. Bill for infringement of patent.

George Harding and *George J. Harding*, for complainant.

Frost & Coe and *Harry E. Knight*, for defendant.

WALLACE, J. The patent in controversy in this suit is No. 160,757, granted to William Eppelsheimer, March 16, 1875, for "improvement in clamp apparatus for connecting street-cars, etc., with endless traveling devices." The complainant alleges that the defendant has infringed the second claim of this patent. The claim is as follows:

"(2) In combination with the lower jaw, I, the transverse bar, O, with its vertical rope-supporting pulleys, P, substantially as described."

This claim is for a combination, in a gripping device for connecting a street-car or other vehicle with an endless moving rope or cable for propelling the vehicle along the track, which consists of two elements: (1) a movable jaw; and (2) a transverse bar carrying pulleys. The specification describes and the drawings show a gripping device provided with two jaws, one fixed and one movable, the lower one of which is caused by suitable mechanism operated from the car to advance towards the other and grip a cable moving upon pulleys between them, and to recede and release the cable. The transverse bar, O, described and illustrated, has vertical rope supporting pulleys, one at each end, so located and arranged that the movable jaw can be raised and lowered between them, and carry the cable resting on the pulleys into contact with the fixed jaw when it is raised, and release it when the jaw is lowered, so that the cable will rest upon the pulleys. The bar is a longitudinal frame, to which the pulleys are journaled and held in a fixed relation to the movable jaw. This bar may be connected with the movable jaw, so as to be partially rotated by the movement of the jaw as it advances to or recedes from the upper jaw; but this feature may be dispensed with, and it may be secured immovably to the fixed jaw. The lower, movable jaw and the transverse bar with the pulleys, constructed and arranged substantially as thus described, are the elements of the claim. The function of the devices in this combination is to enable the pulleys to support and carry the cable when the jaw is lowered, and hold the cable in such a relation to the two jaws that the lower jaw, when raised again, will restore its contact with the upper or fixed jaw. The combination is confined to parts which co-act when the movable jaw is lowered. The patentee was not the first to employ a jaw and pulleys as parts of a gripping device for propelling the vehicle by an endless cable, constructed and arranged so that the pulleys support and carry the cable when the jaw is opened, and hold the cable in such relation to the jaw that it is removed from the pulleys to the jaw by the closing of the jaw. A combination of these parts, having these functions, is described and shown in the patent to Andrew S. Hallidie, No. 129,130, granted July 16, 1872. The gripping-jaws of this patent are moved towards or from each other by means of a wedge actuated by a hand-wheel. The pulleys are oblique, (two at each end of the jaws,) operate in pairs, and are carried by a transverse bar. When it is desired to stop the vehicle the wedge is lowered sufficiently to free the jaws from the rope without dropping it from the pulleys. The rope will then be carried by the pulleys at its ordinary speed, ready to be gripped when the wedge is lifted by turning the hand-wheel, and the jaws are forced together. The Hallidie patent is the nearest anticipation of the invention claimed which is shown in the prior state of the art as exhibited in the record. Except as showing devices which perform in combination the function of the combination of the claim, it is of no value. The other patents in the record, which have been adduced by the defendant for the purpose of negating novelty, do not merit attention. It is apparent from the Hallidie patent alone that the claim in controversy does not extend to

every combination of pulleys and releasing jaw which will perform the functions mentioned. Consequently the claim is limited by the construction impressed upon it by the prior state of the art, as well as by its reference to the specification to a combination in which the jaw and transverse bar are substantially such as are described, and in which the pulleys and jaw co-act by the same mode of operation to discharge the function assigned to them.

The real question in the case is whether the gripping devices of the defendant, which discharge the same functions, are substantially those of the patent. The gripping device of the defendant has no transverse bar as a distinct and independent element of the combination, but the lower jaw itself supports the pulleys. The lower jaw is the movable jaw, and when raised or lowered carries the pulleys with itself towards or from the fixed jaw. The pulleys are one at each end of the jaw, and have their upper faces on a plane above the jaw. When the two jaws are in contact the fixed jaw rests upon the lower jaw between the two pulleys, and the seat of the fixed jaw is below the plane of the upper faces of the pulleys. When the movable jaw is lowered, the cable is released from the grip of the fixed jaw, and rests wholly upon the pulleys; and when this jaw is raised again the cable resting on the pulleys is held by the grip of the two jaws. Plainly the lower jaw does the work of the transverse bar, and also of the lower jaw, of the complainant's patent. The doubt is whether it should be considered as embodying both a jaw and a transverse bar, or should be deemed a single device which dispenses with one element of the combination claimed. If the claim had been one for the lower jaw and the pulleys, substantially as described, it would have appropriately specified the combination described in the patent, and would have covered in terms the combination of the defendant. The transverse bar of the patent is nothing but a pulley carrier. The movable jaw of the defendant's apparatus is a pulley carrier, besides being a jaw. It supports the pulleys in the requisite location as respects the fixed jaw, which is the only office of the transverse bar of the patent. If the transverse bar of the patent had been called a "pulley carrier" in the claim, the movable jaw of the defendant's apparatus would answer the descriptive term. The lower jaw of the defendant's combination does the work of transferring the cable from the gripping jaws to the pulleys, and enables the pulleys to support and carry the cable when the jaw is lowered, and hold it in such a relation to the two jaws that the lower jaw, when raised again, will restore the contact of the cable with the upper or fixed jaw, precisely as does the lower jaw of the combination of the patent. The only difference between the two gripping devices is that the pulleys in the defendant's device are connected with the movable jaw, while in the device of the patent they are connected with the fixed jaw, and in the patented devices the movement of the lower jaw to release the cable is a vertical movement both as respects the fixed jaw and the pulleys, while in the defendant's apparatus the movement of the lower jaw is a vertical movement as respects the fixed jaw, but not as respects the pulleys. These are merely formal differences. They

do not involve any inventive thought, and are immaterial as respects the function and mode of operation of the parts of the combination. The usual decree for an injunction and accounting is ordered for the complainant.

PENNSYLVANIA DIAMOND DRILL CO. v. SIMPSON *et al.*

(Circuit Court, W. D. Pennsylvania. June 13, 1889.)

PATENTS FOR INVENTIONS—INJUNCTION—CONTEMPT.

Where, upon motion after final decree in favor of the plaintiff in a patent cause for an attachment against the defendant for contempt, it appears that the device, the use of which is alleged to be a violation of the injunction, is made under a patent granted since the decree, and it is not obvious that the differences between it and the plaintiff's device are colorable or immaterial, and the question of infringement thus raised is new, and demands an inquiry into the state of the art prior to the plaintiff's patent, and also involves the construction of the claim of that patent,—the motion will be denied, and the plaintiff left to assert his rights by an original suit.

Sur motion for an attachment against the defendants for contempt, in violating the injunction granted at final hearing.

G. G. *Frelinghuysen*, for the motion.

Edwin T. Rice, *contra*.

ACHESON, J. The claim of the patent sued on (the Frisbee patent) is in these words:

"The combination, operating substantially as described, of an annular core-lifter and a tube or ring constructed with a tapering recess in its inner surface."

The described operation is this:

"In operation, as the bit excavates the rock and the core enters D, [*i. e.*, the core-lifter,] the latter first becomes stationary on the core, and is then forced over it by the shoulder of the recess, C, the tube, B, revolving round D till the required depth is reached. When the drill-rod is withdrawn, D is forced towards the small end of the recess, clamping the core more firmly as the tube, B, recedes, until it detaches the core from the solid rock."

The court has heretofore adjudged that the defendants infringed this patent by the use of the Case Core-Lifter, in which the court found a combination substantially the same as Frisbee's, operating substantially in the manner described in his patent. Upon reference to the opinion of the court (29 Fed. Rep. 288) it will appear that this decision was put, not simply upon the ground that the two devices, when in position to act as core-lifters, operated in the same way, but in part upon the additional facts that during the operation of boring each device clasped or hugged the core, and was forced over it by the shoulder of the recess; that in each the tubular rod revolved freely around the core-lifter until the desired depth was reached; and that each was wedged tightly in the tapering recess by the upward pull of the drill-rod. But the core-lifter

now employed by the defendants, and the use of which, the plaintiff insists, is a violation of the injunction, is a device described in and covered by letters patent subsequently granted to Albert Ball, being No. 366,913, dated July 19, 1887, upon application filed November 13, 1886. In mode of operation this latter device differs from the Frisbee core-lifter, and also from the Case device, in two particulars: *First*. During the work of boring, the Ball device does not embrace or come in contact with the core, but by an outward spring pressure clings to the tube or core-barrel, and partakes of its rotary motion. *Secondly*. The Ball core-lifter is not forced towards the small end of the recess by the withdrawal of the drill-rod, but is driven into the conical chamber, and thus made to grasp the core by hydraulic devices brought into action by the operator in charge of the boring machine. Now, I am not prepared to declare that these differences are colorable or immaterial. They are not obviously so. The decision of the question of infringement, here for the first time raised, demands an inquiry into the state of the art prior to Frisbee's invention, and involves, too, the construction of the claim of his patent as limited by the phraseology "operating substantially as described." In cases of this kind a motion for an attachment is not granted unless the violation of the injunction is plain and free from doubt, (*Refrigerating Co. v. Eastman*, 11 Fed. Rep. 902; *Smith v. Halkyard*, 19 Fed. Rep. 602,) and upon the whole I am of opinion that the question whether Ball's patented device infringes the Frisbee patent ought not to be determined upon such a motion as this, but only by an original suit. *Pump Co. v. Manufacturing Co.*, 31 Fed. Rep. 292. And now, June 13, 1889, the motion for an attachment for contempt is denied, without prejudice to any suit the plaintiff may bring to test the question of infringement involved in this motion.

SCOTT v. FOUR HUNDRED AND FORTY-FIVE TONS OF COAL.

(*District Court, D. Connecticut. June 29, 1889.*)

1. SALVAGE—COMPENSATION.

A schooner laden with coal struck and sank in very dangerous water at the entrance of Long Island sound, only the main rail being out of water. The locality was an exceptionally bad one in which to save either vessel or cargo. Libellant, the owner of a wrecking equipment, offered to save the top-hamper for 50 per cent. of its value, if successful, and subsequently offered to save it for 40 per cent., if he could have 75 per cent. of the cargo also as salvage service. The agent of the vessel's owners accepted this proposition. The libellant communicated this offer to the consignees and insurers, without receiving any reply. Libellant took a lighter, a tug, and 12 men, and in 2 days had the top-hamper ashore safely. He secured the services of a large steam wrecking vessel, having a foreman and two men, and with his own lighter and tug proceeded to pump the coal out of the hull. After getting a small part out, by the aid of the current the vessel was raised and, with difficulty, gotten ashore on the same day. Shortly afterwards the coal was removed. The top-hamper alone was worth \$800 to \$1,000, and the schooner and hamper

were worth \$1,200 to \$1,500, and the coal was worth \$1,575. The owners of the vessel paid libellant \$300 more than 70 per cent. of his estimate of the value, and the insurers offered him their interest in the cargo for \$600. The steam wrecking vessel usually earned \$100 per day, and libellant paid her owners \$800 for her services, which were indispensable to the saving of the vessel and cargo. *Held* that, considering the pecuniary risk and expense incurred by libellant, he should receive \$1,000 for his salvage service upon the cargo.

2. SAME—APPORTIONMENT.

While, as a general rule, the same ratio of assessment of salvage service should be applied to all the property, the expense of saving the hull and cargo being so much greater than that connected with the top-hamper, a higher rate of salvage should also be allowed.

3. SAME.

Whether the vessel owners' agent was authorized to contract on behalf of the owners of the cargo as to the rate of salvage or not, the contract made by him, by which he secured better terms for the vessel at the expense of the cargo owners, tended to unfairness, and should not be enforced.

In Admiralty.

Samuel Park, for libellant.

Walter C. Noyes, for claimant.

SHIPMAN, J. This is a libel for salvage. The schooner *Josiah Whitehouse*, bound from Port Johnston to Boston with 445 tons of coal, struck, about half past one o'clock on Monday morning, (April 29, 1889,) on the south-west part of Race Point, the southwestern point of Fisher's island, at the entrance of Long Island sound. The night was dark, and there was a thick fog. The crew were compelled to leave the vessel. On the 29th and 30th there was a strong wind from the south southwest, and the sea was rough. The vessel bilged and sank, and the main rail was under water. The locality is rocky, and full of boulders, and is an exceptionally bad place from which to save a vessel or cargo. At this time the prospect of saving either was poor. On the morning of the 30th Henry F. Kallock, the special agent of the owners, went to New London and saw the libellant, who is the owner of steam-vessels and a wrecking equipment, and makes wreck-saving his business, who offered to try and save the top-hamper for 50 per cent. of its value, if successful. On the evening of that day he said he would endeavor to save the top-hamper for 40 per cent., in case of success, if he could have 75 per cent. upon the cargo as a salvage service. This offer was accepted by Kallock, who had no express authority from the owners of the cargo, or its insurers. He telegraphed to the consignees of the coal, but without reply. The libellant telegraphed to the shippers, offering to save the cargo for 75 per cent. in case of success. They told him to telegraph the insurers, which he did, and made the same offer. They made no reply. On Wednesday the libellant went to the wreck with a lighter and 1 tug and 12 men. They took all the top-hamper from the wreck, carried it to New London, and on Thursday put it ashore. He telegraphed to Poughkeepsie for the steamer *Chester*, a large steam wrecking vessel, with a large steam pump, which could pump coal. This vessel reached New London on Friday evening, and on the next morning (May 4th) went to the wreck with the libellant's lighter and tug. The *Chester* had

two men and a foreman. The libelant had eight men. After pumping about 20 tons of coal from the stern of the schooner, the current, which is always strong at that part of the Race, struck her broadside. She swung off and was towed into New London on the same day. She was leaking. The libelant sent divers under her to ascertain her injuries. Steam pumps were employed to prevent her sinking. On May 9th the coal was libeled, and was bonded and removed from the vessel on May 10th. The value of the top-hamper was \$800 to \$1,000. The value of the vessel and hamper was \$1,200 to \$1,500. The owners of the vessel settled with the libelant for \$600. They paid more than 70 per cent. of the libelant's estimate of the value of the vessel. The value of the coal was \$1,574.70. The insurers offered to sell the libelant their interest in the cargo, subject to his lien, for \$800. No other offer of settlement was made. The Chester was accustomed to charge, and did charge, \$100 per day from the time she left her wharf until she returned to it. The libelant paid her owners \$600 for her services. The undertaking upon which he entered was an expensive one, and with little promise of as complete and prompt success as he had, and could not have been accomplished without the aid of appliances such as were on board the Chester.

Without considering the question whether Kalloch had implied authority to represent the owners of the cargo, I think that the contract under which Scott reduced his offer of 50 per cent. upon the top-hamper to 40 per cent., upon condition that he could have 75 per cent. of the value of the cargo, if successful, was a contract which tended to unfairness. If the agent, who particularly represents the owners of the vessel, is permitted to obtain better terms for the vessel, by making a contract in regard to the cargo which is favorable to the salvor, such a negotiation, if allowed and sanctioned by the courts, would result in injustice towards the absent party. The court is therefore not obliged to carry out the agreement. *The Vesta*, 2 Hagg. Adm. 189; *The Albion Lincoln*, 1 Low. 71.

At the same time the libelant should receive large compensation. He took a serious pecuniary risk upon himself. The expenses were onerous, and he was very fortunate in saving the entire cargo. A very competent witness for the complainant testified that \$1,000 or \$1,200 would have been a fair contract price for the attempted services to vessel and cargo, without reference to a salvage service. Under all the circumstances of pecuniary risk and expense to the libelant, \$1,000 is a proper sum to be allowed him for his salvage service upon the cargo. It is true that, "as a general rule, the court will not assess a different ratio of salvage upon different parts of the property according to the labor expended upon those parts, although it may do so if the justice of the case requires it." *The Albion Lincoln*, 1 Low. 71. The assessment of \$1,000 upon the cargo is a different ratio from that which the libelant accepted upon the top-hamper, but the large expenses of the Chester were necessary to save the hull and cargo, while the services upon the top-hamper were far less expensive. I think that the justice of the case requires that the difference which the libelant recognized should be regarded, and that, if the

amount of salvage upon the cargo should be cut down to 40 or 50 per cent., the result would be inequitable. Let judgment be entered for the libelant for \$1,000, and costs.

THE BARRACOUTA.

CUMMING *et al.* v. THE BARRACOUTA.

(District Court, S. D. New York. July 3, 1889.)

SHIPPING—BILL OF LADING—NEGLIGENCE.

Chlorides having been shipped in barrels, instead of the usual carboys, on their arrival a part was found lost by leakage. The bill of lading excepted liability for leakage. *Held*, that negligence in the ship must be shown to render the vessel liable for the loss, and, the cargo appearing to be well stowed, and no actual negligence proved, the libel was dismissed.

In Admiralty. Libel for loss of portion of cargo.

Arnold & Greene, for libelants.

Wing, Shoudy & Putnam and *C. C. Burlingham*, for claimants.

BROWN, J. The above libel is filed for the loss of a portion of the contents of barrels of chloride, and 20 kegs of salt on a voyage from New York to Trinidad, in December, 1887. The bill of lading excepted liability for loss from "leakage," "effect of climate," and "heat of holds," and forbade "liquids or goods capable of doing damage being shipped, without the nature of their contents being conspicuously marked on the outside of each package." It is evident from the testimony that the loss arose from leakage, and it is incumbent upon the libelant, therefore, to prove negligence on the part of the ship. The weight of evidence shows that such chlorides have heretofore been mostly shipped in carboys. In this case castor-oil barrels were used, and between 600 and 700 pounds were put in each barrel. The use of barrels, if safe, is doubtless much more economical and less subject to breakage. The evidence shows that barrels have been employed to some extent, while some large dealers are wholly ignorant of such use, and testified that barrels were improper and unsafe packages. The correspondence between the parties seems to indicate that the barrels in this case were tried to some extent as an experiment. Without regard to these circumstances, however, I think the libelants fail to establish any such negligence on the part of the ship, as is necessary to a recovery. *The Invincible*, 1 Low, 225. The goods were well stowed in the hold, being undisturbed by a hurricane of great violence. Four barrels were found empty, or nearly so, when discharged, having the heads bulged outwards. The evidence also shows that the rest of these packages leaked, while the rest of the cargo in the hold was in perfect condition. There is no proof of improper stowage, and the only reasonable inference that can be drawn is that the barrels were insufficient for the weight put into them, and for chemicals of such a quality as they contained. No negligence being established, the libel must be dismissed, with costs.

DOYLE *et al.* v. BEAUPRE *et al.*

(Circuit Court, N. D. New York. July 25, 1889.)

REMOVAL OF CAUSES—TIME OF APPLICATION.

Under act Cong. March 3, 1887, (as corrected by act Aug. 13, 1888, 25 St. at Large, 433,) giving a right of removal "at the time or any time before defendant is required by the laws of the state or the rule of the state court" to plead to the complaint, where defendant under the Code of Civil Procedure of New York was compelled to answer by October 10th an application for removal made November 19th, was too late, though under section 542 defendant might have filed an amended answer during that time.

At Law. Application to remand cause.

John N. Beckley, for plaintiffs.

Townsend, Dyett & Einstein, for defendants.

COXE, J. The plaintiffs are citizens of New York; the defendants of Minnesota. The action was commenced in the supreme court of this state to recover \$1,250. The complaint was served August 31, 1888. Under the provisions of the Code of Civil Procedure the time to answer this complaint expired October 10, 1888. An answer containing a counter-claim for \$3,000 was served October 7th. The plaintiffs served a reply to this answer October 11th. The cause was removed to this court November 19, 1888. The plaintiffs now move to remand upon the ground, *inter alia*, that the removal was too late. In this position they are right. The provision of the Code (section 542) permitting pleadings to be amended does not aid the defendants. The language of the act of March 3, 1887, (corrected by the act of August 13, 1888, 25 St. at Large, 433,) which provides that the cause may be removed to the circuit court "at the time or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff," is clear and explicit. It cannot be construed to mean that the cause may be removed at any time before the expiration of an indefinite period contingent upon an answer containing a demand for affirmative relief and a reply thereto. The time to answer the complaint expired October 10th. In default of an answer on that day the plaintiffs were entitled to judgment. An answer having been served, the removal, 40 days afterwards, was too late, notwithstanding the fact that during that period the defendants might have served an amended answer. *Manley v. Olney*, 32 Fed. Rep. 708; *Dwyer v. Peshall*, Id. 497; *Railroad Co. v. Houston*, Id. 711; *Wedekind v. Southern Pac. Co.*, 36 Fed. Rep. 279; *Coal Co. v. Waller*, 37 Fed. Rep. 545; *Hurd v. Gere*, 38 Fed. Rep. 537; *Lockhart v. Railroad Co.*, Id. 274; *Dixon v. Telegraph Co.*, Id. 377; *Kaitel v. Wylie*, Id. 865. The motion to remand is granted.

RIDDLE *et al.* v. NEW YORK, L. E. & W. R. Co.

(Circuit Court, W. D. Pennsylvania. July 9, 1889.)

COURTS.—FEDERAL JURISDICTION.—INHABITANT OF DISTRICT.—CORPORATIONS.

Where a corporation, created by the laws of one state, by its officers or agents, comes into a judicial district of another state, and there carries on business,—for example, operates lines of railway therein and has there an agent upon whom, under the laws of the latter state, process may be served,—it is an inhabitant of said district, within the meaning of the act of congress of March 3, 1887, and is suable in the circuit court of the United States of said district.

Sur Motion to Set Aside the Service of a Writ of Summons.

George Shiras, Jr., for the motion.

James L. Black, *contra*.

Before MCKENNAN and ACHESON, JJ.

PER CURIAM. This is an action brought for the recovery of damages for the alleged violation by the defendant, The New York, Lake Erie & Western Railroad Company, of the act of congress to regulate commerce, approved February 4, 1887. Two of the plaintiffs are citizens of the state of Pennsylvania, and one of them is a citizen of the state of Illinois, and the defendant is a corporation constituted under the laws of the state of New York. The ground of the motion to set aside the service of the writ of summons is that the defendant corporation "is not an inhabitant of the Western district of Pennsylvania, and that this court has therefore no jurisdiction in said case as against the said company." In support of the motion the defendant relies upon that clause of the act of congress, approved March 3, 1887, (24 St. at Large, 552,) and re-enacted August 13, 1888, (25 St. at Large, 433, 434,) which provides as follows:

"But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states suits shall be brought only in the district of the residence of either the plaintiff or the defendant."

The marshal's return shows that the defendant company was summoned by service upon "Samuel Woodside, agent of said company, at their office in the city of Pittsburgh;" and the plaintiffs' statement of claim, which for the present purpose must be accepted as true, sets forth that the defendant company is doing business in the Western district of Pennsylvania, and has a permanent office in the city of Pittsburgh, in said district, with an officer or agent duly appointed thereto in charge of the defendant's business; that under certain recited written traffic contracts it acquired and possesses the right to transport freight over the lines of the Pittsburgh & Lake Erie Railroad Company, which in part are located within said district; that the defendant's own railroad is in part

constructed within said district, and has for years past been, and is now, operated by the defendant company, with offices established thereon and officers appointed thereto, regularly and permanently in charge of the business on said line of road; and, further, that the defendant is, and from about May 1, 1883, has been, the lessee of the New York, Pennsylvania & Ohio Railroad, which in part is constructed through said district, and that the same has since been, and now is, operated by the defendant company, with offices permanently established thereon, and officers duly appointed thereto, in charge of the business thereof. Such being the facts, we are called upon to decide whether the defendant company is exempt from suit brought in this court.

Without undertaking to cite the numerous cases (federal and state) bearing upon the subject, we think we are safe in saying that it is now firmly settled that when a corporation created by the laws of one state voluntarily comes, by its officers or agents, within the jurisdiction of another state, and there engages in business, it becomes amenable to the process of the courts of the latter state, if the laws thereof make provision to that effect. In one of the cases (*Insurance Co. v. Duerson*, 28 Grat. 630) it was declared by the court of appeals of Virginia that the corporation, for the purpose of being sued, is to be considered as having a domicile in the state where it has thus voluntarily located; and in the case of *Insurance Co. v. Woodworth*, 111 U. S. 138, 145, 147, 4 Sup. Ct. Rep. 364, the supreme court of the United States did distinctly hold that a company incorporated in one state, by doing business and having an agent upon whom service may be made in another state, may there acquire another domicile, so as to give locality there to a debt on a policy of insurance as the foundation of administration in the latter state. That the defendant corporation is suable in the courts of Pennsylvania, and that such service as we have in this case would be a good service in the courts of the state, is undeniable. *Hagerman v. Slate Co.*, 97 Pa. St. 534; Act March 21, 1849, (Purd. Dig. 355.) What good reason, then, is there for exempting the company from suit in a federal court sitting in Pennsylvania? Can it be supposed that such was the intention of congress? Under previous laws a person was suable in any district in which he might be found. Although he might have been a mere sojourner in, or was simply passing through, the district, he was liable to be served therein with process from a federal court. This was the mischief which congress intended to remedy by omitting from the act of 1887 the words "or in which he shall be found." But, clearly, under the provisions of the act of 1887, if a citizen of a state, without changing, or intending to change, his citizenship, becomes an inhabitant of another state, or, in other words, has his domicile or fixed residence therein, he is suable in the latter state by original process from a federal court. *Parker v. Overman*, 18 How. 137. Now, in our judgment it was not the intention of the act to make any distinction in respect to liability to suit between natural persons and corporations. As a corporation is a "person" within the meaning of the act, so, also, may it be an "inhabitant."

Under the facts of this case we are clearly of the opinion that the de-

fendant corporation is an inhabitant of the Western district of Pennsylvania, within the meaning of the act of congress of 1887, and therefore that this court has acquired lawful jurisdiction of this suit. We are aware that our conclusion is at variance with that of Judge LACOMBE in *Fuller v. Railroad Co.*, 37 Fed. Rep. 65, but, on the other hand, we are in accord with the decision of Judge MAXEY in *Zambrino v. Railway Co.*, 38 Fed. Rep. 449, and we may add that the opinion in the latter case is so full in the citation of authorities, and the reasoning of the learned judge in support of the jurisdiction of the court is so convincing, that we deem it quite unnecessary for us to discuss the question any further. And now, July 9, 1889, the motion to set aside the service of the writ of summons is denied, and it is ordered that the time for the defendant to answer the plaintiffs' statement of claim shall run from this date.

SNYDER'S ADM'RS v. McCOMB'S EX'X.¹

(Circuit Court, D. Delaware. July 3, 1889.)

1. TRUSTS—DECLARATION—EVIDENCE.

A. had made at B.'s request a declaration of trust of certain shares of stock in favor of C., stating in the declaration that it was in accordance with an "arrangement between A., B., and C." This arrangement was shown to relate to another matter. Afterwards, when pressed by C., A., while not repudiating the trust, asserted C.'s interest to be a qualified one, subject to B.'s debts. The evidence showed that, while A. may have considered his declaration a qualified one, it was not so treated by B. or C., and that C. refused to acquiesce in the statement that it was so. *Held*, that an absolute trust was established.

2. SAME—BAR BY LAPSE OF TIME.

Where an express trust created by act of parties has been admitted by the trustee to exist, but with a qualification, there has been no adverse possession and the trust is not barred by lapse of time.

3. SAME—LIABILITY OF TRUSTEE.

The trustee of certain shares of stock sold very advantageously other shares of the same stock standing in his own name, and transferred the trust stock to same parties without consideration. When urged subsequently by the *cestui que trust*, whom he had not informed of either transaction, to dispose of the trust stock, he, although in a position to know that its value would in a few days be only nominal, dissuaded him from selling, alleging its great value. *Held*, that the trustee was liable for want of full and faithful performance of trust, and that the *cestui que trust* was not compellable to receive worthless shares in satisfaction.

4. SAME—MEASURE OF LIABILITY—CORPORATION STOCK.

A trustee, who has in bad faith prevented a sale of his trust stock while it was of value, is liable to his *cestui que trust*, in the absence of proof of market value of shares when the sale could have been made, and of the receipt of any dividends or interest by the shareholders for the amount paid in, with interest, from the time the trust was acknowledged.

5. SAME—CORPORATIONS—STOCK—EVIDENCE OF VALUE.

A sale of stock under conditions, among others, that the vendor would receive it back at an advanced price, and offers to purchase and statements of value, intended evidently only to inflate the stock, are not evidences of value.

¹ Reported by Marks Wilks Collet, Esq., of the Philadelphia bar.

6. SAME—ACTION TO ENFORCE—RES ADJUDICATA.

An action had been brought by complainants' decedent against respondent's decedent in another court, on an alleged contract by the latter that, having in his hands \$45,000 belonging to complainants' decedent, he would, on consideration of its not being then withdrawn, purchase a certain number of shares of a corporation for him with it, and, if at any time requested, would take back the shares and repay the money. The issues of fact being the existence of the contract, and of consideration therefor, and being negatived, *held*, that this action, though between privies of the present parties, was not for the same cause of action as a suit to enforce a trust, and that the complainants were not estopped by the doctrine of *res adjudicata*.

7. SAME.

The refusal of the court, in the former action, to exercise its discretion, conferred by legislature, and change the declaration into a bill in equity, the suit being dismissed without prejudice to entry of new suit to enforce the trust, the question here involved nowhere appearing, does not estop the complainants.

In Equity.

The bill states, in substance, that Henry S. McComb, in his life-time, held 800 shares, of the value of \$1,000 each, in the Southern Railroad Association, as trustee for C. Brown Snyder, and that he failed to account for them, having converted them to his own use; and this suit is now brought to obtain a decree establishing the trust, and for the payment by the defendant of the value of the stock with its dividends, accretions, etc., including an order for an accounting. The history of the creation of the alleged trust is a very brief one.

On the 30th of June, 1868, an unincorporated company, called the "Southern Railroad Association," was formed by McComb and others, with a capital of \$1,500,000. Among the subscribers to this capital were Henry S. McComb, for \$415,000, Josiah Bardwell, for \$100,000, and Henry S. McComb, trustee, for \$60,000. The capital was soon afterwards increased to \$2,000,000; and on January 14, 1869, the company was incorporated under its original name by an act of the legislature of Tennessee, and was organized under its charter on the 21st of the same month, with McComb as president. The following correspondence between Bardwell and McComb relates directly to, and contains the first acknowledgment of, the trust in favor of Snyder:

"*My Dear McComb*: Will you please acknowledge that you hold in 'the Southern Ass'n,' as trustee for [the benefit,] or, rather, for C. B. Snyder, that am't of stock wh. you held as for me, Mr. Snyder having two months since pd. me its cost and interest.

"Yours, truly,

J. BARDWELL.

"*Boston, Nov. 12, 1869.*"

"OFFICE OF H. S. McCOMB, WILMINGTON, DEL., Nov. 22, 1869.

"*Josiah Bardwell, Esq., care of F. Skinner & Co., Boston*—DEAR SIR: I send this (acknowledgment as trustee) the first leisure moment after the receipt of your letter, and if it is not in conformity with your wishes in any manner please return it to me with such instructions to be carried out as you shall see disposed to make.

"Yours, truly,

H. S. McCOMB. M."

The following is a copy of the paper inclosed in McComb's letter:

"To whom it may concern: I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conformity with an arrangement made some two months ago between Josiah Bardwell, C. B. Snyder, and myself.
H. S. McComb, Trustee."

On this acknowledgment is a memorandum in Bardwell's handwriting, "Received Nov. 23, 1869."

George Gray, Wm. C. Spruance, and Wm. G. Wilson, for complainants.
Bates & Harrington and Wayne McVeagh, for defendant.

Before BRADLEY, Justice, and WALES, J.

WALES, J., (*after stating the facts as above.*) It is not denied that this acknowledgment by McComb, at the time it was made, created a trust of some sort in favor of Snyder, but it is claimed, on behalf of the defendant, that the right of Snyder to a beneficial interest in the trust stock was subject to prior liens or incumbrances for advances made by McComb to Bardwell which were far in excess of the value of the stock, both at and subsequent to the date of the acknowledgment; in other words, that Snyder's interest in the stock was a contingent one, depending on the payment of certain claims held by McComb against Bardwell, who was the original *cestui que trust*, and that these claims have never been paid. An issue of fact is thus presented which can be determined only by a review of the evidence; but, before entering upon any discussion of disputed facts, a preliminary statement of uncontroverted matters in the cause will materially shorten such discussion, and render it more intelligible. There is no evidence that McComb ever repudiated or disclaimed this declaration of trust. He did, however, when threatened with a suit, assert that Snyder's interest was only a qualified one, as before stated. The assessments on the subscription for the trust stock, as far as there is any evidence on that subject, were paid by Bardwell; and certificates Nos. 157 to 164, inclusive, for 800 shares, (increased from the original 600 by the increase of the capital of the association,) were issued to Henry S. McComb, trustee, October 6, 1870, and these shares stood in his name as trustee at the time of his death, December 30, 1881. On November 8, 1871, McComb sold and transferred 5,000 shares of the Southern Railroad Association, belonging to himself, to the Pennsylvania Company, at \$125 per share, and on the same day transferred to the same company 5,000 other shares of the stock, including those standing in his name as trustee. Upon the face of the transaction the transfer of the second 5,000 shares was made without any money consideration, and solely for the purpose of giving to the Pennsylvania Company the controlling management of the association; but by the terms of his agreements with that company McComb parted with and surrendered the possession of the trustee stock for the time being. It was out of his possession at the time of his death, and was delivered to his executrix by the Pennsylvania Company at about the time of the beginning of this suit. It does not appear that any dividends were declared on the trust stock,

or that McComb derived any profit from its transfer to the company except that such transfer may have directly or indirectly enhanced the price he received for his own stock. The Southern Railroad Association was afterwards merged by consolidation in another company, ceased to have an independent existence after July 1, 1874, and thenceforward its stock had a nominal value only. The consolidated lines went into the hands of a receiver, and were sold by virtue of foreclosure proceedings on a mortgage. The original object of the association was to obtain, by lease or purchase, certain main lines of railroad between Chicago and New Orleans, and thus control a large, if not the principal, share of the business of transporting passengers and freight between those important cities, as well as between intermediate points. The scheme appeared to be feasible and attractive to the enterprising minds which conceived it, and to the men who united in its execution, but it failed by reason of causes not necessary here and now to relate.

Approaching the more debatable portion of the testimony, the first inquiry relates to the understanding, or "arrangement," which was had among themselves, by McComb, Bardwell, and Snyder, in reference to the trust stock. McComb and Bardwell, acting independently, and sometimes jointly, were large operators in railroad stocks and other securities, and their personal relations, judging from the letters that passed between them, were intimate and cordial. In the early part of 1869 they were concerned in a joint speculation in the stock of the Chicago & Rock Island Railroad Company, to which Bardwell contributed \$45,000, and was to receive one-fourth of the profits after all the expenses had been deducted, as appears from the following receipt executed by McComb :

"APL. 22, 1869.

"Received, Boston, April 22, 1869, of J. Bardwell, his three drafts of \$15,000 each, 30, 40, and 50 days date, on Strang and Snyder, New York, being in payment of one-fourth interest in 10,000 share transaction in the stock of the Chicago and Rock Island Railroad Co., to be managed by John F. Tracy, as agreed between myself and said Tracy, through Smith, Randolph & Co., of New York, as brokers for the account of myself and Bardwell.

"H. S. McComb."

Annexed to this paper is the following memorandum :

"The three drafts mentioned in the foregoing receipt were paid by Strang and Snyder, and by them charged to my account on their books, after the transaction in the Chicago and Rock Island Railroad Company's stock was closed. The whole or no part of the money or interest was returned to me, but \$42,000 was applied to the subscription to stock in the Southern Railroad Association, for which amount I hold H. S. McComb's receipt, as trustee, dated Nov. 23, 1869.

C. B. SNYDER.

"*Boston, January 23, 1870.*"

Assessments on the subscription to the trust stock were paid by Bardwell prior to McComb's acknowledgment, as follows :

July 8, 1868.	40 per cent. on \$60,000, or	-	-	-	-	\$24,000
Jan. 10, 1869.	10 " " " "	-	-	-	-	6,000

(Stock increased 33 per cent. or to \$80,000.)

Jan. 2, 1869.	5 per cent.	"	\$80,000,	"	-	-	-	-	\$4,000
March 2, 1869.	5	"	"	"	-	-	-	-	4,000
Sept. 20, 1869.	5	"	"	"	-	-	-	-	4,000

This statement shows that up to November, 1869, \$42,000 had been paid on the trust stock, and corresponds with the acknowledgment of trust made by McComb. In reply to a letter dated October 25, 1873, written by E. F. Cutter to McComb, inquiring, "Are the interests of F. S. & C. in the Southern R. Rd. Association, on which you advanced 60 M., still intact, and are they worth the loan and principal? How does the 60 M. of Mr. Snyder's stand affected?" McComb wrote, two days later: "The South'n R. R. Association stands all right, and everybody's interest stands upright and square." Later on, on June 3, 1874, Snyder applied to McComb for \$30,000, either by way of payment, on account, for the trust stock, or as a loan, with the suggestion that McComb could reimburse himself from the sale of consolidated bonds. Bardwell urged McComb to comply with Snyder's request, but McComb declined. It is evident, from the letters which passed between McComb and Bardwell and Snyder, at the time of this application, that both Bardwell and Snyder understood and believed that Snyder's interest in the trust stock was represented by \$42,000, and that Snyder was entitled to at least that much of its value, without making any allowance for the claims of other parties. Being further pressed for money by Snyder, McComb wrote to him on July 21, 1874, that he (McComb) held the trust stock as collateral for advances made to Bardwell and F. Skinner & Co., "which advances more than cover all this stock." In the same letter, however, McComb offered to send Snyder \$30,000 Southern Railroad Association paper, on condition that Snyder would surrender to him the written acknowledgment of the trust. Snyder replied to this that "F. Skinner & Co. never had any interest in the money you receipted to me for as trustee; neither had Mr. Bardwell, except that I agreed to share the profits of the transaction with him after receiving the principal and interest at 8 per cent. per annum; and it was as much to help him as myself that I asked you for an advance. I cannot entertain your offer for a moment, but I will assign my interest to parties who will take what they are entitled to; no more, no less." The statement of Snyder's account with F. Skinner & Co. is produced in confirmation of what Snyder had written to McComb:

"BOSTON, Novem. 20, 1874.

"C. B. Snyder, Esq.—DEAR SIR: On the 4th of August, 1869, we received the sum of \$44,709.38, and paid as follows:

June 29, 1869,	-	-	-	-	-	-	\$37,580 00
Octo. 1, "	-	-	-	-	-	-	2,305 44
Aug. 25, 1870,	-	-	-	-	-	-	4,100 00

\$43,985 44

—and Mr. Bardwell's note, due Sept. 2, 1870, for \$4,172.58, lays under protest, as far as we know. The above receipt and payments being on account of your subscription to the Southern R. Rd. Association.

"Yours, truly,

EDM'D F. CUTTER, of F. Skinner & Co."

Towards the close of the year, 1869, Bardwell became financially embarrassed, although as late as September 15, 1869, McComb had written to him:

"The net of your account is \$36,719.80, from which deduct payment of \$2,500.00, leaving due you, and subject to call, \$34,219.80. Shall I pay your trustee call S. R. R. A., due the 20th inst.?"

On November 18, 1869, Bardwell executed a power of attorney to transfer his own stock, 1,333 shares, in the association. The witnesses Cross and Marsh testify to conversations had at different times in the years, 1873, and 1874, between McComb and Snyder, in which McComb represented the stock of the association to be of great value, and advised Snyder not to part with his interest. Henry Mulliken, another witness for the complainants, acquired an interest in the association, in 1868, for \$10,000, which eventually represented 174 shares of stock, for which McComb, in the spring of 1873, offered him \$25,000, and in the autumn of the same year \$17,000, both of which offers were declined.

The testimony for the complainants, of which a general outline has now been given, points to the conclusion that the acknowledgments of November, 1869, created an unqualified trust in favor of Snyder for at least the quantity of stock represented by \$42,000; nor is there any evidence to the contrary, excepting the unsupported statements of McComb, which were founded on a misapprehension by him of his arrangement with Bardwell and Snyder. A court of equity would hesitate to enforce a declaration of trust, absolute on its face, if it was intended by the declarant, with the knowledge and consent of the *cestui que trust*, that the interest of the beneficiary was a qualified one, and subject to well-understood contingencies; but here there does not appear to be a reasonable doubt that Bardwell and Snyder believed that Snyder was to be the beneficiary of the trust stock for the amount of money which he had paid Bardwell for it, without qualification, and the expressions used by McComb, in declaring the trust, import the same thing. Col. McComb was a man of superior intelligence and capacity, possessed of a large experience, acquired in the management of extensive business operations of different kinds, and was fully competent to protect his own interests on all occasions; and if he failed, in this instance, in making this declaration of trust, to guard against the loss of a collateral security, while he may have deceived himself, his fault or mistake cannot be allowed to deprive an innocent person of his rights. Bardwell requested him to "acknowledge that you hold in the Southern Assn., as trustee for [the benefit,] or rather, for C. B. Snyder, that amt. of stock wh. you held as for me, Mr. Snyder having two months since pd. me its costs and interest." McComb, in sending the required acknowledgment, wrote to Bardwell that "if it is not in conformity with your wishes in any manner, please return it to me with such instructions to be carried out as you shall see disposed to

make." It will be observed that Bardwell made no allusion to any previous bargain or arrangement, but asked for a simple acknowledgment, which McComb made in his own way, but proposed to put it in any other form that Bardwell might direct. The death of Bardwell, in October, 1875, has deprived both parties to the present suit of his evidence on this matter, except what may be gleaned from his letters to McComb; and what he thought of the nature of Snyder's interest in the trust stock may be seen from one of those letters, dated June 24, 1874, in which he wrote:

"Dear General McComb: I make transcript of memorandum for Snyder's benefit, undertaking to carry out myself the verbal agreement I made with you: 6 notes for \$5,000 each, Southern Railroad Association, 4 mos., and 2 for \$5,000 each, your indorsement, you to have the \$42,000 Snyder's as col. security, and I will send you the satisfactory papers. I think you will send them to my care for Snyder * * *. Truly yours, J. B."

This does not look as if Bardwell believed that Snyder's interest was subject to any lien or incumbrance, or he would hardly have proposed to McComb to accept the trust stock as collateral security for further advances. The reading of the whole correspondence prompts several questions. Why should a capable and experienced man like Col. McComb have made a declaration of trust, for the benefit of Snyder, in property which was already held by McComb as collateral security for more than it was worth? Did McComb and Bardwell contrive to deceive Snyder, by luring him into the belief that the money which he had lent to Bardwell was safely secured by its investment in the trust stock? Or did McComb endeavor to allay all suspicion on the part of Bardwell and Snyder by writing to Bardwell that, if the form of the acknowledgment was not entirely satisfactory, he would reform it in any manner to please Bardwell? To answer these questions consistently with the theory of the defense, that Snyder's interest was only a contingent one, would, in the light of all the testimony, reflect unfavorably on the intelligence or on the good faith of McComb. There is no impenetrable mystery about this trust. The only trouble is that all the persons who were closely connected with and interested in the business are not here to explain some of the minor details, but, looking at the facts contained in the evidence and spread on the record of the case, there is sufficient proof to establish the trust as set forth in the bill of complaint.

Having disposed of this branch of the defense, there remain to be considered the plea of the statute of limitations, and the defense of *res adjudicata*. It may be sufficient to say that, as between a trustee and his *cestui que trust*, an express trust, created by the act of the parties themselves, will not be barred by any length of time, for, in such cases there is no adverse possession, the possession of the trustee being the possession of the *cestui que trust*. This is elementary law, not without modifications, it is true, but none of which are applicable to the present case. Hill, Trustees, 264, and the cases there cited; *Prevost v. Gratz*, 6 Wheat. 497; *Decouche v. Savetier*, 3 Johns. Ch. 216; *Goodrich v. Pendleton*, Id. 390. As already seen, there never was any disclaimer of the trust by McComb. He ad-

mitted it, with a qualification; and no statute has been referred to by which a trust, when once created, is barred by lapse of time. In fact this defense was not insisted on in the argument.

But it was urged, with much ingenuity and with an imposing array of authorities, that the matters now in dispute between the respective representatives of McComb and Snyder have already been passed upon by a court of competent jurisdiction, and are therefore *res adjudicata*, and are not now subject to be reviewed and decided anew by this court. To sustain this defense evidence has been introduced of two separate actions instituted by Snyder against McComb, to recover the money which Snyder advanced to Bardwell, and which went into the trust stock in the hands of McComb. The first action was brought in the supreme court of the state of New York, June 25, 1875, and was discontinued, January 19, 1876. The second action was begun, October 26, 1875, in the supreme judicial court of Massachusetts, was heard by that court without a jury, and resulted in a judgment in favor of the defendant, December 23, 1878. The amended declaration in the Massachusetts action set forth that in July, 1869, the defendant having in his hands the sum of \$45,000 belonging to the plaintiff, promised the plaintiff, for the consideration of leaving this money in defendant's hands, that he would purchase therewith a number of shares in the capital stock of the Southern Railroad Association, and would cause certificates for said shares to be issued to the plaintiff and to be delivered to him, and, further, that he would at any time, when requested, take the said shares from the plaintiff and pay him the sum of \$45,000, with interest at the rate of 7 per cent. The declaration further complains that, relying on the defendant's promises, the plaintiff allowed the defendant to retain the sum of \$42,000, but that the defendant neglected to purchase the stock or to perform his promises, etc. The issues of fact tried in that case were whether the plaintiff and defendant therein made the contract declared on, and whether there was any consideration for such a contract. The defendant's counsel negatived both these propositions, and relied on the acknowledgment of trust to disprove the contract, contending that an action at law would not lie on such a paper, because the only scope and effect of such acknowledgment were to create a trust, for the enforcement of which a remedy must be had in equity. Before judgment was rendered, a motion was made on behalf of the plaintiff to convert the declaration into a bill in equity, under the provisions of a Massachusetts statute which authorized the supreme judicial court of that state to change a suit at law into a proceeding in equity, at the discretion of the court, if such change be necessary to enable the plaintiff to sustain the action for the cause for which it was intended to be brought. The court denied the motion, presumably on the ground that the action at law had no relation to the establishment of a trust; but, whether such was the reason or not, the court exercised its discretion in refusing the motion, without prejudice to the right of the plaintiff or to his representatives to bring an independent suit in equity to enforce the trust and compel its proper execution. The opinion of the court makes no part of the record of the judgment; and it nowhere ap-

pears that the question involved in the present suit was considered or decided by that court. Much testimony was given on the trial by McComb and Snyder, but their testimony was in relation to the existence of the contract between them as declared on, and not for or against the establishment of a trust, which is the issue made by the bill and answer in the cause now before this court. Moreover, at the time of the trial in Massachusetts, Snyder was ignorant of important facts which are vital to the support of the present suit, and which were not discovered until after his death, particularly of the transfer of the trust stock to the Pennsylvania Company, in 1871, and of the profitable sale of McComb's own shares at the same time; nor had he knowledge of the value of these shares, which were not quoted in the stock exchange, or placed on the market for sale. *Res adjudicata* cannot be pleaded as a technical estoppel, or be introduced in evidence as conclusive, *per se*, except where there is both identity of parties and identity of cause of action. The rule laid down in the *Duchess of Kingston's Case*, 2 Smith, Lead. Cas. (8th Ed.) pt. 2, p. 785, is the accepted law on this subject, "that the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court." The same parties who were litigants in the Massachusetts case are represented here by their privies in law; but here the cause of action and the thing sued for are different. In the former case the cause of action was an alleged contract; here, the object of the suit is to establish a trust. The acknowledgment of the trust, which is the basis of the present suit, was used to defeat the action on the contract. It thus becomes perfectly clear that the former judgment cannot, under these circumstances, be pleaded, or used, to bar or estop the complainants. The applicability of *res adjudicata*, as a plea or bar, is well explained in *Cromwell v. County of Sac*, 94 U. S. 351, where the court say:

"In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the injury must always be as to the point or question actually litigated and determined in the original action; not what might have been litigated and determined. Only upon such matters is the judgment conclusive in another action."

In determining the amount for which a decree should be entered, it must be remembered that Snyder, during his life-time, never claimed more than the sum of \$42,000, that also being the amount which McComb acknowledged to have been paid on the trust stock at the time he made the acknowledgment, and there is no proof that Snyder paid any assessments after that. It has not been shown that the stock had an ascertained market value, or that the holders of it received any dividends or interest. The sale by McComb to the Pennsylvania Company was made on certain conditions, among which was one that he would, at the expiration of two years from the day of sale, if requested, take the stock back at an advanced price; and his statements of its value, in the presence of Snyder and others, were made rather to inflate the stock by giv-

ing it a fictitious price, than to name a figure at which he would be willing to purchase. He, however, had the use of the money which belonged to Snyder by the assignment of Bardwell. It went into his estate, and has not been accounted for, he having always refused or evaded an accounting, and it is only equitable that it should be restored with interest.

BRADLEY, Justice. I concur entirely with Judge WALES in the opinion just delivered. There is no question but that McComb held the stock in trust for Snyder. The declaration of trust executed on the 22d of November, 1869, is conclusive on this subject; and it is absolute, having no qualification whatever. The words are:

"I hereby acknowledge to hold in the Southern Railroad Association, as trustee for C. B. Snyder, under an arrangement with Josiah Bardwell, an original subscription of sixty thousand dollars, on which seventy per cent. has been paid. This notice is in conformity with an arrangement made some months ago between Josiah Bardwell, C. B. Snyder, and myself."

Whatever may have been the conditions and qualifications of the trust existing while Bardwell had the beneficial interest, none are claimed in this declaration as between McComb and Snyder. The plea that it was to be held by McComb as collateral is an after-thought. No such idea was put forward until several years after the declaration of trust was executed. In all the conferences that took place between McComb and Snyder about the stock, down to July, 1874, the former never suggested that he held it as collateral, or that he had any claim on it. Collateral to what? The pretense now is that it was to be collateral to the debts that Bardwell, the original *cestui que trust*, owed to McComb. Then why was not that condition expressed in the declaration of trust given to Snyder? No reservation of any such right was made or hinted at. Besides, what debts of Bardwell was it to be collateral for? All the debts that he might ever owe to McComb? Or only those which were due when the stock was subscribed for? The vagueness of the claim, as stated by McComb himself in his testimony, is strongly presumptive against it. What evidence is there that Bardwell owed a dollar to McComb at the time of the latter's death? It seems to me that this claim to hold the stock as a collateral paramount to the interest of Snyder as *cestui que trust* is unsupported by any sufficient proof. Assuming that the trust was an absolute one, it is clear that the stock has never been accounted for to Snyder or to his estate. The transaction in Chicago & Rock Island stock, in the spring and summer of 1869, does not affect the case in the least, except as being the occasion, perhaps, on which Snyder advanced the money to Bardwell in consideration of which the latter transferred all his interest in the trust stock to Snyder. Besides, this transaction had all passed before the declaration of trust was executed. The relation, then, of trustee, pure and simple, being established against McComb, how can his conduct be excused? In November, 1871, he sold his own stock in the Southern Railroad Association to the Pennsylvania Company for \$125 per share, under agreement, it is true, to repurchase it at an advance at the end of two years, at the option of the Pennsylvania Company,—an op-

tion which we do not learn was ever exacted of him. While thus advantageously disposing of his own stock, he did nothing of the kind with that which he held in trust for Snyder, and gave Snyder no notice or information of what he had done with his own, but urged him and persuaded him against his wishes to let the stock held in trust remain as it was, alleging that it was very valuable, was worth twice its par value, and was a first-rate investment. Nor did he inform Snyder that, in his deal with the Pennsylvania Company, he had actually handed over the trust stock to that company to enable them to have full control of the operations in prospect. In June, 1874, Snyder was hard pushed for money, and desired to dispose of the trust stock, and applied to McComb for that purpose. The latter urged him to keep it, and to put more money into the concern; said that it was a good thing, worth two for one, and all that, never mentioning the fact that the stock was then out of his hands, and in possession of the Pennsylvania Company. This was in June, and yet, on the 1st of July of the same year, the Southern Railroad Association was merged into another company, which assumed its obligations, it is true, but left its stock out in the cold. McComb himself testified that since that day the stock had had only a nominal value. From the large share of control which McComb had in the affairs of the company it cannot be conceived possible that he was not fully aware of the changes to be made, at the very time when he was persuading Snyder to hold on to the stock. It seems to me that there was not a faithful execution of the trust on the part of McComb. He was in a situation to know everything that affected the value of the stock. He was one of the managers and manipulators, if not the principal manager, of the affairs of the association. He was on the inside, and, having such knowledge as this position gave him, he was bound to exercise entire frankness and good faith towards his *cestui que trust*. Instead of doing this, he kept up false appearances, gave glowing views of the value of the stock, discouraged every attempt to dispose of it, or to change it for something else, kept secret the disposition of his own stock, and induced Snyder to believe that the prospects of the association were of the most promising character. However free from liability he may have been towards other stockholders, I think the course he pursued was unjustifiable, to say the least, in relation to Snyder, for whom he was trustee.

I concur with Judge WALES in the opinion that the estate of McComb is liable to the complainants for the want of a full and faithful fulfillment of the trust on the part of Mr. McComb. I also agree that, in the absence of satisfactory proof of the value which the stock had during the period from 1870 to 1874, when it could have been advantageously disposed of, and when Snyder desired to dispose of it, but was prevented from so doing by the representations of McComb, the amount paid upon it, with interest, is the most equitable and satisfactory award of compensation that can be made. It would be no relief at all to the complainants to give them a decree for the specific stock. That has long ceased to have any value. The complainants contend that they ought to be allowed the same price which McComb realized for his own stock in

disposing of it to the Pennsylvania Company, to-wit, \$125 per share. But that price is not a fair criterion of its value at the time. The sale was incumbered with an agreement to take the stock back at an advanced price, at the end of two years, if the Pennsylvania Company should so desire. Sales of this kind, in which the purchaser incurs no hazard, are often effected at fancy prices, and stock is subscribed which the party would never think of taking on his own responsibility and hazard. Besides, another agreement, made at the same time, shows that the transaction was not so much a sale as the joinder of stocks by McComb and the Pennsylvania Company for purposes of mutual profit. I also agree that the offers made by McComb from time to time for portions of the stock are but slight proof of its value. He never purchased at those offers, and in one case, where the party a few days afterwards concluded to accept his offer, McComb replied that it was not an open one, and declined to take the stock. I think, with Judge WALES, that those offers were made to satisfy the holders of the stock that it was their interest to keep it. The plea of the statute of limitations, set up by the defendant, does not lie in this case. It is a case of pure trust, subsisting to this hour, and not denied. Had the trust been repudiated, the statute might have run from the time of such repudiation; but it has never been repudiated. The relief sought by the *cestui que trust* is not a legal demand, but a purely equitable one, namely, recompense for a deterioration or unlawful disposition of the trust-estate by the fault of the trustee, and an account of the proceeds or value thereof. The statute of limitations is no defense in such a case. Great lapse of time and unreasonable delay might be; but the present suit is not amenable to that charge. Sufficient reason is shown for any delay that has occurred. The secrecy observed by McComb in his transactions with the Pennsylvania Company, and the ignorance in which Snyder and his representatives were kept, are a sufficient answer to the charge of laches and unreasonable delay. The plea of *res judicata* is equally untenable. Snyder sued McComb in an action at law upon an alleged agreement to take the stock off his hands at any time. That was the only issue tried. It was decided against Snyder. The mere statement is sufficient to show that the question in that case was very different from the question in the present case. The decision simply settled the point that McComb did not make any such agreement. It did not affect the trust on which this suit is based, nor the breach of trust which forms its *gravamen*.

Let a decree be made for the complainants against the defendant for the sum of \$42,000, with interest at 6 per cent. per annum from the 23d day of November, 1869, the date of the declaration of trust.

JOHNSTON v. STANDARD MIN. Co. *et al.*

(Circuit Court, D. Colorado. July 8, 1889.)

LACHES—MINING PROPERTY.

Complainant claimed mining property under an agreement made seven years before suit brought, which was to become effectual in the event of the other party thereto prevailing in proceedings about to be instituted by him to recover the legal title to the property from adverse claimants. Complainant would have been the principal witness in the proceedings for the plaintiff therein. That litigation was compromised, complainant never asserted any claim to the property, and he was informed of the compromise more than five years before bringing this suit, during which time the property was developed and shown to be of great value by defendants, who received it on the compromise, complainant not objecting to their expenditure and work on the property. A suit was brought by complainant under the agreement several years before this suit, but it was in a court which had no jurisdiction, and was voluntarily abandoned. *Held*, that complainant's rights were barred by laches as against defendants.

In Equity.

Hugh Butler and *C. S. Wilson*, for complainant.

C. I. Thomson, *C. J. Hughes, Jr.*, and *O. H. Dean*, for defendants.

HALLETT, J. This bill was filed October 7, 1887, seven years after the transactions narrated in it; or, if it is supposed that the cause of action arose upon the settlement made by the Fulton Mining Company with the parties claiming the Smuggler No. 2 title, the bill was filed more than five years after that event. Whether this was in good time to secure the aid of a court of equity in a cause of this nature was not presented or considered at the first hearing, and is now to be determined. The Chatfield agreement of October 12, 1880, was to become effectual "in the event of the party of the first part prevailing and succeeding in certain legal proceedings about to be instituted and commenced by the party of the first part for the vesting of the legal title in the party of the first part against persons who claim adversely to him." The issue thus to be contested by Chatfield was between the J. C. Johnston and the Smuggler No. 2 locations, both of which were made by complainant; and of course he would be the principal witness in support of the Johnston title in any suit that might be brought as required by the agreement. Conceding that the entire burden of the litigation was to be carried by Chatfield, complainant's relation to it was such as to call for strict attention to all that was done. As no progress could be made without his testimony, it may be assumed that he was at all times ready and anxious to ascertain what was being done by Chatfield towards acquiring title to the property. From his own testimony it appears that he was impressed with this view of his relations to the property, for he says that in May, 1881, he went to the office of Thomson & Sayer in Leadville "and asked how the case was, and he said it was compromised; and I told him I would like to take the papers to copy them; and he gave them to me, and I took the papers and looked them over, and went down to have

them copied, and found out it would cost too much, and so didn't do it. *Question.* What papers? *Answer.* Contract between Chatfield and I, Crittenden and Adair and I, and a copy of the original grub-stake contract between Dunscombe, Seaver, and I. I supposed there was a contract between Chatfield and Thomson and Sayer, and I wanted to copy that more than anything else. I don't think that was among the papers." That he wanted "the papers" for the purpose of asserting his claim to the mine under the Chatfield agreement seems clear enough, and no sufficient reason is assigned for not doing so within some reasonable time thereafter. It is true, as his counsel says, that the compromise was not then complete; but it was in progress. The property had been conveyed to the Fulton Mining Company. Some of the Smuggler No. 2 people had come into the Fulton Company, and efforts were being made to bring in others, and this was accomplished a year later. The way in which the compromise was carried on was to give the stock of the Fulton Company to the Smuggler claimants according to their respective interests. Any proper assertion of his claim to the property, pending the compromise, would have been effectual to secure his interest without injuring other stockholders of the company.

In the cross-examination of Chatfield by complainant's counsel he testified as follows:

"*Question.* What demands, if any, did Mr. Johnston ever make upon you for his interest in that property? *Answer.* I think in 1882, at Littleton, he spoke to me and said he thought he ought to be entitled to his interest in the property; that we should have gone on and contested that case. *Q.* What did you say to him? *A.* If I recollect right, I told him we found we had no shadow of a ghost to maintain his case, and it was divided up among the stockholders,—in other words, among the claimants, Dunscomb, Seaver, Achison, and Holden. *Q.* Then this eighth interest which he was to have was divided up among them? *A.* I think that was what I told him at that time in Littleton."

There is some dispute whether this conversation was before complainant went to Wood River, in 1882, or after his return in the following year. Whatever the date may be, it was after the final settlement in April, 1882, although probably the agreement was not then entered of record in the way of dismissing suits and issuing stock of the Fulton Company. Here, again, complainant was fully informed of the settlement of the controversy, and nothing more was necessary to enable him to maintain a suit for his interest. It is said that he understood that suit could not be brought until patent was obtained; that Chatfield constantly informed complainant that the patent had not been issued, and thereby he was misled until, in 1885, he learned the truth and brought the first suit in this court. If any such belief was entertained, there was nothing in the agreement to support it. On the contrary, Chatfield agreed to convey "upon so acquiring the title, legal and equitable, to the said mine by means of the legal proceedings so about to be commenced." With the compromise of the "legal proceedings" mentioned in the agreement, complainant became entitled to his interest in the property and the patent was of no importance to him.

As showing diligence in asserting his claim complainant's suit of 1885 in this court is of little weight. It is admitted that it was misconceived in all material aspects, and it was between citizens of the same state, and therefore not within the jurisdiction of the court. It was kept on the docket for 11 months, during which it was not moved at all, and then it was voluntarily abandoned. All the evidence tends to show that, with full knowledge of his position and relation to the property, no serious effort was made by complainant to enforce the Chatfield agreement for some five or six years, during which, work on the property was carried on by the Fulton and Standard mining companies at great expense, and the value of the property was established. Under the circumstances he was bound to proceed in the enforcement of his claim within some reasonable time after his cause of action accrued. The property was held by a corporation, the shares of which in the ordinary course of business would fall into the hands of innocent purchasers. It was not known to be valuable until, by development and the expenditure of a large amount of money, it was shown to be so. The work of development was carried on for several years, first by the Fulton Company, and afterwards by the Standard Company, while complainant stood by apparently waiting for the result. Where property is of fluctuating value, and work requiring courage and energy and the expenditure of money is going on, he who would assert ownership in it must do so promptly, and share in the hazards as well as the profits of the enterprise. *Oil Co. v. Marbury*, 91 U. S. 587. Complainant failed in such diligence for more than five years and until the great value of the property was fully demonstrated by the defendants claiming adversely. As to the present owner of the property, the Standard Mining Company, the bill must be dismissed.

If complainant wishes to have a decree against Chatfield, several questions arise which have not been discussed at the bar; as whether, upon dismissing the bill as to a citizen of another state, the court may proceed to determine matters in issue between citizens of the same state; at what time did Chatfield's liability arise, and what does the evidence show as to the value of the property at that time. Hitherto argument has been confined to the issue between complainant and the Standard Mining Company. If the case is to be pressed against Chatfield, it is obvious that further argument will be necessary on the issue with him.

McCULLOUGH v. CITY OF DENVER *et al.**(Circuit Court, D. Colorado. July 13, 1889.)*

INJUNCTION—TRESPASS—NOMINAL DAMAGES.

The court will not enjoin a municipal corporation from laying a ditch or flume over private property, though the entry by the city was made on the Sabbath day, and in a forcible and lawless manner, where it appears that the ditch is for a necessary public purpose, and that complainant's damages are but trifling.

In Equity. Motion for injunction.

Teller & Orahood, for complainant.

O. C. Marsh and J. F. Shafroth, for defendants.

HALLETT, J. In McCullough against the city of Denver and others, the court is asked to restrain the building of a ditch or flume over a tract of land adjacent to the city. The land is vacant, except that complainant is grading streets through it, and preparing it for use as town lots. It has been used for brick-yards. There are houses on all sides of it, and it is now valuable only as an addition to the town. For many years ditches on this tract have been in use for conveying water to other parts of the town, and the one last used was destroyed by complainant's work in grading the streets. On Sunday, June 30, the city authorities entered the premises with a large force of men, and made an underground flume on the north side of Eighteenth avenue, as defined by complainant's work. It is not said that the work was done in a manner to cause unsightly ditches, or otherwise injure the land in any way, having regard to the use which is to be made of it, and the purpose was to convey water to other parts of the town, where it was greatly needed. It is a matter of profound regret that the city authorities should feel at liberty to go about a work of this kind with force and arms, and on the Sabbath day. A municipal government, charged with the duty of maintaining law and order and rights of property within the corporate limits, should not be endowed with or entertain the predatory instincts and lawless habits of private corporations. In this instance the conduct of the city government seems to have been according to the practice of a railroad corporation stealing a right of way. Such indecent and illegal proceedings cannot be justified in any case, and there is no shadow of excuse for such conduct in this instance. The extraordinary conduct of the city authorities will not, however, give authority to the court to interpose by injunction. The damage to complainant's land on account of the flume will be trifling, and the water is needed for public use. Under such circumstances the court will decline to act, and leave complainant to his action at law for any damages he may be entitled to.

OLYPHANT v. ST. LOUIS ORE & STEEL Co. *et al.**(Circuit Court, N. D. Illinois. July 8, 1889.)*

SET-OFF—UNLIQUIDATED DAMAGES—INSOLVENCY.

A garnishee of an insolvent company is not entitled, upon intervention in an action by the company's creditors for appointment of a receiver, etc., to have set off against the judgment obtained against it as garnishee a claim against the company for unliquidated damages growing out of the breach of a contract independent of the one upon which the garnishee was garnished, and arising subsequent to the service of process in the garnishment.

In Equity. Intervening petition of the North Chicago Rolling Mill Company.

George Willard, for intervenor.

Hutchinson & Luff, for respondent.

GRESHAM, J. On December 1, 1883, the North Chicago Rolling Mill Company, an Illinois corporation, and the St. Louis Ore & Steel Company, a Missouri corporation, entered into a written contract whereby the former company agreed to manufacture and deliver to the latter company 18,000 tons of steel rails at \$35 per ton, in monthly installments, during the year 1884. About the same time Cherrie & Co., of Chicago, agreed with the Chicago company to purchase from the St. Louis Company and deliver to the Chicago company, 100,000 tons of Pilot Knob iron ore. Cherrie & Co. failed on July 3, 1884, not having fully performed their contract, and the St. Louis Company agreed to sell and deliver to the Chicago Company a quantity of ore of the same class, at the same price. Ore was delivered under this contract. The failure of Cherrie & Co. appears to have embarrassed the St. Louis Company, and on July 21, 1884, in a suit brought against that company in the circuit court of the United States for the Eastern district of Missouri, a receiver was appointed, who took charge of the company's assets, and undertook to carry on its business. On the same day the Joliet Steel Company, an Illinois corporation, brought a suit in attachment against the St. Louis Company, and garnished the Chicago Company, claiming that it was then indebted to the St. Louis Company in the sum of \$19,000 for ore sold and delivered under the contract already referred to. The Chicago Company filed a plea of set-off, containing different items of indebtedness due to it from the St. Louis Company, all of which were allowed, except a claim for unliquidated damages growing out of the non-fulfillment of the contract of December 1, 1883, the court holding that a claim of that nature could not be allowed as a set-off in a suit at law. A judgment was entered against the Chicago Company, as garnishee, in favor of the St. Louis Company, for \$16,000, for the use of the Joliet Company; and the Chicago Company then filed its intervening petition in this case. After setting out the proceedings in the suit in garnishment, the petition avers that the St. Louis Company is insolvent, and prays that the damages resulting from the non-fulfillment of the rail contract be ascertained

and set off against the judgment entered against the petitioner as garnishee. After the intervening petition was filed, the St. Louis Company effected a compromise with its creditors, and the suit against it in the federal court at St. Louis was dismissed, and its property was restored to its possession. The judgment against the Chicago Company, as garnishee, was for money due for pig-iron bought from the St. Louis Company, and the claim of the former company is for unliquidated damages growing out of the failure of the latter company to receive rails under the contract of December, 1883, a contract having no connection with the one upon which the Chicago Company was garnished. When the latter company was served as garnishee, no part of the claim now urged as a set-off had accrued. The Chicago Company, then, had no right of action for the recovery of that claim, or any part of it. Indeed, it was then uncertain whether that company would make or lose money by the further performance of the rail contract. Without ruling upon other questions discussed by counsel it is sufficient to say that the claim for unliquidated damages growing out of the failure of the St. Louis Company to receive rails under the rail contract, after the failure of that company, and after the commencement of the suit in attachment, and the service of the writ of garnishment upon the Chicago Company, was properly rejected by the court in the trial of the action at law, and cannot now be set off against the judgment rendered against the garnishee. The intervening petition is dismissed without prejudice to the right of the Chicago Company to prosecute an action against the St. Louis Company.

FIRST NAT. BANK OF RICHMOND v. CITY OF RICHMOND *et al.*

(Circuit Court, E. D. Virginia. July 15, 1889.)

TAXATION—NATIONAL BANKS.

Rev. St. U. S. § 5219, providing that shares of national bank stock may be taxed as part of the personalty of the owner, and that each state may tax them in its own manner, except that the taxation shall not be at a greater rate than is imposed on other "moneyed capital" owned by citizens of the state, and that the shares of non-residents shall only be taxed in the city wherein the bank is located, do not authorize the taxation of the stock of a bank *in solido* by the city in which it does business, but only the shares of individual owners residing in the city are taxable, and they must be taxed separately, in order that the owner may deduct from their value the amount of his personal indebtedness, where the state laws or municipal ordinances permit such deductions, and require equality of taxation.

In Equity. Bill for injunction.

Johnston, Boulware & Williams, for complainant.

C. V. Meredith, City Atty., for defendants.

HUGHES, J. The question in this case is upon the amount of a tax assessed by the city of Richmond upon a national bank, and upon the manner of assessing and collecting it. It was competent for congress to

have prohibited any taxation of the national banks by states, cities, counties, or towns. Indeed, on general principles of public policy, the mere silence of congress on the subject, in its legislation respecting the national banks, would have been a prohibition of such taxation. But congress was not entirely silent, and provided, in section 5219 of the Revised Statutes of the United States, that nothing in its legislation respecting the national banks should be construed to "prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere." A clause is added, authorizing real estate of national banks to be taxed by the states at the same rate as other real estate. Authority is here given to tax the shares of national banks as part of the taxable estates of the owners of the shares; and, in laying this tax, the state is prohibited from assessing it at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. It is plain that the tax authorized by congress is a several tax upon the shares of each individual stockholder, as distinguished from a lumping tax, or tax *in solido*, upon the bank itself. By "moneyed capital" is evidently meant, either money itself, or negotiable securities readily convertible into money, and having a quotable market value, as distinguished from ordinary property. In substance, therefore, congress declares that national bank shares may be assessed for taxation as the property of the individual owners of them respectively, and that these shares, being themselves moneyed capital, shall not be assessed at a higher rate than is assessed upon other forms of moneyed capital in the hands of individual citizens. The constitution of Virginia requires that taxation shall be equal and uniform; that no species of property shall be taxed higher than any other species of property; and that stocks shall be taxed according to their market value. An ordinance of the city of Richmond provides that any person taxed may deduct from the aggregate value of solvent debts and securities held by him all bonds, securities, liquidated claims, and demands due from him to others, in computing the tax to be assessed against him. The city of Richmond imposes a tax of one and four-tenths per cent. of their market value upon all shares of stock in any bank or corporation of the city whose capital stock is itself not assessed for taxation.

In this condition of the law, the defendant F. W. Cunningham, city collector of the city of Richmond, presented for payment a tax-bill to the First National Bank of Richmond, the complainant here, made out as follows:

1889.

Mr. H. C. Burnett, Cashier of the First National Bank of the City of Richmond, to the City of Richmond, Dr.

For taxes upon shares of stock	-	-	-	\$840,000
Less value of real estate	-	-	-	38,320

\$801,680 at 1.4=\$11,223 52

Whereupon the bank exhibited in this court its bill of complaint against the city of Richmond and its collector, praying an injunction against the collection of the tax. A temporary injunction was granted, and the case is now heard for a final decree, either of perpetuation or dismissal. The bill recites that the capital of the bank is \$600,000, (which seems to have produced a surplus fund of \$240,000;) that the par value of its shares (6,000 in number) is \$100, and their market value \$140; that its capital consists in part of—

Real estate, (specifically taxed,) worth	-	-	-	-	\$ 38,000
United States bonds, (non-taxable)	-	-	-	-	134,000
Virginia state bonds, (non-taxable,)	-	-	-	-	64,500
City of Richmond bonds, (non-taxable,)	-	-	-	-	49,000
Stock in the Union Bank of Richmond, (whose tax is paid by that bank,)	-	-	-	-	10,500
Aggregating	-	-	-	-	\$296,000

—all of which property is tax-paid or non-taxable as against the First National Bank.

The bill charges that the city imposes, and requires the bank to pay, the tax of one and four-tenths per cent. upon the market value of its shares, without allowance of any deduction for the non-taxable securities and specifically taxed property thus shown to be held by the bank; and charges also that this tax is so assessed that the owners of the shares thus taxed are deprived of the privilege, allowed other moneyed capitalists, of deducting from the amount of securities held by them, including their shares, respectively, the amount of bonds, securities, liquidated claims, and demands due from them respectively to others. It complains that, besides this discrimination against its own individual shareholders in favor of other moneyed capitalists, the city unlawfully discriminates against the banks of the city, as corporations, in favor of corporations which are taxed on their capital stock, all of which latter are allowed to deduct the amount of exempted securities held by them from the values assessed against them. Thus it is charged that, contrary to national, state, and municipal law, the tax levied against the shareholders of the complainant, under the present system of taxation enforced by the city of Richmond, discriminates against them in three particulars, viz.: (1) Other corporations get the benefit of relief from taxation upon all non-taxable securities which form part of their capital, in which relief their shareholders participate; whereas, under the method of taxation complained of, this bank's shareholders are deprived of such relief as to nearly half the amount of its original capital. (2) The tax being as

sessed against the cashier of the bank, and not against the shareholders severally, these latter are deprived of the privilege accorded by the city to the owners of other moneyed capital, of deducting the amount of the debts they owe, from the value of the bonds and securities which they hold, in estimating the amount on which they are taxable. (3) These discriminations against banks in favor of other corporations, and against shareholders of banks in favor of other moneyed capitalists, violate the provision of the state constitution, requiring taxation to be equal and uniform.

It is apparent from an inspection of the tax-ticket and the provisions of law under consideration that the discriminations complained of by the bill must result from an enforcement of the tax. There is no room for doubt of the fact that the city of Richmond, in assessing the tax complained of in the manner described in the bill, does discriminate against shareholders of national banks, in favor of other moneyed capitalists, in all the respects specified, and that this discrimination violates alike a leading provision of section 5219 of the United States Revised Statutes, a like provision of the tenth article of the Virginia constitution, and a just provision of an ordinance of Richmond conferring a privilege of great importance upon all holders of taxable securities, who themselves owe debts. The fact is too obvious to need illustration; and the only question for this court, as a federal court, is whether the decisions of the supreme court of the United States, in cases on this subject which have gone before it, have sanctioned or condemned such discriminations. A considerable number of cases involving the construction of section 5219 of the United States Revised Statutes have gone to that court, in which the complaint has been of discriminations against national banks and their shareholders, in favor of owners of other moneyed capital, in the assessment of taxes by the states. In most of them the court has upheld the tax; in others it has pronounced against it. From the nature of the subject, each case has presented its own special facts, and has differed in these facts from every other case. Up to this time no case of this class has gone from Virginia, and none, like the one at bar, has presented a scheme of taxation charged to be in violation at once of national, state, and municipal law. The supreme court has dealt liberally with the tax laws of the states which have been brought under its review. It has held that the shares of national banks may be taxed by the states, though no provision be made in assessing it for deducting from computation the always large amount of United States bonds held by the banks. It has held that the tax upon the shares of these banks may be assessed upon and collected from the banks themselves. It has held that neither of these circumstances in itself vitiates a tax. Even in cases where it has appeared that the system of taxation enforced by a state has operated unequally as between shareholders of national banks and owners of other moneyed capital, the court has not looked upon the system with unfriendly scrutiny and illiberal spirit; but in cases where the discrimination was trivial or technical, or such as must always result from the greater or less imperfection of all human legislation, it has declined to

interpose in behalf of the tax-payer. Further than thus indicated, I do not discover in the many decisions in which that court has given construction to section 5219 any general principle laid down applicable to all cases that have arisen. The court has decided each case upon its own special facts. The question has continually been, does the tax materially and injuriously discriminate against the shareholders of national banks? And in every case the question has been rather one of fact than of law.

In deciding that shareholders of national banks may be taxed at a rate in fixing which no account has been taken of the non-taxable United States bonds required by law to be held by those banks, the court has not made so absolute a ruling that, if it should be shown in any particular case that such omission operates as a material and injurious discrimination against national bank shareholders, in favor of other moneyed capitalists, the tax thus operating may not be pronounced illegal. The paramount question in every case is whether or not the tax, or system of taxation, complained of, materially and injuriously discriminates against national bank shareholders, in favor of other moneyed capitalists, in a degree tending to discourage investments in the shares of the national banks. Upon this question of fact the decisions of the supreme court have turned, and all decisions on this subject must turn. As already indicated, I do not think the tax complained of in the case under consideration can stand this test. The question need not be decided in the present case; but it is doubtful whether congress, in authorizing the states to tax the shares of national banks, under legislation of their own, prescribing the manner and place of doing so, intended thereby to authorize cities, counties, and towns to exercise the same power. The mere fact that municipal corporations may tax national banks at their pleasure would tend strongly to discourage investments in their shares; and no instance of such a tax has yet gone to the supreme court of the United States; but if the right exists, and if the city of Richmond may legitimately impose a tax on the national banks doing business within it, yet I think that the tax complained of here is one whose necessary effect must be to discourage investments in national banks. Congress requires the tax to be assessed as part of the personal property of the owners of the shares of the bank. It does not authorize a tax upon the bank itself. The city has no power to assess a tax upon the bank *in solido*. It can assess only the shares, and these only as the property of the shareholders. There are 6,000 shares of the stock of this complainant, held doubtless by hundreds of different persons residing in Richmond and other cities, and in the counties surrounding Richmond, and in the state at large. By section 5210 of the United States Revised Statutes congress requires every national bank to keep at all times for public inspection "a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted." If it be within the legal power of the city of Richmond to tax the shares of those stockholders of the national banks here who are residents of the city, certainly that is the extent of its

power. It cannot tax the banks themselves. It can tax only the shares of their shareholders, as part of their individual property, and of course only of those shareholders who are its own resident citizens, and whose other personal property it may of right tax. It was practicable for the city to call for a list of the names and residences of the shareholders of the First National Bank of Richmond, and to tax the shares of those of them who were its own residents. It was not competent for it, in doing so, to assess the shares even of its own residents in such wise as to bar them from the privilege of offsetting the amount of the debts they might owe against the value of their shares in the bank and the other securities which they might hold; and especially was it not competent for the city, in laying its tax, to proceed upon the violent assumption that all the shares of the bank are held by residents of Richmond, and none by residents of other localities in Virginia and elsewhere. To assess the tax as if against the bank *in solido*, on a value made up of the whole amount of the bank's capital and surplus fund, without deduction for non-taxable securities, constituting nearly half the bank's capital; to require this tax to fall upon the whole body of the bank's shareholders, wherever resident, whether in Richmond or Virginia; and to give no shareholder the privilege of deducting the amount of his debts from that of securities due him in determining the net value of his estate,—these features of the tax complained of by the bill under consideration all seem to me to condemn it as contrary alike to national, state, and municipal law, and as discriminating against the owners of national bank shares in favor of other moneyed capitalists, in a manner obnoxious to the policy of congress in regard to the national banks, and seriously discouraging to investments in national bank shares. I will sign a decree of perpetual injunction, this ruling being founded on the decisions of the supreme court of the United States in the cases of *Hills v. Bank*, 105 U. S. 319, and *Whitbeck v. Bank*, 127 U. S. 193, 8 Sup. Ct. Rep. 1121. In dealing with the subject I have also considered the decisions of the same court in *Van Allen v. Assessors*, 3 Wall. 573; *People v. Commissioners*, 4 Wall. 244; *Bank v. Com.*, 9 Wall. 353; *Bank v. New York*, 121 U. S. 138, 7 Sup. Ct. Rep. 826; *Lionberger v. Rouse*, 9 Wall. 475; *Waite v. Dowley*, 94 U. S. 533; *Supervisors v. Stanley*, 105 U. S. 311; *Bank v. Kimball*, 103 U. S. 733; *Pelton v. Bank*, 101 U. S. 143; *Cummings v. Bank*, *Id.* 153; *Bank v. Davenport*, 123 U. S. 83, 8 Sup. Ct. Rep. 73; and *People v. Weaver*, 100 U. S. 539. The jurisdiction of this court, as a court of chancery, to entertain this bill, I have thought too plain to need discussion.

CARPENTER v. MEXICAN NAT. R. Co.

(Circuit Court, W. D. Texas, San Antonio Div. May 17, 1889.)

1. MASTER AND SERVANT—FELLOW-SERVANTS—BRAKEMAN AND CAR INSPECTOR.
A car inspector is not a fellow-servant with a brakeman, but is a representative of the employer.
2. SAME—RISKS OF EMPLOYMENT—LATENT DEFECTS.
While a brakeman cannot recover for injuries caused by defective brakes if he had, or by the exercise of reasonable prudence might have had, knowledge of such defects, he is not bound to look for latent or hidden defects.
3. SAME—MEASURE OF DAMAGES FOR PERSONAL INJURIES.
In estimating damages for personal injuries to plaintiff, a servant, caused by defective appliances, the jury may consider (1) the value of the time lost during the period of disability; (2) fair compensation for the mental and physical suffering caused by the injury; (3) the probable effect of the injury upon plaintiff's future health, and ability to earn money and pursue the course of life for which he was fitted.

At Law.

Action by W. J. Carpenter for damages for personal injuries.

S. G. Newton, W. Showalter, and C. C. Pierce, for plaintiff.

Thomas W. Dodd, for defendant.

MAXEY, J., (*charging jury*.) The plaintiff, W. J. Carpenter, brings this suit to recover damages of the defendant, the Mexican National Railroad Company, and his petition alleges that at the time he received the injuries complained of he was employed in the service of the defendant as a brakeman, and was then performing his usual duties as such employé; that his injuries resulted from the negligence of defendant in failing to furnish the cars upon which he was working with proper and safe brakes and machinery for stopping the train. The accident occurred at or near a place called "El Puerto," in the republic of Mexico, on the 30th of April, 1888. To inform you more accurately of the plaintiff's cause of action, I will read to you the following extracts from his petition:

"That when said train upon which said defendant was employed arrived at said place called 'El Puerto,' and began to descend said down grade, plaintiff and two other employés set all the brakes upon all the cars in said train with great care, and as rapidly as the same could be done, but that said brakes would not work, and were not fit for the purpose for which they were used, and could not be made to press sufficiently upon the car-wheels to check the motion of the train; that the chains and all the machinery of the said brakes were defective in construction, and not in good and safe condition, and were not fit and adapted for the purposes for which they were used; that because said machinery of said brakes would not work, said train of cars upon which plaintiff was employed, upon entering upon said down grade, began to move down the said grade at a terrific and dangerous rate of speed, and that there were no means to check the said train, and that said train became unmanageable; that plaintiff and his fellow-brakeman did everything that skillful and prudent men in such affairs could do to check and control said train, and to preserve their own lives and limbs; that, while said train was so moving at

such terrific rate of speed, plaintiff was on top of one of said cars in the performance of his duties as brakeman; and that the immense strain caused by the rapid motion broke a journal of one of the cars, and that thereupon the car jumped the track and threw plaintiff to the ground with such force that the bones of his left leg, from the knee to the ankle, were broken and crushed, and the flesh thereof torn and mangled, and that he was otherwise greatly injured and hurt; * * * that if said cars upon said freight train had had suitable brakes and machinery for stopping and slowing, the said train could have been easily stopped, and said injuries to plaintiff prevented; that said defendant, in placing cars with defective brakes and machinery for stopping or slowing them in the train upon which plaintiff was so employed, was guilty of great negligence, which was the cause of plaintiff's said injuries."

The defendant answers: (1) By general denial,—that is, it denies all the allegations in the plaintiff's petition,—which devolves upon the plaintiff the duty of proving his cause of action as he has alleged it. (2) That the injuries complained of by plaintiff were caused by the breaking of a journal of one of the cars forming the train upon which plaintiff was employed; that the breaking of the journal aforesaid was one of those unforeseen accidents against which no foresight could guard or prevent; and that the plaintiff's injuries, therefore, were one of the risks assumed by him in accepting employment in defendant's service, for which no recovery can be had. (3) Defendant further denies liability on the following grounds, set out in its answer: "That if plaintiff's injury was in any manner or remotely attributable to the lack of a sufficient number of brakes to keep the train under control,—which is specially denied,—such failure was the fault and negligence of the car inspector, a fellow-servant of plaintiff, and whose duty it was to inspect carefully all cars, car-wheels, brakes, etc., before departure of trains; and if he failed in that particular to discharge his duty, it was the failure of a fellow-servant, and for which plaintiff ought not to recover; and of this the defendant puts itself upon the country." (4) Defendant further interposes the defense of contributive negligence on the part of plaintiff and his fellow-brakeman, in bar of this action.

You observe that the plaintiff predicates his right to recover on the ground that the brakes on the cars composing the train were defective, unsafe, and wholly insufficient to enable the employes (including himself, the conductor Wiggins, and the brakeman Sullivan) to control the train in its descent of the grade at El Puerto. To entitle him to a recovery he must prove his cause of action as alleged,—that is to say, the testimony must satisfy you that the brakes were defective, unsafe, and insufficient to enable the employes to keep the train under control; that the defendant knew, or by the exercise of ordinary and reasonable care ought to have known, of the unsafe and defective condition of the brakes; and that the plaintiff's injuries resulted from the use of such defective appliances. If his injuries resulted from some other cause, or from a risk incidental to the service in which he was engaged,—as the purely accidental breaking of a journal of a car, disconnected from the use of defective brakes,—he could not, in this event, recover against the defendant; for it is a rule of law that, "in general, when a servant, in the ex-

execution of his master's business, receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master responsible, but must bear the consequences himself. The reason most generally assigned for this rule is that the servant, when he engages in the employment, does so in view of all the incidental hazards, and that he and his employer, when making their negotiations, fixing the terms, and agreeing upon the compensation that shall be paid to him, must have contemplated these as having an important bearing upon their stipulation. As the servant then knows that he will be exposed to the incidental risks, 'he must be supposed to have contracted that, as between himself and the master, he would run this risk.'" *Tuttle v. Railway Co.*, 122 U. S. 195, 196, 7 Sup. Ct. Rep. 1166, 1168. But you are instructed it is also an equally well-recognized principle "that it is the duty of the employer * * * to furnish sufficient and safe materials, machinery, or other means by which it [the service] is to be performed, and to keep them in repair and order. This duty he cannot delegate to a servant so as to exempt himself from liability for injuries caused to another servant by its omission. Indeed, no duty required of him for the safety and protection of his servants can be transferred, so as to exonerate him from such liability. The servant does not undertake to incur the risks arising * * * from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision that no danger shall ensue to him." *Railroad Co. v. Herbert*, 116 U. S. 647, 648, 6 Sup. Ct. Rep. 590. The plaintiff, therefore, when he entered the service of defendant, did not, by virtue of his contract of employment, assume any risk incidental to the use of defective appliances or machinery, of which defects he was ignorant; and it was the duty of the defendant, in employing the plaintiff as a brakeman, to provide its cars with safe and suitable brakes and appliances to be used by him. Whether the cars upon which plaintiff was working at the time he was hurt were provided with safe and sufficient brakes is a question of fact which you must determine for yourselves from a consideration of the testimony. The mere fact that the defendant had in its employment a competent car inspector would not, of itself, exonerate it from liability if the brakes on the cars were defective in construction, or not in proper repair; for he was the representative of the defendant, and not a fellow-servant of plaintiff in the sense contended by the defendant's counsel; and, if he failed to exercise due and reasonable care in inspecting the brakes of the cars, and keeping them in proper repair, then for any negligence on his part in that respect, from which injury resulted to plaintiff, the defendant would be liable. 116 U. S. 648, 652, 6 Sup. Ct. Rep. 593-595.

In this immediate connection your attention is directed to another principle of law touching the duty of the plaintiff. He was bound to exercise reasonable and ordinary care to avoid injuries to himself; and if the brakes on the cars, at the time he was hurt, were defective, and he knew, or might have known by ordinary attention, their condition, and thus exposed himself to danger,—in other words, using the language

of the supreme court, "if he did not use his senses as men generally use theirs to keep from harm,—he cannot complain of the injury which he suffered." 116 U. S. 655, 6 Sup. Ct. Rep. 597. But the principle of law as to the duty of plaintiff under such circumstances is subject to the qualification that he was not required to inspect the brakes to ascertain whether or not there were latent or hidden imperfections or defects in or about them (if there were any defects at all) which rendered their use more hazardous. That was a duty of the defendant, the general principle of law being that, "unless the defects are such as to be obvious, open to common observation, to any one giving attention to the duties of the occasion, the employé has the right to assume that the employer has performed his duty in respect to the implements and machinery furnished." *Railway Co. v. Bradford*, 66 Tex. 735, 2 S. W. Rep. 595. Bearing in mind the foregoing directions, you will inquire whether the brakes on the cars at the time plaintiff received his injuries were sufficient in number, and properly adapted to the purpose for which they were used. Were they sufficiently numerous, and in proper condition of repair, to enable the persons using them to properly manage the train, and keep it under control? If so, then it will be your duty to return a verdict in favor of defendant. If, however, the brakes were unsafe or defective, and the defendant knew of their defective and unsafe condition, or could have discovered it by the exercise of reasonable care and diligence, and the plaintiff was ignorant of the defects, and could not have ascertained their condition by the exercise of ordinary care and caution; and if the injuries of which he complains resulted from such unsafe or defective condition of the brakes,—that is to say, if, as claimed by the plaintiff, the journal testified to broke in consequence of defective or unsafe condition of the brakes, and he was thereby injured,—then you will return a verdict in favor of the plaintiff for such amount of actual damages as will compensate him for the injuries he has sustained. In making your estimate of such damages you are authorized to consider (1) the value of the time lost by the plaintiff during the period in which he was disabled, from his injuries, to work and labor, taking into consideration the nature of his business and the value of his services in conducting the same; (2) fair compensation for the mental and physical suffering caused by the injury; (3) the probable effect of the injury in future upon his health, and the use of his injured foot and leg, and his ability to labor and attend to his affairs, and, generally, any reduction of his power and capacity to earn money and pursue the course of life which he might otherwise have done. *Railroad Co. v. Randall*, 50 Tex. 261. The object of the law in cases like the present is simply to compensate the injured party for the injuries he has sustained; nothing more. It therefore follows, and you are instructed, that the plaintiff is not entitled to recover exemplary or punitive damages.

You are the exclusive judges of the credibility of the witnesses, and of the weight to be attached to their testimony; and in civil suits, such as the present one, you may predicate your finding upon a preponderance of evidence. You have just heard the testimony, and are familiar

with all the facts in the case, and I will not attempt to review them. It is now your duty to render such a verdict as will be just and right in view of the testimony and the law as embodied in these instructions.

HAYES v. SHOEMAKER.

(Circuit Court, N. D. New York. July 23, 1889.)

NATIONAL BANKS—INSOLVENCY—STOCKHOLDERS—INCOMPLETE TRANSFER.

Where a shareholder of a national bank makes a *bona fide* sale of his stock, and goes with the purchaser to the bank, indorses the certificate, and delivers it to the cashier of the bank, with directions to make the transfer on the books, he has done all that is incumbent upon him to discharge his liability, and he is not liable, though the cashier failed to make the transfer, upon the subsequent suspension of the bank, for an assessment made by the comptroller of the currency, under Rev. St. U. S. § 5161, to pay the bank's debts.

At Law. Trial by the court.

John N. Beckley, for plaintiff.

H. V. Howland, for defendant.

COXE, J. This action is by Frank M. Hayes, as receiver of the First National Bank of Auburn, N. Y., to recover \$4,100 upon an assessment made by the comptroller of the currency, under section 5151 of the Revised Statutes, against the defendant as a shareholder of the bank. The facts are undisputed. On the 16th of March, 1885, 41 shares of stock were transferred by Michael Shoemaker to the defendant, and have since stood in defendant's name on the books of the bank. On the 31st of August, 1886, the defendant, through his attorney, H. W. Taylor, sold this stock in good faith to Clinton T. Backus. Taylor was appointed attorney, by a written instrument, and was invested with full authority to sell the stock, and to perform any act with reference to the transfer thereof that the defendant could perform. On the day in question Taylor went to the bank to receive the purchase money, and complete the transaction. He met Backus there. Charles O'Brien, the cashier of the bank, was present. O'Brien was advised of the sale, shown the certificate and power of attorney, and informed by Taylor and Backus that they had come to make a legal transfer of the stock, and to do all that was necessary to accomplish this result. The cashier directed Taylor to indorse the certificate, and deliver it to him with the power of attorney, stating that nothing further was required of either Taylor or Backus. Taylor did as requested. The cashier was authorized and directed to make the proper entries in the books of the bank, and he promised so to do. The defendant supposed that the stock had been properly transferred, and never was informed to the contrary until just prior to the commencement of this action. It is argued by the plaintiff that, notwithstanding this sale,—concededly a *bona fide* one as between the parties,—the de-

defendant's individual liability continued, for the reason that the stock was not transferred upon the books of the bank, as required by law (section 5139, Rev. St.) and by the by-laws of the bank. The defendant, on the contrary, insists that all liability was discharged by the sale and the transactions subsequent thereto. He maintains that after he had sold his stock in good faith and received payment, after he had indorsed the certificate and surrendered it to the cashier with full notice of the sale, after he had instructed the cashier to have a legal transfer made in the books of the bank, and had been informed by that officer that such a transfer would be made, and nothing more was required from him, he had done all that was incumbent upon him to discharge his liability. It is thought that the facts bring the cause directly within the rule of *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. Rep. 61. The cases cannot be distinguished in principle. In many respects the facts at bar are stronger for the defendant than in the *Whitney Case*. The authority of the officers of the bank to transfer the stock was, in that case, implied from the blank power of attorney and notice of sale. Here the request to transfer, made by both vendor and purchaser, was direct, explicit and complete. Nothing is left to inference. The *Whitney Case* did not turn, as is intimated, upon the form of the authority to make the transfer; the decision is based upon the broad, rational doctrine that the duty of the shareholder was done when he had sold the stock, notified the bank of the sale, requested the proper entries to be made and clothed the bank officials with full authority to make them. The notice of sale and request to transfer being conceded, it is wholly unimportant whether these communications are oral, in writing, or by signs. There can be no doubt that the *Whitney Case* would have been decided as it was if the executors had gone to the bank, and orally given the president the authority to transfer. There is no warrant for supposition that the court intended to release a seller of stock who sends a power of attorney to the bank, and hold liable one who goes in person, and orally directs the transfer to be made. Such a construction of the decision must necessarily be based upon the unfounded hypothesis that stock cannot be transferred legally unless the shareholder personally makes the transfer or, in writing, authorizes some other person to act as his agent in so doing. Taylor and Backus clothed the cashier with the necessary authority. He could legally have made the transfer after his interview with them. Had they put the conversation in writing, and signed it, it would have been no stronger. No custom and no law required that this should be done. But, if a written conveyance were necessary, the cashier had the necessary authority to supply it. *Bank v. Kortright*, 22 Wend. 348. The rule is a just one that a shareholder, after having done all that a prudent and careful business man should do, will not be held responsible for the neglect and carelessness of an officer of the bank. It is of the utmost importance that the liability of stockholders of national banks should be rigorously enforced; but, on the other hand, the court should not treat them with exceptional severity, and apply to their transfers different rules from those which obtain in other business transactions. An examination of this testimony

has convinced the court that the defendant, though he might, perhaps, have taken additional precautions, did all that the law, custom, and common prudence required to relieve himself from liability. It follows that judgment should be entered for the defendant.

MARX v. TRAVELERS' INS. CO.

(Circuit Court, D. Colorado. July 24, 1889.)

1. INSURANCE—ACCIDENT—VOLUNTARY EXPOSURE TO UNNECESSARY DANGER.

It cannot be said that a passenger on a railroad train, who goes out onto the platform while the train is in motion, because he is overcome by the heat of the car, or suffering from nausea, voluntarily exposes himself to unnecessary danger, within the meaning of a policy of accident insurance.

2. SAME—RULES OF RAILROAD COMPANY.

Where a rule forbidding passengers on a railroad train to ride on the platform of a car is generally disregarded by both passengers and trainmen, it cannot be said that to so ride is a violation of "a rule of a corporation," within the meaning of a policy of accident insurance

At Law. On motion for new trial.

Patterson & Thomas, for plaintiff.

Markham & Dillon, for defendant.

HALLETT, J. Plaintiff is the widow of Sigmund Marx, to whom defendant issued an accident policy under date of August 19, 1887, for \$5,000. Marx came to his death by falling from a platform of a railroad car on which he was a passenger proceeding from Denver to Central City. At the trial it became a question whether in riding upon the platform of a car there was "voluntary exposure to unnecessary danger," or a violation of a rule of the railroad company within the meaning of certain conditions indorsed on the policy. There was testimony to show that in traveling upon cars deceased was at times affected with nausea, and found it necessary to go to the open air for relief. The day of the accident was extremely hot, and other passengers had taken position on the platform on that account. When last seen on the platform deceased was sitting with his feet over the end in a position of some danger in case of collision, but not especially so as to falling from the platform. It may be said, however, that he was riding on the platform, and that the accident would not have occurred if he had kept inside the car. That deceased was in a dangerous position on the platform, as distinguished from the body of the car, in which as a passenger, he was entitled to ride, is clear enough; but whether in going on the platform there was voluntary exposure to unnecessary danger cannot be ascertained except with knowledge of all the circumstances which influenced his conduct. If he was overcome by the heat of the car, or affected with nausea, which impelled him to seek the open air, it

cannot be said that there was voluntary exposure, or that the danger was unnecessarily incurred; and so the jury was advised to consider whether under all the circumstances the case was within that condition of the policy.

As to the condition exempting defendant from liability in case of death from violating a rule of a corporation, it is said that deceased was forbidden to ride on the platform by a rule of the railroad company, which was inscribed on a metal plate on the door of the car. Whether this can be taken to be a rule of a corporation, or what shall be a rule of a railroad corporation within the meaning of the condition, is not very clear. By another condition some limitations are imposed upon policy-holders traveling by rail as follows: "Entering or trying to enter or leave a moving conveyance using steam as a motive power; walking or being on a railway bridge or road-bed." Having thus defined the acts which must be avoided by policy-holders in traveling on cars, I doubt very much whether another can be added under the general designation of a "rule of a corporation." If, however, it shall be conceded that the railroad company had at some time prior to the death of Marx adopted a rule forbidding passengers to ride on the platform of a car, and that such rule was within the general condition of the policy referring to rules of a corporation, it was not then of force. The testimony of the trainmen was to the effect that it was not at all observed. All passengers on the road who were so inclined, and often by the invitation of the trainmen, rode on the platforms of the cars as freely and as commonly as elsewhere. Under such circumstances it cannot be said that there was any rule of the railroad company as to riding on the platform. The cases cited to show that the consent of a conductor of a train or others in authority shall not be effectual to set aside such a rule, in so far as it may affect the liability of the railroad company for any injuries received while in that position, are not controlling. An insurance company offering indemnity for injury or death in case of accident, as to its policy-holders, is not at all in the position of a carrier for hire as to its passengers. The latter is engaged in a special service of peculiar danger, as to which some rules of conduct on the part of its patrons are highly necessary. The former assumes a guardianship of its patrons in respect to the casualties of life which beset men everywhere, and as to which it is not practicable to impose limitations which shall be constantly borne in mind by the insured. Will any one say that on sea and land, at home and abroad, a policy-holder must constantly consider whether he is within all the rules of all the corporations, public and private, which he may in any way encounter? Whatever the answer may be to any such question, it is plain enough that a rule of a corporation, within the meaning of this policy, must be one which is known to the policy-holder, and of force at the time of the alleged violation. The evidence at the trial did not establish this fact, and the policy cannot be avoided on the ground that deceased was not observing its terms at the time of the accident. The motion for new trial will be denied.

KREMENTZ v. COTTLE Co.

(Circuit Court, S. D. New York. June 21, 1889.)

PATENTS FOR INVENTIONS—KREMENTZ COLLAR BUTTON.

The patent granted to complainant, May 6, 1884, for "a collar or sleeve button having a hollow head and stem, the said head, stem, and the base-plate or back of the said button being shaped and made of a single continuous piece of sheet-metal," is void for want of novelty. The Stokes patent, No. 171,882, January 4, 1876, covers a button composed of a single piece of sheet-metal, the only difference being that the head is flat and solid instead of round and hollow, like complainant's; and the Keats patent, No. 177,353, May 9, 1876, also covers a button made of a single piece of sheet-metal, having a hollow head and hollow stem, of the same form as complainant's.

In Equity. Bill for infringement of patent. On final hearing.

Louis C. Roegerer, for complainant.

Edwin H. Brown, for defendant.

WALLACE, J. The patent in suit granted to complainant, May 6, 1884, is in the words of the claim, for "a collar or sleeve button having a hollow head and stem; the said head, stem, and the base-plate or back of the said button being shaped and made of a single continuous piece of sheet-metal, substantially as shown and described." The specification and drawings describe and illustrate a button in the form of a stud. It is made of a single piece of metal, without soldering or joints. By means of any suitable dies, a metal plate is pressed into the form of a cap, with a flange or rim at the bottom, and then the sides of the cap are pressed together about the middle in any suitable manner, to form the head and stem. The prior state of the art may be sufficiently understood by referring to only two of the several earlier patents in the record. The patent to Stokes, No. 171,882, granted January 4, 1876, describes a stud composed of one piece of sheet-metal, in which the head and stem are made by striking them up or raising them out of the metal base-plate by means of a punch and die. The stud is of substantially the same form as the stud of the complainant's patent, except that the head is flat instead of round; the stem is hollow; and the head is solid. The patent to Keats, No. 177,353, granted May 9, 1876, describes a button or stud made of a single piece of sheet-metal having a hollow head and hollow stem, and is of the same form as the stud of the complainant's patent. It has an extra shank or base-plate. In making it, the sheet-metal blank is formed in two sections, having the desired configuration, one of which is doubled over upon the other, and the edges are brought together by lateral pressure. It thus appears by the two prior patents referred to that the complainant was not the first to make a hollow stud, or a hollow stud from a single piece of metal, or a stud from a single continuous piece of metal, or a partly hollow stud from a single continuous piece of metal. So far as appears, he was the first to make a stud from a single continuous piece of metal in which the head was hollow and round in shape. The stud of the Stokes patent would be

his if the head were not flat and preferably solid, instead of being round and hollow. The stud of the Keats patent would be his if it were not folded over and joined by lateral pressure at the sides, so as not to be made of a continuous piece of metal. For the particular use for which the Stokes stud was designed a flat and solid head was preferable, and for the particular use for which the Keats stud was designed a joint or seam at the sides was not objectionable. For the use for which the complainant's stud was designed a round head was preferable, and a seam at the sides was objectionable. He desired to improve upon his predecessors by making a stud without a seam, and thus obviate the necessity of soldering, and which should be hollow throughout and thereby save material; and he desired to make a stud differing somewhat in details of the configuration of the parts from that of Stokes or Keats. The idea and the method of making a seamless stud out of a single continuous piece of metal was suggested and fully shown by the patent of Stokes, and the idea and method of saving material by having the entire stud hollow was suggested and fully shown by the patent to Keats. It is not open to reasonable doubt that any competent mechanic, versed in the manufacture of hollow sheet-metal articles, having before him the patents of Stokes and Keats, could have made these improvements and modifications without exercising invention, and by applying the ordinary skill of the calling. Indeed, the stud of the Stokes patent alone is a substantial anticipation of the complainant's patent. The different manipulation of the blank necessary to introduce the desired modifications of form, and the hollow head, which distinguish the studs, was within the obvious knowledge of the skilled mechanic. It must be held that the patent is invalid for want of novelty. The bill is dismissed, with costs.

ASBESTINE TILING & MANUF'G CO. v. HEPP *et al.*

(Circuit Court, D. Oregon. June 28, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—ACCOUNTING.

Under section 4921 of the Revised Statutes, where a decree is given in a suit in equity restraining the infringement of a right secured by patent, the court may also decree a recovery of the profits arising from such infringement and the damages the plaintiff has sustained thereby.

2. MUNICIPAL CORPORATION—INFRINGEMENT OF PATENT.

Where the council of Portland authorizes a contractor to lay a sewer in one of its streets, in pursuance of a power contained in its act of incorporation, and in so doing the contractor infringes upon the patent of another for making sewer-pipe, the act being a corporate one for the benefit of the corporation, it is liable for such infringement, the same as a private corporation or person.

(Syllabus by the Court.)

Suit in Equity for the Infringement of a Patent.
Albert H. Tanner, for plaintiff.

William H. Adams, for defendant.

DEADY, J. This suit is brought by the Asbestine Tiling & Manufacturing Company, a corporation formed under the laws of Washington, against V. Hepp and F. D. Ball, citizens of the state of Oregon, and the city of Portland, a municipal corporation of said state.

It is brought to restrain the defendants from using or vending certain moulds for making mortar-pipes, for which Ezra Hamilton, the inventor, on October 23, 1877, obtained a patent from the United States, for the term of 14 years, for an account of the profits arising from the making, using, and vending of said moulds, and damages for the same.

The defendants Hepp and Ball answer the amended bill, and the city of Portland demurs thereto.

It appears from the bill that the plaintiff is the assignee of this patent for this county, and that the city of Portland is authorized by its act of incorporation to lay down sewers within the corporate limits, designate the material to be used in the construction of the same, exercise exclusive control in all matters relating thereto, and to assess the cost thereof on the property benefited thereby; that the defendant, by its common council, has employed and contracted with the defendants Hepp and Ball to put down numerous sewers constructed of pipe made with said moulds, and in pursuance thereof has used a large number of said moulds and a large quantity of pipe made by means thereof, and is about to contract with them for the construction of other sewers therewith.

On the argument of the demurrer the points made in support of it were these:

(1) The city of Portland, in constructing sewers, exercises a police power for the benefit of the public health, which "in no way inures to the profit or advantage of the city in its corporate capacity," and therefore it "is not liable for the infringement of a patent in prosecuting such work."

(2) The city of Portland is not liable for profits on account of the alleged infringement, "none being realized" or "claimed by the bill." Hence equity has no jurisdiction.

(3) The city, if liable at all, is only liable for damages, and these can only be recovered in an action at law.

By section 4921 of the Revised Statutes (section 55, act of July 8, 1870, 16 St. 206) it is provided that in cases arising under the patent laws this court shall have power to grant injunctions "to prevent the violation of any right secured by patent, and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the plaintiff has sustained thereby."

Presumably the city has made no profits out of the alleged infringement; but, whether it has or not or will not, the complainant is presumably damaged thereby to the extent of the royalty or license fee usually charged for the use of the patent.

Prior to the act of 1870 damages could not have been recovered in a suit in equity for the infringement of a patent, but resort must have been had to an action at law for this purpose.

The city, like any natural person, may be enjoined from violating any right secured to the patentee in this patent, or his assigns, and the statute expressly provides that in case of a decree for an injunction to restrain the infringement of a patent the plaintiff shall be entitled to recover the damages sustained thereby.

In *Root v. Railway Co.*, 105 U. S. 189, the whole subject of redress in equity for the violation of a right secured by a patent is exhaustively examined by the late Mr. Justice MATTHEWS. The bill was filed after the expiration of letters patent for the profits derived by the defendant from the use of an improvement in railway car brakes, and, as there could be no further infringement after the expiration of the patent, it was not a case for an injunction, and consequently not of equitable cognizance.

In stating the conclusion of the court, Mr. Justice MATTHEWS said (page 215) "that a bill in equity for a naked account of profits and damages against an infringer of a patent cannot be sustained; that such relief ordinarily is incidental to some other equity, the right to enforce which secures to the patentee his standing in court; that the most general ground for equitable interposition is to insure to the patentee the enjoyment of his specific right by injunction against a continuance of the infringement."

In the case under consideration, on the demurrer to the bill, the plaintiff is entitled to an injunction against the continuance of the infringement by the city, and this gives this court, sitting as a court of equity, jurisdiction. Incidental to this, according to the rules of procedure in equity and the express language of the statute, (section 4921, Rev. St.,) the court may give the plaintiff further relief by way of the recovery of the profits made by the infringer or the damages sustained by the plaintiff.

By the act of October 24, 1882, incorporating the city of Portland, the common council thereof is authorized to open, lay out, widen, grade, and improve the streets of the city, and, by section 121 of such act, "to lay down all necessary sewers and drains, and cause the same to be assessed on the property directly benefited by such drain or sewer," and by subdivision 30 of section 37 of said act the council is given the power "to regulate * * * the building and repairing of sewers."

In *Dillon on Municipal Corporations* (3d Ed. § 966) it is said that such corporations "are liable for acts of misfeasance positively injurious to individuals, done by their authorized agents or officers, in the course of the performance of corporate powers constitutionally conferred, or in the execution of corporate duties." But, the writer adds, there is "not a little diversity of opinion as to what duties are corporate duties."

However this may be, it is certain that the state may authorize the officers of a municipal corporation to perform a duty which is not corporate in its character or purpose, and for the omission or wrong-doing of which the corporation is not, and ought not to be, liable to any one. My attention has not been attracted to any specific instance of this kind, but many suggest themselves. For instance, if the state were to author-

ize and require the mayor of the city to keep a rain-gauge or weather record in Portland, or an account of the immigrants arriving at the port, in the performance of such duties he would be serving the public at large, and not the agent of the corporation.

But where the act is a corporate one, to be performed primarily for the benefit of the corporation, the inhabitants of the municipality, it is none the less a private, corporate act, because the public at large may be incidentally benefited thereby.

What few cases there are on this subject refer to and follow the ruling in *Bailey v. Mayor, etc.*, 3 Hill, 531. In this case it appeared that certain "water commissioners," appointed by the state under an act of the legislature to provide the city of New York with pure and wholesome water, employed persons to build a dam across the Croton river.

The action was brought against the corporation to recover damages for injuries caused by the insufficient construction of the dam. The court held that the work was a corporate one; that the commissioners were the agents of the corporation; and that the latter was therefore liable for the injury.

In delivering the opinion of the court, Mr. Chief Justice NELSON, in speaking of the grants of power to municipal corporations for exclusive public purposes and those for private purposes, and the difficulty sometimes of distinguishing them, said:

"But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had not so much to the nature and character of the various powers conferred as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body in its public, political, or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation, *quoad hoc*, is to be regarded as a private company. It stands on the same footing as would any individual or body of persons upon whom the like special franchises had been conferred."

Certainly the purpose of the power to drain the streets of the corporation for the health and convenience of the inhabitants thereof, is quite as much a private one as that of the power to furnish them with water. Like the power to maintain fire-engines and lights, the power to drain the streets by constructing sewers therein to carry off the waste water and refuse matter is granted and intended for the benefit and emolument of the corporation,—the dwellers in the city, and not the general public, although the latter may be and is incidentally benefited thereby.

When the municipal corporation of Portland was created by the legislature, it was not contemplated that the inhabitants thereof should be left to perish in their own filth, and the place become a nuisance, and therefore the corporation is authorized, for its own benefit, to provide for the removal of its waste water and refuse matter by laying down sewers or constructing drains in its streets.

In *Ransom v. New York*, 1 Fish. Pat. Cas. 254, and *Bliss v. Brooklyn*, 4 Fish Pat. Cas. 596, it was held that the municipal corporation was liable as an infringer for acts done in the course of the execution of its corporate

powers and duties, the patents infringed being in the one case for fire-engines and the other for an improvement in hose-couplings.

In *Elizabeth v. Pavement Co.*, 97 U. S. 126, it was not questioned that the corporation, having contracted with third persons to lay down a pavement on its streets, which was in fact an infringement of the pavement company's patent, was liable therefor as an infringer for profits, if any were made, and for damages, if any were sustained. But, the suit having been commenced before the passage of the act of 1870, "damages" could not be recovered therein; and, it not appearing that any profits had been made by the corporation, there were none to recover.

Nor is it material whether the council contracted for or required that the pipe to be used by the contractor should be made on the machine of the plaintiff. It is enough that it has accepted the same, or allowed the contractor to use it, without the license of the patentee or his assignee. The demurrer is overruled.

THE KATE V. AITKIN.

PINCKNEY v. THE KATE V. AITKIN.

(District Court, D. South Carolina. June 28, 1889.)

SHIPPING—BILL OF LADING.

Phosphate rock, as an article of export, is known to commerce as "wet" and "dry" rock, the latter being subjected to heat, and thereby made merchantable. Libelant sold a cargo of "dry" rock, which should contain not more than 2 per cent. of moisture, but after the rock was loaded, the master, representing the vendees and charterers, refused to sign a bill of lading for anything but simply "phosphate rock," while libelant insisted that he should sign for "dry phosphate rock," without qualification. On libel filed for damages for the master's refusal to sign, *held*, that both parties were in the wrong,—the libelant for insisting upon bills of lading for "dry rock" without qualification or explanation, and the master for refusing to sign except for phosphate rock without statement of its condition, wet or dry, as ascertainable by the senses,—and the libel was dismissed, and costs divided.

In Admiralty.

Libel for refusing to sign bill of lading.

J. N. Nathans, for libelant.

J. P. K. Bryan, for claimant.

SIMONTON, J. In order to understand this case a brief preface is necessary. Phosphate rock, as an article of export, is taken from the mine and subjected to the process of washing. When it leaves the washer, it is known as "wet" rock, and is shipped in that condition. Very frequently, however, the wet rock is dried before shipment. The drying process is either in a kiln or in the open air. The latter process exposes it to the action of the sun and air. The moisture is thus expelled.

In the kiln the rock is dried by artificial heat. After leaving the washer it is carried to the kiln, a brick structure, and is dumped on the floor. The rock being in nodules, falls naturally in conical form, the edges being near the walls of the kiln. When heat is applied the whole mass is affected, but, of course, the rock in the neighborhood of the center of the pile feels the full action of the heat. The nodules at the edges have less moisture expelled from them. When the fire is applied directly to the rock it shows the mark, and is dark. Rock dried in the sun and air is nearly white. All things being equal, the value of kiln-dried rock and rock dried in the sun and air is the same. The rock thus dried contains more or less moisture, varying from one-half per cent. up. What is known in commerce as "dry" rock must not contain more than 2 per cent. of moisture. More than 2 per cent. renders it unmerchantable. On 9th October, 1888, libelant contracted with Thomas & Son to sell them a cargo of best kiln-dried Magnolia rock, moisture not to exceed 2 per cent., at six dollars per long ton, delivered along-side buyers' vessel, at seller's works, on Ashley river. Terms, note at 60 days from date of bill of lading, with interest added at 6 per cent. per annum. Thomas & Son chartered the schooner *Kate V. Aitkin*, and sent her for the rock. The charter-party is in the usual form, and provides for a full cargo of "phosphate rock;" "the captain to sign bills of lading without prejudice to the charter-party." The schooner went to libelant's landing, and employed Mr. Cuthbert, the managing agent of libelant's mines, as her stevedore. Cuthbert began to load the schooner with rock out of a kiln near by and in sight. The rock was put into the lower hold. He then began to put in rock taken from a pile outside of the kiln. He says that this was sun-dried rock. The crew say that it was rock just from the washer,—wet rock. As soon as the mate saw this rock coming into the vessel, the master being absent, he stopped it, saying that it must not be mixed with the other rock. Cuthbert persisted. Finally he stopped work. When the master returned, he confirmed the action of the mate, and directed the outside rock to be put in between-decks. Cuthbert again persisted, and finally had his own way, the master saying that as Cuthbert persisted in mixing the rock he would not sign bills of lading for dry rock. Cuthbert had nothing to do with the bills of lading. About 50 tons of this outside rock were put in, and then the loading of the schooner was completed. The entire cargo was about 600 tons. When she came from the landing to the port of Charleston, Mr. Cohen, shipping agent of libelant, on 9th November, 1888, prepared and presented to the master bills of lading for a cargo of dry phosphate rock. The master refused to sign for dry phosphate rock, and tendered bills of lading for cargo "of phosphate rock." Neither side would yield or suggest or adopt amendment. The schooner being ready for sea, the libel was filed. It has been the practice in this trade to sign bills of lading for dry phosphate rock. In his bills libelant uses these words: The *Aitkin* has carried cargoes from his landing, and has given bills of lading in these words. The schooner sailed on 11th November, delivered cargo to Thomas & Son, which was found wet

in streaks on the starboard side, about one-third of cargo being so wet. She had encountered bad weather, and had been damaged by gales. Libellant drew on Thomas & Son for three-fourths of invoice price of cargo, 15 or 20 days after she left, and the draft was accepted. These are the essential facts. There is no doubt as to the jurisdiction. *The W. A. Morrell*, 27 Fed. Rep. 570; *Paterson v. Dakin*, 31 Fed. Rep. 682. It has not been questioned.

The evidence filed with this opinion shows that if all the rock had been taken from the kiln the master would have signed the bills of lading for dry phosphate rock. It is probable that if the rock had not been mixed he would have pursued the same course. Counsel, however, in presenting this case, have not directed their attention solely to the question whether the outside rock was phosphate rock dried by sun and air, or whether it was rock just out of the washer. On this point I have a clear opinion that it was not wet rock, and that Mr. Cuthbert's evidence settles the issue. But counsel have widened the question, and have discussed earnestly and learnedly the questions of strict right. Did libellant have the right to require the master to sign bills of lading for "dry phosphate rock?" Did the master have the right to refuse to sign except for "phosphate rock?" The words "dry phosphate rock" have two significations. In trade, as between buyer and seller, they mean phosphate rock, containing 2 per cent., or less, of moisture. When this fact is disputed it can be settled only by chemical analysis. But they have another, so to speak, a vulgar signification, in contradistinction to rock just from the washer, which is "wet" rock. The first has reference to its commercial qualities, to be definitely ascertained only by chemical analysis; the second, solely to its condition, observable by the senses. The master cannot be required to state in his bills of lading the precise chemical character of the cargo. He has no authority to do so. He has authority "to bind his owners with regard to the weight and condition and value of the goods. He has no authority to estimate and determine and state on the bill of lading the particular mercantile quality of the goods before they are put aboard; as, for instance, that they are goods containing such and such a percentage of good or bad material, or of such and such a season's growth. To ascertain such matters is obviously quite outside the scope of the functions and capacity of a ship's captain, and of the contract of carriage with which he has to do." *Cox v. Bruce*, L. R. 18 Q. B. Div. 147, quoted and followed in *Railway Co. v. Knight*, 122 U. S. 86, 7 Sup. Ct. Rep. 1132. So, when in this present case the master was called upon to sign bills of lading for dry phosphate rock, one meaning of which—a meaning used in the contract with his principal, the charterer of his vessel—was that it contained two per cent., or less, of moisture, he had the right to refuse to do so unless the expression was so qualified as to indicate the condition, and not, perchance, the chemical quality of the rock; especially so when, as the agent of the vendees, his charterers, he received the delivery under the contract of sale, and was thus, perhaps, in a position to bind them as to the chemical quality of the rock involved in the expression. But the libellant

also had his rights. He was fulfilling a contract to deliver to the buyer's vessel dry phosphate rock. The cargo was about to be transported by sea. It went in dry; that is to say, not moist, or wet. It was about to be exposed to wetting. Heavy rains might penetrate the deck. The hatches might be imperfectly or negligently battened down and protected. The sea-water could thus reach the cargo. Stress of weather might open her seams and let water in. The master himself might order or permit water to be put into the cargo, thus increasing its weight and his freight, payable on the result at the port of delivery. He had therefore the right to require the master to state on the bill of lading the condition of the cargo, (*Cox v. Bruce, supra*), ascertainable by the senses; that is to say, either that it was not wet rock or that to all appearance it was dry,—neither damp nor wet to the eye or touch. The ordinary form of the bill of lading, "received in good order and condition," did not meet this if only the words "phosphate rock" were used. Phosphate rock direct from the washer, as we have seen, is used as cargo. This view is strengthened by another consideration. A carrier is not responsible if he safely delivers the very goods he actually received for transportation. *Railway Co. v. Knight, supra*. But in the carriage of phosphate rock such is the difference in the value of wet and dry rock (one dollar per ton) that it is important to the shipper to have from the carrier the acknowledgment, not only that he carries so many tons of phosphate rock, but also that it was in such a condition that the delivery of wet phosphate rock would not fulfill the contract. The master, therefore, had no right to refuse to sign bills of lading for anything else but phosphate rock. As is not unfrequently the case, both parties are in the wrong. Let each pay his own costs, and let them divide the costs of the officers of court between them.

THE S. A. RUDOLPH.

McCAULLEY *et al.* v. THE RUDOLPH.

(*District Court, S. D. New York. June 14, 1889.*)

SALVAGE—ABANDONMENT.

The schooner R. having stranded on the Jersey coast during a snow-storm, the master and crew were taken ashore by the life-saving service. A tug was sent for by the master, who kept watch of the vessel as she floated and drifted upward and outward along the beach. The libelants' tug, passing near in rough weather, observing the schooner's condition, went to her rescue, and towed her to New York. No signal was given the tug from the shore. *Held*, that the service was a salvage service; that the schooner was only temporarily abandoned; and that the service was rendered with the virtual consent of the master; and \$1,500 was awarded upon the gross value of \$6,314, for ship, freight, and cargo,—one-third to the master and crew, two-thirds to the owner; and an amendment to the libel was allowed to embrace the master and crew.

In Admiralty. Libel for salvage.

H. D. Hotchkiss, for libelants.
Owen, Gray & Sturges, for claimant.
W. A. Walker, for the cargo.

BROWN, J. On the 6th of February, 1889, the schooner *S. A. Rudolph*, bound from Washington, N. C., to New York, loaded with lumber partly on deck, stranded on the New Jersey coast off Point Pleasant, during a snow-storm. After being aground a couple of hours, the master and crew were taken ashore by a crew from the life-saving station at Island beach, the master being injured by having a hand mashed, and being disabled in the legs. The captain sent a telegram to New York for a tug. About half past 10 the libelants' tug, *Ivanhoe*, approached the schooner, which was at that time afloat, and, seeing no one on board, took her in tow and brought her to New York. Before the schooner had floated the mate had again visited her, but, finding three feet of water in the hold, refused to stay aboard. The wind was blowing off shore, the schooner had some sails set partly torn, and the tiller was lashed to port. Some little time before the *Ivanhoe* approached her she had floated in the flood tide, and she was drifting up along the beach at the rate of about three miles an hour. The captain and crew, with the members of the life-saving staff, were on shore watching her, and it is claimed they were preparing to go on board of her again at the time when the *Ivanhoe* took charge of her. The captain, it is said, desired to go on board before, but was prevented by the captain of the life-saving crew on account of his injuries. The libelants claim that the schooner was derelict. I cannot find upon the evidence that the schooner was derelict or abandoned. There still remained the *spes recuperandi*. A tug had been sent for. The master and crew were watching her from the shore, with reference to her preservation. I am not satisfied, however, that there was any present intention of boarding her for the purpose of attempting to navigate her into New York harbor. When the tug appeared no signals to her were made by the schooner's master and crew on shore. Such signals might have been made, and if there had been any objection to the tug's rescuing the schooner, the tug's presence and manifest intention, instead of causing the master and crew to forbear to go out in the boat, as it is alleged they were preparing to do, would naturally have expedited their going. Virtually, therefore, the tug acted upon the assent, if not request, of the master of the schooner, and rescued her in her existing and apparent condition, *i. e.*, only temporarily abandoned, and remaining under the eye and watch of her master and crew, who were seeking some means of rescue, and were satisfied that the *Ivanhoe* should take her in the condition she was. Under such circumstances the service was a salvage service, and entitled to a reasonably liberal reward. Though the sea was rough and the weather stormy, the service itself was not attended with any great difficulty or danger. The vessel, as saved, was of the value of \$4,700, the freight \$890, the cargo of the net value of \$724,—in all \$6,314. Fifteen hundred dollars will, I think, be a proper compensation for the whole service of the *Ivanhoe*,

her master, and crew, to be apportioned ratably against the schooner, freight, and cargo. See *The Hyderabad*, 11 Fed. Rep. 749; *The Joseph C. Griggs*, 1 Ben. 81; *The Anna*, 6 Ben. 169. Of this amount one-third should go to the master and crew of the *Ivanhoe* and two-thirds to the owners. The libel is filed by the owners alone, and not in behalf of all interested. A petition may be filed in behalf of the master and crew, or the libel amended in behalf of all interested, and a decree thereupon taken for the full amount. *The Adirondack*, 2 Fed. Rep. 872. If neither is done within a reasonable time, the libelants may take a decree for their share only.

THE HAVILAH.

(District Court, S. D. New York. June 27, 1889.)

ADMIRALTY—REHEARING.

A rehearing of a cause will not be granted after an assessment of damages, upon alleged new evidence that is equally controverted, and involves the reconsideration of all the previous evidence. The remedy is by appeal.

In Admiralty.

Henry D. Arden, for libelants.

H. D. Hotchkiss and *R. D. Benedict*, for claimants.

BROWN, J. The assessment of damages, under such circumstances as in the present case, is attended with much difficulty and perplexity. Assuming that the brig was liable on account of her negligence, as found at the hearing, I think that substantial justice is done by the award of damages, and that I am not warranted in making any material change, except as respects \$551.25, allowance for demurrage, which is doubtless an oversight. Payment of the full value of the vessel at the time that she was sunk is the legal equivalent of a new vessel purchased to supply the place of the old, and interest thereon represents the value of the use. Demurrage in addition, therefore, is not chargeable. *The Venus*, 17 Fed. Rep. 925; *The Utopia*, 16 Fed. Rep. 507. In other respects the report is confirmed. An urgent appeal is made for the rehearing of the cause on the merits, on the ground of newly-discovered evidence, derived from the raising of the vessel during the assessment of damages, by which it is claimed to be shown that the angle of collision, instead of being from three to four points, as found heretofore by the court, was eight points, as the libelants had contended; and because such a collision angle would require the reconstruction of the whole theory of the collision, and charge the schooner with fault, and perhaps wholly relieve the *Havilah*. Such evidence as the raising of the schooner affords is, no doubt, new, and, if it were certain that the evidence derived from an inspection of the vessel proved an angle of collision of eight points, I should not hesitate to admit the testimony, and to re-examine the evidence with reference to that

fact, as the angle of collision was a very important factor in the determination of the case. But it is clear from the opposing affidavits that, if the case were opened, the angle of collision would be the subject of as much controversy as any part of the case on the original hearing. Where very important facts are discovered after trial, and there is either no dispute about them, or substantially little dispute, it is better that this court, as I have held, should reconsider the case, the same as where there has been an important misapprehension or mistake as to the testimony or facts proved; but not so, I think, where the opening of the cause would renew the same controversy upon a new field of evidence, evidently with contradictory witnesses, all of which must be weighed in connection with the evidence previously considered. As the law supplies the opportunity for rehearing on new evidence by appeal, I think it better that it should be heard there, where it can be determined free from the preoccupation of mind that naturally follows a judgment once formed and expressed, as respects the mass of the old evidence, which must, nevertheless, be reconsidered with reference to the new.

SNOW *et al.* v. PERKINS *et al.*

(*District Court, S. D. New York. June 26, 1889.*)

SHIPPING—GENERAL AVERAGE—NEGLIGENT STRANDING.

Voluntary stranding, made necessary by negligence on the part of the ship, does not entitle the ship-owners to a general average contribution from the cargo saved.

In Admiralty.

Wm. A. Walker, for libelants.

Evarts, Choate & Beaman and *T. Cleveland*, for respondents.

BROWN, J. The libelants claim a general average contribution for the sacrifice of the bark *Oneco*, which was voluntarily stranded in April, 1885, at Sagua la Grande, Cuba, for the preservation of the respondents' cargo. The bark of 726 tons was chartered to the respondents to load a cargo of sugar, to be delivered in some port of the United States north of Hatteras. Fully loaded, she drew about 18 feet. On account of the shoal water in the harbor, the port regulations prohibited loading beyond 16 feet 3 inches draft. When loaded to that draft the *Oneco* proceeded, in charge of a government pilot, about 9 miles to the outer anchorage. She came to anchor on the 10th of April, as the log of that date states, "in 20 ft. of water, 35 fms. of chain, the cayo bearing S. E. by E. and the light W. by N." On the three following days her loading was completed. On the morning of the 14th, a strong wind and sea getting up, at 7 A. M. another anchor was let go. There is no evidence that she dragged her anchors, but in the boisterous weather she struck heavily upon the bottom, breaking the rudder and damaging the keel. The

pumps were manned and signals of distress were kept flying, but no help was obtained, and at the end of the day 36 inches of water was in the well. On the morning of Wednesday, the 15th, the captain returned to Sagua, and came back on Thursday, the 16th, with three surveyors and a lighter. The surveyors recommended beaching the vessel for the preservation of the cargo, so far as possible, which was immediately done. The cargo was thereafter unladen, the vessel stripped, and the wreck sold. The cargo was unloaded under a salvage contract made at Sagua by the master with one Garcia, bearing date the 15th, allowing the salvor 50 per cent. This contract recites that the Oneco was then stranded, and believed to be a total loss. This contract is also certified by the United States commercial agent under that date. During the master's absence on the 15th assistance in pumping had been obtained from the gun-boat *Telegrama*; but the water had gained on the pumps, and on the master's return the bark had 8½ feet of water in her hold. The surveyors were sent by request of the resident American commercial agent upon the master's application for a survey, two of whom have testified in the cause.

Upon the considerable evidence on this branch of the case there seem to me to be grave doubts whether the beaching of the vessel was for the best interests of the ship and cargo, or was reasonably justified by the circumstances of the situation. The salvage contract with Garcia having been made the day before the survey, the survey can be regarded only as called to justify a foregone conclusion. But no further comment will be made on this part of the case, as I am satisfied that upon other grounds a general average charge cannot be sustained, for the reason that the pounding on the bottom, and consequent leaking of the ship, which was the occasion of the voluntary stranding, arose through negligence on the part of the ship. It is one of the commonly accepted rules in the law of general average that the party whose negligence has made the sacrifice necessary cannot claim contribution. *Lown. Gen. Av. c. 1, § 4*; *Gourl. Gen. Av. 15*, and cases there cited; *The Ettrick*, L. R. 6 Prob. Div. 127, 135; *Robinson v. Price*, L. R. 2 Q. B. Div. 91; *The Ontario*, 37 Fed. Rep. 220, 222, and cases there cited; *Ralli v. Troop*, Id. 888, 890. Such is the express provision, also, of several of the continental Codes. Germany, § 704; Italy, § 643; The Netherlands, 700; Spain, § 820; Belgium, § 103. In France the law is the same, without any express provision of the Code. 5 Valroger, *Droit Mar.* §§ 2001, 2087. The charter in the present case does not adopt the York-Antwerp rules. Taking all the circumstances into consideration, I cannot find that the vessel was anchored in deep water, as the master testifies, but must hold that she was improperly and negligently anchored in shoal water, (20 feet, as the log states,) and negligently allowed to remain there after her loading was completed until she pounded on the bottom in the rough sea that arose on the 14th. The master testifies, indeed, that he repeatedly sounded about the ship, both before and after the pounding began, and that there was from 16 to 20 fathoms of water all around the vessel, and that the entry of "20 ft." in the log is a mistake

for 20 fathoms. But the same entry in the log mentions both feet and fathoms. The entry reads: "Came to anchor in 20 ft. of water, 35 fms. chain, at 4 p. m." It is difficult to believe that the two forms of abbreviation would have been used if fathoms had been meant in both cases. But there are many circumstances that sustain the log, and I have sought in vain for anything to confirm the master's testimony. The protest made soon after and signed by the master, first and second mates, and two seamen, repeats the same statement of the log, the words "feet" and "fathoms" being written out in full. No other witness from the ship, and neither of the surveyors, two of whom were sworn, were examined as to the depth of water where the ship lay. Capt. Keen, one of the surveyors, speaks of the place as a "shoal" which he had found out, and he anchored his vessel a reasonable distance off to keep clear of it. Capt. Charleson speaks of the Oneco as aground. The master, in his application on the 15th to the United States commercial agent for a survey, states that the Oneco had "struck upon a rock or reef." In his testimony he intimates that, though the ship lay in 16 fathoms of water, the rudder and keel struck upon some "lump." But he also testifies that he sounded all about the stern and found no such lump, and he made no further effort to find what it was on which the ship pounded. While it is not absolutely impossible that such a peak arose from a depth of 100 feet to within 20 feet of the surface, it seems scarcely credible that so unusual and extraordinary a thing, if it existed, should excite no interest, remark, or investigation on the part of either the master himself or the other shipmasters, the surveyors, and the salvor and lightermen, who came out to the ship on the 16th. Had there been so dangerous a rock in that vicinity, in deep water, where vessels were accustomed to lie and complete their loading, it seems incredible that no inquiry or investigation should have been made concerning it. The evidence even of the master shows no such interest or investigation; and the testimony of the other witnesses gives no intimation of anything unusual, but treats it as any ordinary shoal on which the vessel had grounded. The master, when asked to explain how the ship could thump on the bottom in 100 feet of water, could give no explanation except the suggestion of a "lump" beneath the keel, which he made no special effort to find, and which is not proved to have existed. In the face of the entry in the log, and the language of the protest, that the ship anchored on the 10th in 20 feet of water, and of the other evidence, intimating nothing unusual, but speaking of the vicinity as a shoal, and the vessel as stranding on the bottom; I must find the master's testimony insufficient to support his theory. If it was permissible to anchor at all in so shallow water as 20 feet, it was not permissible to remain there when the wind shifted or freshened; and I must hold it negligence in the ship, if not to have anchored in that depth at all, at least not to have taken care that the ship was hauled out into deeper water before any such change in the wind and sea arose as made her berth palpably dangerous, and produced the injuries on account of which she was stranded. This negligence being the efficient cause of the sacrifice, the libel must be dismissed.

MERCANTILE TRUST CO. v. KANAWHA & O. RY. CO. *et al.**(Circuit Court, D. West Virginia. July 13, 1889.)*

1. COURTS—FEDERAL—ANCILLARY JURISDICTION.

A suit was brought in the United States circuit court for Ohio for the foreclosure of a mortgage on defendant's railroad, which extends through Ohio and West Virginia. After the appointment of a receiver in that suit, complainant filed a bill termed an "ancillary bill," in the United States circuit court for West Virginia, reciting the proceedings in the first suit, and exhibiting a copy of the bill therein, and praying the court to take "ancillary jurisdiction" and furnish such relief as might be necessary to accomplish the purposes of the first suit, "and for such other and further relief as the nature of the case may require," etc. *Held*, that the bill should be dismissed. If the aid of the court in West Virginia is desired in enforcing the mortgage, it must be invoked by an independent suit.

2. EQUITY—PLEADING—BILL TO FORECLOSE.

The bill cannot be regarded as an original bill seeking foreclosure, because it contains no sufficient description of the mortgaged premises, nor averment of facts essential to show complainant's right to foreclose, and such defects cannot be supplied merely by reference to the copy filed of the bill in the other suit.

In Equity. On petition for ancillary proceedings.

Alexander & Green, Simpson, Thacker & Barnum, and John E. Kenna,
for complainant.

E. B. Knight, for defendant railroad company.

J. B. Jackson, for defendant Davis.

Before HARLAN, Justice, and JACKSON, J.

HARLAN, Justice. The bill filed in this court, May 4, 1889, by the Mercantile Trust Company, and which was spoken of in argument as an "ancillary bill," shows that that corporation has heretofore filed in the circuit court of the United States for the Southern district of Ohio, Eastern division, "a bill of complaint against the Kanawha & Ohio Railway Company, a corporation created and existing under and by virtue of the laws of the states of Ohio and West Virginia, and having its principal offices at Columbus, in said state of Ohio, and at Charleston, in said state of West Virginia, seeking for the foreclosure of a certain indenture of mortgage or deed of trust, dated the 1st day of May, 1886;" and that "a portion of the line of railway and property owned by the said Kanawha & Ohio Railway, and subject to the lien of said mortgage, is situated within the district of West Virginia, and within the jurisdiction of this court."

The remaining parts of the bill are in these words:

"And your orator respectfully refers to the said bill of complaint in the circuit court of the United States for the Southern district of Ohio for a more particular statement of the contents thereof, and for the terms and conditions of said mortgage; and your orator files herewith a true copy of said bill of complaint, and prays that your honors will take the same as a part of this ancillary bill, your orator making all the averments, and showing unto your honors the same facts which are set forth in said bill filed as aforesaid.

"And your orator further shows that all the statements contained in said
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bill are true, as it is informed and verily believes, and it repeats the same herein.

"And your orator makes the same corporation defendant in this cause that is named in said bill filed as aforesaid, and prays process against the said defendant, as in said bill it has already prayed.

"And your orator prays that your honors will make such orders and decrees, preliminary and final, as are prayed for in said bill by your orator in the circuit court of the United States for the Southern district of Ohio, Eastern division; and that your honors will make such other and necessary orders, judgments, and decrees as may be required in aid of said bill; and that your honors will take ancillary jurisdiction with the said circuit court of the United States for the Southern district of Ohio, Eastern division, and will give your orator all the relief which may be necessary to accomplish the purposes of filing said bill.

"And your orator prays in all respects as in said bill set forth, and prays such other and further relief as the nature of the case may require, and to your honors seem meet."

The case is now submitted upon a petition by the plaintiff, filed May 25, 1889, asking this court to take "ancillary" jurisdiction in aid of the suit brought in Ohio, and give the petitioner all the relief necessary to accomplish the purposes of the bill for foreclosure. To that end the petitioner asks that an order be entered "confirming and ratifying in all respects" the order in the circuit court of the United States for the Southern district of Ohio, appointing Robert W. Kelley receiver of the property of the Kanawha & Ohio Railway Company; also, that such orders and decrees be passed by this court "as shall be necessary or advisable in order to vest in said receiver the possession of said mortgaged property and the control over the same."

The case is also before the court upon the plaintiff's motion to set aside the *ex parte* order herein of March 15, 1889, making Erwin Davis a defendant, and to strike from the files the answer and cross-bill heretofore filed by him. Davis claims to be the owner of a large amount of the mortgaged bonds, as well as of each class of the stock of the railway company. In his cross-bill he denies that there has been any such default on the part of the mortgagor company as entitles the trustee to institute foreclosure proceedings, or that the railway company is insolvent, or, if properly managed, unable to pay its interest as it matures; that he is willing to take a 20-year lease of the railroad, and deposit in advance of the maturity of the interest coupons the amount necessary to meet them, the lease to be forfeited if such deposits are not promptly made; and that, if his proposition to lease be not accepted, he asks that a receiver be appointed of the mortgaged property within the jurisdiction of this court, who is wholly disinterested, and who is in no wise connected with the present management of the company's affairs.

It was frankly admitted at the argument that the plaintiff did not seek a final decree in this court foreclosing the mortgage of May 1, 1886, and ordering the property covered by it to be sold; that the purpose of the parties by whom or at whose instance the suit here was instituted was to have the entire mortgaged property administered under the orders of the court in Ohio, in which the suit for foreclosure was brought;

and that nothing was desired or expected from this court except an order approving or confirming the appointment of Kelley as receiver, and such other orders as may be necessary to vest in him the possession and control of such of the mortgaged property as was in this district.

In the brief submitted by the plaintiff's counsel since the oral argument was concluded it is suggested that if this court should deem an independent suit here for foreclosure necessary or proper before any order is made in respect to the mortgaged property in this district, the bill filed might be treated as an original bill seeking a foreclosure.

This proposition cannot be sustained. The bill filed in this court, regarded as an original bill for foreclosure, is defective, especially in that it does not sufficiently describe the mortgaged premises, nor show the terms and conditions of the mortgage, nor the amount secured by it, nor the sum due and unpaid by the mortgagor. It fails to show, by proper allegations, in conformity with the rules of equity pleading, that the plaintiff is entitled to maintain a suit for foreclosure, or to have a receiver appointed. Its right to have such relief should be made to appear by direct averments, and not simply by referring to a bill filed in another circuit, and making a copy of that bill part of the one filed in this court. It may be that a decree of foreclosure based upon the bill filed here could not be attacked collaterally as invalid or void. But we are of opinion that, in its present shape, and in view of the avowed object of this suit, that bill ought not to be regarded by this court as a sufficient basis for a decree of foreclosure in this court. The nature and extent of the relief asked should be indicated by clear and exact statements in the bill itself, apart from the exhibits.

The bill being defective as an original bill for foreclosure, and for the appointment of a receiver, we are next to inquire whether it is proper for this court to enter an order simply approving or confirming the appointment, made in an original suit in another circuit, of a receiver of the Kanawha & Ohio Railway Company. It was assumed by counsel that a determination of this question adversely to the plaintiff would be a repudiation of the decision in *Muller v. Dows*, 94 U. S. 444. But such is not the fact. In that case the circuit court of the United States for the district of Iowa passed a decree of foreclosure and sale of a railroad extending from a point in Iowa to a point in Missouri, and owned by a corporation formed by the consolidation of a corporation of Missouri with a corporation of Iowa. The entire line was covered by one mortgage and the suit for foreclosure was brought by the trustee. The mortgagors were also before the court, and the sale was made by a master at the instance of the trustee. There was no conflicting possession by any court in Missouri of the mortgaged property in that state. It was held that the decree was not void, so far as it directed the foreclosure and sale of that part of the railroad lying in Missouri, and that the trustee could be required by the court in Iowa to make a deed to the purchaser in confirmation of the sale. The case before us presents no question of that character. It is for the plaintiff to determine whether it will seek a final decree in the circuit court of the United States for the Southern district

of Ohio for the sale under the direction of that court alone, of the entire mortgaged premises, those in Ohio as well as those in West Virginia. But if it desires the active intervention of this court in respect to the mortgaged property in West Virginia, such intervention should only occur in a separate, independent suit, of which it may take cognizance, and in which, if proper or necessary to do so, this court may lay its hands upon the property within this district, and, if need be, administer it by a receiver directly amenable to its authority, for the benefit of all parties interested, of whatever state they may be citizens. The request that this court will simply confirm the appointment of a receiver, made in another circuit, and by its order invest that receiver with the possession and control of the mortgaged premises within this district,—no other relief being contemplated,—is, in effect, a request that this court will compel all who have claims and rights in respect to the mortgaged property situated in West Virginia to seek relief in the original suit for foreclosure pending in another state; and this, notwithstanding such parties may have the right, under existing legislation, to invoke the jurisdiction of this court, or of some court of general jurisdiction established by this state. It might be well if congress would so enlarge or regulate the jurisdiction of the courts of the United States as to enable a circuit court in which is brought an original suit for the foreclosure of a mortgage resting upon an interstate railroad to take actual possession, by its officers, of the entire line, and of all the mortgaged property, wherever situated, and administer it for the benefit of all concerned; preserving in that mode the unity of the railroad, and the just rights of mortgagors, mortgagees, creditors, as well as those of the general public interested in commerce among the states. But there has been no such legislation, and we do not see our way clear to effect any such result by judicial orders merely.

A good deal was said at the argument about the injury that might possibly ensue to mortgagors, mortgagees, creditors, and the public if an interstate railroad, covered by one mortgage, be placed under the management of different receivers, each acting under the orders of the court appointing him, and sold under separate decrees, rendered in distinct foreclosure suits brought in different circuit courts of the United States. Undoubtedly railroad property of that kind could be very materially injured in value, and the general public put to serious inconvenience, if the courts in which such separate suits are brought decline to act in harmony, or according to some fixed plan, in the administration and sale of the property. It is not, however, to be assumed that this court, if its jurisdiction is properly invoked in reference to this railroad, so far as it lies in West Virginia, will fail in any duty imposed upon it by law, or the comity prevailing between courts of equal dignity and authority.

It is unnecessary now to consider other questions discussed at the bar.

The plaintiff's petition, filed May 25, 1889, is denied, but without prejudice to any right it may have to institute a separate suit in this court for foreclosure, or to amend its present bill, so as to make this suit one of that character. If it does not so amend its present bill, within

40 days from the entry of this order, then this suit shall stand dismissed. It follows from what has been said that the order allowing Davis to become a party defendant must be and is set aside, and his answer and cross-bill stricken from the files, but without prejudice to any right he may have to become a party to the present suit, if the plaintiff amends its bill as above indicated.

Judge JACKSON, of the district court, authorizes me to announce his concurrence in the above views.

ALLEC v. REECE.

(Circuit Court, S. D. California. July 22, 1889.)

JUSTICE OF THE PEACE—LIABILITY FOR TORTS.

A justice of the peace is not liable in damages for causing the arrest and imprisonment, as authorized by Code Civil Proc. Cal. §§ 1993, 1994, of one who has failed to obey a subpoena issued by the justice, though the subpoena was insufficient to require the attendance of the person served, and the warrant of arrest was directed "to the sheriff or any constable," when by the statute it should have been directed to the sheriff only, as in issuing the subpoena and warrant the justice acted in his judiciary capacity.

At Law. On demurrer to complaint.

Action for damages by Alfred Allec against O. M. Reece.

H. M. Morgan, for plaintiff.

Willis & Treat, for defendant.

Ross, J. The defendant was, at the times stated in the complaint, a justice of the peace for San Luis Rey township, of San Diego county, and as such, on the 7th of September, 1888, issued a subpoena for the plaintiff to appear in the said justice's court on the 10th day of September following, then and there to testify as a witness in a criminal proceeding then pending in that court, entitled *People of the State of California v. Jesus Fidoroa*, in which proceeding Fidoroa was charged with the crime of grand larceny. The plaintiff herein not appearing at the time specified in the subpoena for his appearance, the justice issued a warrant, directed to the sheriff or any constable of San Diego county, commanding the arrest of the plaintiff, and that he be brought before the said court on the 11th of September, then and there to show cause why he should not be punished for contempt in disobeying the subpoena. Under that warrant the plaintiff was arrested in Los Angeles county by the constable of San Luis Rey township, of San Diego county, and taken before the justice's court at the time named in the warrant, and was there adjudged guilty of contempt in failing to appear as a witness in obedience to the subpoena, and a fine of \$30 was imposed upon him, with the alternative of imprisonment in the county jail of that county at the rate

of one day for every dollar of the fine unpaid. The plaintiff paid the fine, and was discharged. At all of the times stated the plaintiff was a resident of Los Angeles county, in which county the subpoena was served upon him. It had not indorsed upon it an order for the attendance of the witness made by the judge of the court in which the offense charged against Fidorca was triable, nor by a justice of the supreme court of the state, nor by a superior judge thereof.

There can be no doubt of the illegality of the arrest and imprisonment of the plaintiff, and of the subsequent contempt proceedings before the justice's court: *First*, for the reason that it is provided by section 1330 of the Penal Code of California that "no person is obliged to attend as a witness before a court or magistrate out of the county where the witness resides or is served with a subpoena, unless the judge of the court in which the offense is triable, or a justice of the supreme court, or a judge of a superior court, upon an affidavit of the district attorney or prosecutor, or of the defendant or his counsel, stating that he believes the evidence of the witness is material, and his attendance at the examination or trial necessary, shall indorse on the subpoena an order for the attendance of the witness;" *secondly*, because by sections 1993 and 1994 of the Code of Civil Procedure of California every warrant to arrest or commit a witness for failure to obey a subpoena is required to be directed to the sheriff of the county where the witness may be, and not to a constable; and, *thirdly*, because under no circumstances had the constable for San Luis Rey township, of San Diego county, the legal right to execute the warrant in Los Angeles county. The liability of the constable, however, is not involved in the present case, but the question here is whether the justice of the peace is answerable in a civil action for the arrest and imprisonment of the plaintiff.

Had defendant been a judge of superior and general jurisdiction, it is clear that he would not be; for the rule laid down by the supreme court in the case of *Bradley v. Fisher*, 13 Wall. 335, is that "judges of courts of record of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." The principle on which such exemption is founded and maintained rests in public policy, and was established in order to secure the independence of the judges; it being, as observed by the court in the case above cited, "of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." With respect to judges of limited and inferior jurisdiction, however, it has been generally held that they are protected only when the act complained of was within their jurisdiction. The reasons given by Judge COOLEY, in his valuable work on Torts, why the law protects the one judge and not the other, and that one the very one who, from his higher position and presumed superior learning and ability, ought to be more free from error, are as follows:

"The inferior judicial officer is not excused for exceeding his jurisdiction, because, a limited authority only having been conferred upon him, he best observes the spirit of the law by solving all questions of doubt against his jurisdiction. If he errs in this direction, no harm is done, because he can always be set right by the court having appellate authority over him, and he can have no occasion to take hazards so long as his decision is subject to review. The rule of law, therefore, which compels him to keep within his jurisdiction at his peril, cannot be unjust to him, because, by declining to exercise any questionable authority, he can always keep within safe bounds, and will violate no duty in doing so. Moreover, in doing so he keeps within the presumptions of law, for these are always against the rightfulness of any authority in an inferior court, which, under the law, appears doubtful. On the other hand, when a grant of general jurisdiction is made, a presumption accompanies it that it is to be exercised generally, until an exception appears which is clearly beyond its intent. Its very nature is such as to confer upon the officer intrusted with it more liberty of action in deciding upon his powers than could arise from a grant expressly confined within narrow limits, and the law would be inconsistent with itself if it were not to protect him in the exercise of this judgment. Moreover, for him to decline to exercise an authority because of the existence of a question, when his own judgment favored it, would be to that extent to decline the performance of duty, and measurably to defeat the purpose of the law creating his office; for it cannot be supposed that this contemplated that the judge should act officially as though all presumptions opposed his authority, when the fact was directly the contrary." Cooley, Torts, 420.

In all this there does not appear to me to be any sound reason for denying protection to the inferior judicial officer. As has been said, the principle on which any exemption is maintained is founded in the interest of the public, and is established in order to secure independence in the judiciary. This principle, in my judgment, is as applicable to an inferior judge as to one of superior and general jurisdiction. To the extent that the former is authorized to act at all, it is just as important to the public interests, or, if less important, less only in degree, that he should be free to act upon his own convictions, without apprehension of personal consequences to himself, as that the judge of superior and general jurisdiction should be. It is all important that every branch of the judiciary should enjoy this freedom. While it has undoubtedly been generally held that the exemption does not extend to inferior judicial officers, that it has been so extended is seen from the case of *Scott v. Stansfield*, L. R. 3 Exch. 220, in which case the court, in holding that the judge of a county court, which was a court of record, was not liable to a civil action for slander for words spoken in his judicial capacity, even if spoken falsely and maliciously, and without any reasonable, probable, or justifiable cause, and without any foundation whatever, and not *bona fide* in the discharge of his duty as judge, and were wholly irrelevant to the matter before him, said:

"The question arises, perhaps, for the first time, with reference to a county court judge; but a series of decisions, uniformly to the same effect, extending from the time of Lord Coke to the present time, establish the general proposition that no action will lie against a judge for any acts done or words spoken

in his judicial capacity in a court of justice. This doctrine has been applied, not only to the superior courts, but to the court of a coroner, and to a court-martial, which is not a court of record. It is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear. This provision of the law is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences."

In applying the principle, however, to the acts of any judge, the distinction so clearly pointed out by Mr. Justice FIELD in delivering the opinion of the court in *Bradley v. Fisher*, *supra*, must be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. "Where there is clearly no jurisdiction over the subject-matter," said the learned justice, "any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the validity of his judgments may depend. Thus if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him; for these are particulars for his judicial consideration whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit, where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons."

In the present case the defendant, as justice of the peace, had before him, for examination under the state statutes, a criminal charge. It is not claimed that he did not have jurisdiction of that proceeding. For

its proper investigation witnesses were required, and to procure their attendance he had the power to issue subpoenas. Pen. Code, § 1326. For a witness duly subpoenaed, who should fail to attend, he was by the statutes empowered, upon proof of the service of the subpoena and of the failure of the witness, to issue a warrant for the arrest of the witness, addressed to the sheriff of the county where he was to be found, (sections 1993, 1994, Code Civil Proc.;) and by section 1331 of the Penal Code it is provided that disobedience to such subpoena may be punished by the court or magistrate as a contempt. Whether the subpoena had been so served as to authorize the issuance of a warrant was a matter for judicial ascertainment by the justice. The direction of the warrant to the sheriff or any constable of San Diego county was a clear violation of sections 1993 and 1994 of the Code above cited, but this was done in his judicial capacity. The witness, being a resident of another county, was by virtue of section 1330, *supra*, not compelled to attend the court of defendant in the absence of an order of the judge of the court where the offense under investigation was triable, or of a justice of the supreme court of the state, or of a state superior judge, indorsed on the subpoena; and in the absence of such an order the justice of the peace was clearly in error in adjudging the witness guilty of contempt in failing to obey the subpoena. But to pass upon the contempt matter it was necessary for the justice to ascertain the facts in respect to the subpoena, and whether or not the required order for the attendance of the witness was indorsed on it, and all of this he did in his judicial capacity. When that is the case, the grossness of the error of such determination, and of the judgment following it, will not render the officer liable in a civil action for damages, even if the exemption already referred to does not extend to him. From these views it results that the demurrer must be sustained, and the suit dismissed, with costs to defendant. So ordered.

DEDERICK v. FARQUHAR.

(Circuit Court, E. D. Pennsylvania. June 28, 1889.)

PLEADING—AMENDMENT—LACHES.

Plaintiff had filed an amendment to his bill, after the expiration of the patent sued on, introducing new causes of action, and moved to extend the time for taking testimony. He had allowed three years to elapse in total inactivity on account of the alleged unsettled state of the law. *Held*, the delay not being sufficiently excused, the amendment will be stricken off and the motion dismissed.

In Equity. Motion to strike off amendment, and to extend time for taking testimony.

Church & Church, for complainant.

W. G. King, for defendant.

BUTLER, J. The amendment was filed without hearing, subject to a motion to strike off. The patent had expired. New causes of action are embodied in the amendment. If suit were brought upon them it could not be sustained. The expiration of the patent terminated the right to sue here. Whether we could obtain jurisdiction by their introduction into the pending suit is open to doubt. The question, however, need not be decided. An examination of the record has satisfied me that if the court may allow such introduction it would be an unwise exercise of its discretion to do so. The suit was commenced in the summer of 1886, and nothing whatever has been done to prepare it for trial. The complainant's recent affidavit does not show a sufficient excuse for this delay. The supposed unsettled state of the law did not constitute a reason for total inaction during all this time. If complainant did not believe he had a cause of suit which could be sustained, he should not have sued. If he did so believe, he should at least have prepared for trial. The suit is virtually dead, and might be stricken off for want of prosecution. We should not, therefore, breathe new life into it by extending the time to take testimony, and allowing the amendment, thus depriving the respondent of the opportunity to try before a jury, which now seems to be his right as respects the new causes of action, and virtually as respects the old. The amendment must be stricken off, and the motion to extend be disallowed.

WHEELER v. NORTHWESTERN SLEIGH CO.

(Circuit Court, E. D. Wisconsin. August 5, 1889.)

1. CORPORATIONS—STOCK—SALE—RIGHT TO DIVIDENDS.

When a corporation declares a dividend, the earnings represented by the dividend are no longer represented by the stock, but become a debt due to the owner of the stock at the time of the declaration, and this right of the stockholder does not pass by a transfer of the stock, in the absence of a special agreement. That the dividend is payable at a future date does not affect the stockholder's right.

2. PRINCIPAL AND AGENT—AUTHORITY—LIABILITY OF PRINCIPAL TO THIRD PERSONS.

An owner of stock on which a dividend had been declared, but not paid, authorized an agent to sell the stock, expressly reserving the right to the dividend. The agent agreed with the purchaser that the dividend should go with the stock. *Held*, that the purchaser had no right to assume that the agent, because possessor of the stock, was authorized to sell the dividend, which formed no part of and did not pass as an incident to it, and as to that dealt with the agent at his peril, and that the principal was not bound by the representations.

3. SAME—RATIFICATION.

The owner received from the agent the exact amount for which he had authorized the stock to be sold, without any knowledge of the agent's representations and agreements, or that the purchaser claimed to have purchased the dividend. No transfer was made or demanded of the dividend. The owner was first informed by the treasurer of the company of the purchaser's claim, but the ground of the claim was not disclosed, and the purchaser asserted none to the owner. Upon the maturity of the dividend the owner brought suit against the company, and upon the trial he was informed for the first time of the facts upon which the purchaser based his claim. *Held*, that the retention of the proceeds of the sale did not amount to a ratification of the agent's unauthorized acts.

At Law. On motion for judgment.

W. J. Turner, for plaintiff.

J. V. & Chas. Quarles and *J. G. Flanders*, for defendant.

Before GRESHAM and JENKINS, JJ.

JENKINS, J. At the trial a special verdict was taken, upon which both parties moved the court for judgment. The plaintiff sues to recover a certain dividend declared by the defendant upon stock in its company at the time owned by the plaintiff. This dividend was declared on the 1st day of March, 1886, and was payable by the terms of the resolution on May 1st and July 1st next thereafter. The defense is that after the declaring of the dividend, and before it was payable, the plaintiff sold the dividend to Chapman & Goss, to whom it was paid by the defendant.

The facts established by the evidence and the special verdict are these: Soon after the dividend was declared, the plaintiff authorized one H. S. Benjamin to sell his stock at par, but did not empower him to dispose of the dividend declared. To the contrary, in his instruction the dividend was expressly reserved. The plaintiff retained possession of the stock. Benjamin, on March 12th, contracted with Chapman & Goss, then and previously stockholders in the company, and connected

with its management, to sell them the plaintiff's stock at its par value, representing that the dividend declared would, and agreeing that it should, go with the stock. From the amount of stock offered them, Chapman & Goss supposed that it was the stock once owned by the plaintiff, but were told by Benjamin, and believed, that the stock was then owned by Benjamin's wife. They were not informed of the plaintiff's instructions to Benjamin, and did not know that Benjamin was the agent of the plaintiff. At the time of the contract of sale, Benjamin did not, as Chapman & Goss knew, have possession of the stock, and did not receive it from the plaintiff until March 15th, the date of its transfer to the purchasers. It was sent to the agent by the plaintiff pursuant to advice that he had sold it at par. Benjamin delivered the stock to Chapman & Goss, who paid therefor the par value upon the faith of Benjamin's representation that the dividend would, and his agreement that it should, go with the stock. There was no formal assignment or transfer of dividend. The plaintiff received from Benjamin the avails of the stock in ignorance of Benjamin's representation and agreement, and still retains the same. The defendant, after demand by the plaintiff, paid the dividend to Chapman & Goss upon receiving indemnity. It does not appear when, if at all, the plaintiff had information of the representation and agreement of Benjamin. So far as the record discloses, no communication upon the subject at any time passed between the purchasers of the stock and the plaintiff. The latter had notice about May 1st, when he applied for payment, that Chapman & Goss claimed the dividend, but was not advised of the nature of their claim. At the trial Benjamin denied the representation and agreement alleged, insisting that he merely expressed to Chapman & Goss an opinion upon the question whether, as matter of law, the dividend would follow the stock. His contention in that respect is settled adversely to him by the special verdict. Chapman & Goss have never tendered to the plaintiff the stock, or demanded return of the money paid, nor has the plaintiff tendered back the money, or demanded the stock.

It is insisted for the defendant (1) that, as matter of law, the dividend passed with the stock; (2) if otherwise, that the plaintiff is bound by the representation and agreement of his agent; (3) that the plaintiff, by retention of the avails of the bargain, has ratified the contract made by his agent.

1. Stockholders are, as to the property of the corporation, *quasi* partners, holding *per my et per tout*. The earnings of the corporation are part of the corporate property, held by the same tenure, and, until separated from the general mass, the interest of the stockholder therein passes with a transfer of the stock; and this, irrespective of the time during which earnings have accrued. By the declaration of a dividend, however, the earnings, to the extent declared, are separated from the general mass of property, and appropriated to the then stockholders, who become creditors of the corporation for the amount of the dividend. The relationship of the stockholder to the corporation, as to the amount of the dividend, is thus changed from one of partnership ownership to that of cred-

itor. He thereafter stands to the corporation in a dual relation;—with respect to his stock, as partner and part owner of the corporate property; with respect to the dividend, as creditor upon a par with other creditors of the corporation. The severance of the earnings from the general mass of corporate property, and the promise to pay, arising from the declaration of the dividend, works this change. The earnings represented by the dividend, although the fruit of the general property of the company, are no longer represented by the stock, but become a debt of the company to the individual who at the time of the declaration of dividend was the owner of the stock. That the dividend is payable at a future date can work no distinction in the right. The debt exists from the time of the declaration of dividend, although payment is postponed for the convenience of the company. The right became fixed and absolute by the declaration. This right could, of course, be transferred with the stock by special agreement, but not otherwise. The dividend would not pass as an incident of the stock. *Brundage v. Brundage*, 60 N. Y. 544; *Hill v. Newichawanick Co.*, 8 Hun, 459, affirmed 71 N. Y. 593; *Boardman v. Railway Co.*, 84 N. Y. 178. So a legatee of shares is not entitled to a dividend thereon declared before, but payable after, the death of the testator. The dividend forms part of the *corpus* of the estate, and passes to the executor. *De Gendre v. Kent*, L. R. 4 Eq. 283. The dividends are earnings growing out of the stock, but when declared are immediately separated from it, and exist independently of it. They are happily likened in the case last cited to fallen fruit, which does not pass with the sale or gift of the tree. The cases of *Clive v. Clive*, Kay, 600, and *Burroughs v. Railroad Co.*, 67 N. C. 376, relied upon by the defendant, are not availing. The former case was ruled upon the peculiar terms of the corporate articles of the company, providing that the shareholder should not receive any dividends after the period at which he ceased to be proprietor of the shares, but that dividends on such shares should continue in suspense until some other person should become proprietor of them. In the latter case, the resolution declaring a dividend payable on two future dates provided that the transfer books should be closed for 30 days prior to each such date. The court lay stress upon the language of the resolution, and construe it as an express declaration that the dividend was payable, not to present shareholders, but to those who should be shareholders upon the books at the maturity of the dividend, since otherwise the closing of the books would be a useless ceremony. In this view the decision may be upheld, although much of the argument of the opinion is opposed to the current of authority.

2. It is, of course, correct to say that if a principal puts his agent in a position to impose upon an innocent third person, by apparently pursuing his authority, he shall be bound by his acts. It is, however, equally true that one dealing with an agent must look to the extent and scope of his agency, and that an implied or ostensible agency is never construed to extend beyond the obvious purpose for which it is apparently created. Here the plaintiff had authorized his agent to sell his shares in the defendant company. He was bound by all such acts of

his agent as were within the apparent authority arising from possession of the stock. But that possession did not clothe the agent with apparent authority to sell other property; did not authorize the disposition of a previously declared dividend. The ostensible, as well as actual, authority was limited to disposition of the stock, and that alone. The purchasers had no right to assume that the agent, because the possessor of the stock, was also authorized to sell the dividend, that was no part of and did not pass as an incident to the stock. As to that they dealt with the agent at their peril. Supposing the agent to be acting for himself or his wife, and not for the plaintiff, they were bound to the greater caution to ascertain if there had been a transfer of the dividend by the plaintiff. It is clear that the plaintiff was not bound by any representation or agreement of his agent touching the dividend, because in respect thereto the agent was acting without authority, and beyond the apparent scope of authority flowing from possession of the stock.

3. The plaintiff received from Benjamin, and has since retained, the avails of the stock. This the defendant insists works a ratification by the plaintiff of the unauthorized act of the agent. It was doubtless competent for the defendant to have interpleaded these rival claimants to the dividend. *Salisbury Mills v. Townsend*, 109 Mass. 115. Instead of so doing, it paid to Chapman and Goss the dividend claimed by the plaintiff, and asserts a ratification of the contract to which it was not a party, and in behalf of those who are not before the court, nor bound by its decision. It may well be doubted if the defendant is in position to avail itself of the alleged ratification. Assuming, however, that such defense is availing to the defendant, is ratification shown? It is well established that a ratification of an unauthorized contract, to be effectual and binding upon the one sought to be bound as principal, must be shown to have been made by him with full knowledge of all the material facts connected with the transaction to which it relates, and that the existence of the contract, its nature and consideration, were known to him. But if the material facts were suppressed, or were unknown to him, except as the result of his intentional and deliberate act, the ratification will be invalid, because founded upon mistake or fraud. *Owings v. Hull*, 9 Pet. 629; *Bennecke v. Insurance Co.*, 105 U. S. 360; *Bloomfield v. Bank*, 121 U. S. 135, 7 Sup. Ct. Rep. 865; *Rolling-Mill v. Railway Co.*, 5 Fed. Rep. 852; *McClelland v. Whiteley*, 15 Fed. Rep. 322; *Dickinson v. Conway*, 12 Allen, 491.

The defendant, asserting such ratification, was therefore bound to show that it was made by the plaintiff under such circumstances as to be binding upon him, and that all material facts were made known to him. *Combs v. Scott*, 12 Allen, 495; *Hardeman v. Ford*, 12 Ga. 205. Do the facts disclose ratification? The plaintiff authorized his agent to sell the stock, at par. He conferred upon the agent no apparent authority to dispose of anything else. As to the dividend, the purchaser had no right to assume that Benjamin could dispose of it. The possession or the actual ownership of the stock, subsequent to the declaration of the dividend, gave him no apparent authority to sell the dividend. As to that they

dealt with Benjamin at their peril. A transfer of the stock vested no legal title to the dividend previously declared. There was no actual transfer of the dividend, and none was demanded. The purchasers are chargeable with knowledge of the law that the dividend did not follow the stock; that the dividend belonged to the plaintiff, and they were bound to inquire, supposing Benjamin to be acting for himself or his wife, as to his or her ownership of this dividend. So far, therefore, the purchasers were negligent; the plaintiff was innocent.

Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of his stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other property than the stock as the consideration for the money paid by the purchasers and received by him. Under such circumstances, the retention of the money cannot be held to be a ratification by him of the unauthorized acts of the agent, because it was retained without knowledge of the facts. *Bell v. Cunningham*, 3 Pet. 69, 81; *Hastings v. Proprietors*, 18 Me. 436; *Bryant v. Moore*, 26 Me. 87; *Thacher v. Pray*, 113 Mass. 291; *Navigation Co. v. Dandridge*, 8 Gill & J. 248; *Smith v. Tracy*, 36 N. Y. 79; *Baldwin v. Burrows*, 47 N. Y. 199; *Smith v. Kidd*, 68 N. Y. 130; *Reynolds v. Ferree*, 86 Ill. 576; *Roberts v. Rumley*, 58 Iowa, 301, 12 N. W. Rep. 323; *Bohart v. Oberne*, 36 Kan. 284, 13 Pac. Rep. 388; *Insurance Co. v. Iron Co.*, 21 Wis. 458, 464.

So far as the record discloses, the first notice which the plaintiff received that the purchasers of the stock claimed the dividend was about May 7th, when the treasurer of the defendant seems to have advised him thereof, and requested to know if the plaintiff made claim thereto. It does not appear that the grounds of the claim were then disclosed. It would seem probable that the plaintiff understood the claim to be bottomed upon the ground that by law the stock carried dividend previously declared and unpaid,—a ground insisted upon at the trial,—as the plaintiff in his letter of that date speaks of the purchaser undertaking to hold the dividend “under some technicality.” There seems to have been no communication between Chapman & Goss and the plaintiff at any time touching their claim. They asserted no claim, and disclosed no ground of claim. They knew the false representation and the agreement, of which the plaintiff was ignorant, and were, I think, bound, if they sought to hold the plaintiff to a ratification of the unauthorized act of his agent, to possess the plaintiff with facts within their knowledge, and not in his, and to assert a claim founded thereon. This they did not do, but, knowing that the plaintiff claimed the dividend, remained passive so far as concerns getting information to him of the grounds of their claim. It cannot surely be said that under such circumstances the retention of the money was an act of affirmance. To so hold would place every principal at the mercy of his agent with respect to matters as to which he had conferred no apparent authority. So that if one should authorize his agent to sell his house for \$20,000, and the agent

selling the house for that sum should include in the sale certain bank stock which he was not authorized to sell, and of which he had not possession, the principal, by the mere receipt and retention of the sum which he had authorized to be taken for the house, and in ignorance of the fact that the bank-stock was part of the consideration running to the purchaser, would be bound to deliver the stock. I cannot yield assent to such doctrine. The purchaser had, in the case supposed, no right to trust the agent with respect to the bank-stock. He had not the possession of it, and was not clothed with any authority with respect to it. The purchaser was bound to inquire into the authority of the agent in such case. The reception and retention of the exact sum authorized to be taken for the house, in ignorance of the act of the agent with respect to the bank-stock, is no ratification. Otherwise the principal is bound for every unauthorized act of the agent, and the purchaser may trust the agent, who can exhibit no authority. Such a principle would be ruinous. Upon maturity of the dividend, suit was at once brought against the company. Until the trial the plaintiff is not shown to have knowledge of the facts upon which the claim of the purchasers to the dividend is based. They had not communicated them to him. He could not have learned them from the agent, for he denied the representations and agreement. This was no acquiescence, working ratification of the unauthorized act of Benjamin. The cases relied upon by the defendant are of the class, either of recognized agency or of acts adopted by the principal as done for him, where a right obtained by the agent is sought to be enforced, or where the principal receives the avails of a contract either authorized or adopted by him. The liability of the principal for the fraud of his agent is bottomed upon the principle that, by adopting the contract made by the agent, and receiving the avails, the principal assumes responsibility for the means adopted to effect the contract; but, as well observed in *Baldwin v. Burrows*, *supra*, where the cases are ably reviewed, and the lines of distinction are sharply defined, "this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contract may have been the means by which the agent was enabled to effect the authorized contract, and the principal retain the proceeds thereof after knowledge of the fact." The present case is not within the class of cases relied upon. The collateral contract for the transfer of the dividend was in excess of any authority, actual or ostensible. The proceeds of the authorized sale of the stock were received in ignorance of the fraud perpetrated by the agent. The amount of such proceeds was the exact amount authorized to be received for the stock. The plaintiff, by retaining the proceeds, adopted and ratified what he had authorized. Such action cannot be tortured into ratification of unauthorized acts. *Smith v. Tracy*, 36 N. Y. 79; *Conditt v. Baldwin*, 21 N. Y. 219. Judgment for plaintiff.

GRESHAM, J., concurs.

ANDREWS BROS. CO. v. YOUNGSTOWN COKE CO., Limited.

(Circuit Court, W. D. Pennsylvania. July 25, 1889.)

1. LIMITED PARTNERSHIPS—CONTRACTS—STATUTE OF FRAUDS—EQUITY.

A contract of sale by a limited partnership association of the state of Pennsylvania, organized under the act of June 2, 1874, which will impose a liability exceeding \$500 for non-performance, cannot be enforced against the association, either in a court of law or equity, unless in writing, and signed by at least two managers of the association.

2. SAME—REFORMATION—MISTAKE.

One dealing with such an association is bound to take notice of the statutory requirements for the valid execution of contracts; and if he makes a contract with an agent of the association, which is reduced to writing, and signed by only one manager, he cannot, on the ground of mistake, maintain a bill in equity against the association for the reformation of the instrument by compelling its execution by two managers.

In Equity.

Suit by the Andrews Bros. Company against the Youngstown Coke Company, Limited, to reform a certain written instrument, for specific performance thereof by defendant, and general relief.

S. Schoyer, Jr., for complainant.

S. L. Mestrezat, for respondent.

ACHESON, J. The defendant is a limited partnership association of the state of Pennsylvania, organized under and subject to the provisions of the act of assembly of June 2, 1874. The fifth section of the act provides that "no liability for an amount exceeding five hundred dollars, except against the person incurring it, shall bind the said association, unless reduced to writing, and signed by at least two managers." This clause of the act was considered by the supreme court of Pennsylvania in *Melting Co. v. Reese*, 118 Pa. St. 355, 12 Atl. Rep. 362, and it was there adjudged that a contract for a sale by such an association, which will impose on it a liability for non-performance exceeding \$500, cannot be enforced unless in writing, and signed by at least two managers of the association. The bill here sets forth that Frederick C. Keighley, the defendant's general manager, acting in its behalf, agreed with the plaintiff corporation that the defendant should furnish the plaintiff the coke necessary to run its furnace—about 10 cars per day—from July 10, 1888, to January 1, 1890, at the rate of 95 cents per ton, upon the basis of then existing wages, the price to rise or fall in proportion as wages might advance or decline, and that the agreement was reduced to writing, and was duly executed by the plaintiff, and was signed in behalf of the defendant by H. O. Bonnell, the treasurer, and one of the managers of the defendant company; but that the plaintiff is advised by counsel that the said agreement, in the form in which it stands, cannot be enforced at law against the defendant; and the bill prays, in substance, that the said written instrument may be reformed so that it shall be and appear to be executed by at least two of the defendant's managers, to the end that it may be legally enforceable against the defend-

ant, and that the defendant be decreed to specifically perform the contract, and for general relief.

It is admitted that the liability for non-performance which would be imposed on the defendant exceeds \$500. Confessedly, then, there is here no contract which legally binds the defendant. But if there is no such valid contract at law, upon what principle can the plaintiff be granted the equitable relief here sought? Undoubtedly the above quoted statutory provision is as binding on a court of equity as on a court of law. *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. Rep. 820. Certainly the general rule is that courts of equity cannot dispense with regulations prescribed by a statute, or supply any circumstance for the want of which the statute has declared the instrument void. 1 Story, Eq. Jur. §§ 96, 177. If there be any exceptions to the rule, clearly this case is not one. Here was neither fraud nor accident, and, if there was mistake, it was on the part of the plaintiff only, and was, too, a mistake merely as to the legal effect of the instrument signed by Bonnell; but such mistake is no ground for the reformation of a written instrument. *Adams, Eq. *171; Cooper v. Insurance Co.*, 50 Pa. St. 299; *Snell v. Insurance Co.*, 98 U. S. 85. Besides, strangers dealing with a limited partnership organized under the act of June 2, 1874, are bound by the limitations imposed upon the powers of the individual members. *Melting Co. v. Reese, supra*. The plaintiff was bound to take notice of the legislative restriction expressed in the fifth section of the act. *Id.*; *Pearce v. Railroad Co.*, 21 How. 443. If the requirements of the statute of frauds are not complied with, a contract falling within its scope, so long as it remains *in fieri*, cannot be enforced, either at law or in equity. *Adams, Eq. *86*. Now, under the facts of this case there can be no pretense that there was such part performance as would perfect the contract in equity. *Williams v. Morris*, 95 U. S. 457. To a bill in equity to reform an instrument in writing, if the proposed reformation involves the specific enforcement of an oral agreement within the statute of frauds, or the term sought to be added will so modify the instrument as to make it operate to convey an interest or secure a right which can only be conveyed or secured through an instrument in writing, and for which no writing has ever existed, the statute is a sufficient answer, unless the defendant is estopped to plead it. *Glass v. Hulbert*, 102 Mass. 24. But no ground of estoppel appears here.

Enough has been said to show that the plaintiff is not entitled to equitable relief. I may add, however, that it appears from the evidence that the contract which Keighley agreed to was not only improvident, as respects the defendant, and, in the length of time it had to run, unusual, but it had not been authorized by the defendant's board of managers. The instrument which Bonnell signed had not been submitted to any other member of the board, and he signed it under the belief that it expired on July 1, 1889, and also upon the supposition that its terms had been approved by Mr. McCurdy, another manager, which was a mistake. Let a decree be drawn dismissing the plaintiff's bill, with costs.

UNITED STATES v. TERRY *et al.**(District Court, N. D. California. May 24, 1889.)*

1. INDICTMENT AND INFORMATION—PLEA IN ABATEMENT—DEMURRER.

Where a plea in abatement to an indictment alleges facts contrary to the record, or which could be proven only by the testimony of the grand jurors disclosing their proceedings or impeaching their findings, a demurrer to the plea cannot be regarded as admitting the truth of such allegations, but will be considered as an objection or exception to the filing or allowance of the plea.

2. SAME—IMPEACHING RECORD BY PLEA.

Such allegations cannot properly be inquired into by plea in abatement, but the inquiry must be addressed to the discretion of the court, by suggestion or motion, and it will be allowed only in rare and extraordinary cases, where the matters, if true, work a manifest and substantial injury to the defendant.

3. SAME—CONDUCT OF GRAND JURY—OMISSION TO READ INDICTMENT.

The fact that after a large number of witnesses had been examined by the grand jury, and the district attorney had been instructed to prepare indictments against defendants, the jury dispensed with the reading of the indictments, and returned them into court without knowing their exact contents, because of the statement made to them by the attorney that it would take three hours to read them, and that the supreme court justice wanted to leave, and wanted the indictments found before he left, affords no ground for setting aside the indictments.

4. SAME—PRESENCE OF DISTRICT ATTORNEY IN JURY ROOM.

In the United States district court, the mere fact that the district attorney was present during the expression of opinion of the grand jury upon the charge in the indictment, and during their voting thereon, is at most an irregularity, which, in the absence of averment of injury or prejudice to defendant, is a matter of form, and not of substance.

5. SAME—REFUSAL TO SUBPENA WITNESSES FOR ACCUSED.

In the United States district court, the mere refusal of the district attorney to summon witnesses for the accused at the request of the grand jury furnishes no ground for setting aside the indictment.

Indictments against D. S. Terry for an assault with a deadly weapon; attempting to obstruct justice; obstructing United States marshal; and displaying deadly weapon in a threatening manner. Also against Sarah A. Terry for attempting to obstruct justice and obstructing United States marshal. On demurrer to plea in abatement.

HOFFMAN, J. The first four articles of the plea were abandoned at the hearing. It is urged in support of the remaining articles that the matters therein set up show, if true, that the indictment was not legally found by the grand jury, and that the suit must therefore abate. It is further urged that the demurrer admits, for the purpose of this argument, the truth of the matters so alleged.

The district attorney contends—*First*, that the plea alleges matters contrary to the record, and, therefore, that the truth of those matters cannot be inquired into; and, *second*, that the inquiry can from its own nature be made only by taking the testimony of the grand jurors, who by law and the terms of their oaths are forbidden to disclose their proceedings or to impeach their finding. It would seem that the more regular course would have been to object to the allowance of the plea. The court would have ruled it out as a formal plea in abatement, for a plea

of that character is bad so far as it contradicts the record. At common law the regular answer would be that the indictment was duly returned by a grand jury *prout patet per recordum*, and this must be tried by an inspection of the record itself. *Countess of Rutland's Case*, 6 Coke, 53; 3 Bl. Comm. 331; 1 Bish. Crim. Proc. § 885, and cases cited; *State v. Hamlin*, 47 Conn. 116; *Com. v. Smith*, 9 Mass. 110. So, also, if the allegations of the plea cannot be proved except by the testimony of the grand jurors themselves. *State v. Hamlin*, *ubi supra*. The demurrer, therefore, in this case can only be allowed to operate as an objection or exception to the filing or allowance of the plea. It cannot be taken as an admission of the truth of the allegations pleaded. No such admission was intended by the district attorney, nor had he authority to make it. These observations may seem to savor of technicality. They will be found, however, to be not without importance to the final decision of the questions argued at the hearing. Assuming, however, that the plea in the case is open to exception as a formal plea in abatement, it does not follow that the defendant is without remedy. Thus, for example, where it is alleged that there has been improper conduct on the part of officers employed in the designating, summoning, and returning of the grand jury, the defendant, who may have been prejudiced thereby, may bring the matter before the court by suggestions or motion or affidavit, even where no right of challenge to the array is allowed by law. But this motion is addressed to the discretion of the court, and the court, having general power to preserve the pure administration of justice, will freely exercise its sound discretion for the purpose of serving that end. Per NELSON, J., *U. S. v. Reed*, 2 Blatchf. 449. To the attainment of this great object for which courts are established, general rules or doctrines must in some cases give way; but exceptions to their application must be admitted with extreme caution, and on the clearest ground of their necessity, to secure substantial, and not merely technical, rights. Thus it is the policy of the law that the preliminary inquiry by a grand jury as to the guilt or innocence of the accused party should be secretly conducted; and in furtherance of this object the juror is sworn to secrecy; and yet, in cases of alleged perjury, or to impeach or contradict a witness in a criminal, or, perhaps, in a civil, case, the grand juror may disclose the testimony given before the jury. So, again, the general rule that the admissibility and sufficiency of the evidence on which an indictment has been found cannot be inquired into, is unquestionable. Yet if, for example, it should appear from the indorsement on the back of the indictment that only one witness was examined, and it should be shown that he was a convicted felon and, therefore, incompetent to be a witness in any case, I presume that the indictment would be quashed. It has also been held that in extreme cases, "when the court can see that the finding of a grand jury is based upon such utterly insufficient evidence or such palpably incompetent evidence as to indicate that the indictment resulted from prejudice, or was found in willful disregard of the rights of the accused," it will interfere and quash the indictment. *U. S. v. Farrington*, 5 Fed. Rep. 343. On the other hand, many au-

thorities can be cited to show that the court will under no circumstances inquire into the character of the evidence on which the indictment was found, the presentment of the indictment, duly indorsed, being held conclusive of the regularity of the proceedings. Whether an objection that the bill was found by a less number than 12 will be entertained was said by Mr. Justice NELSON to be doubtful under the authorities.

It is evident that the inquiry thus raised is open to technical objections: *First*. That it would require the juror to reveal his own vote and that of his fellows. *Second*. It would contradict the record which shows that the indictment was "a true bill," *i. e.*, found by the requisite number of jurors. *U. S. v. Reed*, 2 Blatchf. 435-466; *U. S. v. Brown*, 1 Sawy. 531; *People v. Hulbut*, 4 Denio, 133; *State v. Boyd*, 2 Hill, (S. C.) 288; *State v. Fowler*, 52 Iowa, 103, 2 N. W. Rep. 983; *Stewart v. State*, 24 Ind. 142; *Creek v. State*, Id. 151; *State v. Fasset*, 16 Conn. 467. But it has been held that the testimony of grand jurors may be received to show that under a misapprehension of the law the indictment was found on a majority vote of the jury, and without the concurrence of 12 of the number, and that therefore it was void, and no true bill; and, secondly, that the court, while recognizing the absolute verity which a regular judicial record imports, and the policy on which the rule is founded, yet holds that there always has been and always must be from the necessities of the case a power in the court to vacate or cause to be amended a record which has been erroneously or falsely made, by inadvertency or otherwise, by any of its officers; and that it is competent for it to say, if the claims of justice require it: "This is not our record; it is false and erroneous, and the authentication it bears is unauthorized and unwarranted." *Low's Case*, 4 Greenl. 444, 445; Hawk. P. C. bk. 2, c. 25, § 15; *Com. v. Smith*, 9 Mass. 107. Professor Greenleaf adds the great weight of his authority to the doctrine announced in these cases, but he is careful to limit his statement to the points actually decided, *viz.*, "that grand jurors may be asked whether twelve of their number actually concurred in the finding of a bill, the certificate of the foreman not being conclusive evidence of that fact." 1 Greenl. Ev. § 252. Assuming this statement of the law to be correct, we perceive that it introduces exceptions to well-settled and fundamental rules which the courts uniformly declare to be salutary, and in general indispensable to the administration of justice. It is not surprising that the courts have in many instances refused to sanction so great a departure from established rules, and that the question should still, as observed by Mr. Justice NELSON, be doubtful. In *Low's Case*, the court seems to be fully alive to the danger of allowing the exception contended for. "It may be said," observes the court, "that to permit an inquiry of this sort would open the door to great abuses; that it would afford opportunity to tamper with the jury; and that it would lessen the respect due to the forms and solemnities of judicial proceedings. These are considerations which address themselves strongly to the attention of the court. * * * It could only be in a very clear case, where it could be made to appear manifestly and beyond every reasonable doubt that an indictment apparently legal and formal had not in

fact the sanctions which the law and the constitution require, that the court would sustain a motion to quash or dismiss it upon a suggestion of this kind."

From the foregoing it results: *First*. That matters which contradict the record, or which are, if true, only provable by testimony of the jurors, who must be permitted to disclose what the terms of their oath and the general rules of law require of them to keep secret, and the effect of which is to impeach their verdict, cannot be set up in a formal plea in abatement. *Second*. If they can be inquired into at all it must be on a suggestion or motion addressed to the discretion of the court; that an exception to the general rules of law, which forbid a record to be contradicted, or a grand juror to disclose the proceedings of the jury, or to impeach its findings, will only be allowed in rare and extraordinary cases, and where the matters, if true, worked a manifest and substantial injury to the defendant, which the court, in the interest of justice, is bound to redress; that the facts contradicting the record must be "made out to the entire satisfaction of the court so as to leave no doubt on the subject," (Per PREBLE, J., *Low's Case*, 4 Greenl. 453;) that the facts, if true, must present a case, not of technical, or possible, or hypothetical, but of manifest and undeniable, wrong to the defendant, such as putting him to trial on an indictment not found by 12 jurors, and which is therefore no indictment, but an accusation, made by an unauthorized body of men.

Treating, then, the allegations of the plea as suggestions made to the court on an application addressed to its discretion or its authority to remedy abuses by its officers which would work a manifest and substantial wrong to the defendant, I proceed to consider those allegations which were relied on at the hearing. The fourth article of the plea alleges, in substance, that the indictment was not found or concurred in by 12 of the grand jurors. The facts on which this averment is made are stated in the succeeding article. Article 5 alleges that "the indictment was wrongfully and fraudulently brought into and presented to the court, because, as defendant is informed and believes, the said indictment was never read to the grand jury, or its contents made known to them, or any of them; that four charges were under consideration by the grand jury; that four indictments in form were prepared by the district attorney, which were brought by him into the grand jury room; and that he then and there told the grand jury that they should hurry up with those indictments against defendant, because Judge FIELD wanted to leave, and wanted them found before he left; that thereupon the grand jury asked the district attorney how long it would take to read the indictments against the defendants, and he replied, 'About three hours;' and thereupon the said grand jury, in the presence of the said district attorney, agreed together to dispense with the reading of said indictments, including the indictment in this action, and to present the same to the court without reading or hearing read any of said indictments, or any part of either one of said indictments, and all and each of said indictments were thereafter returned into and presented to the court by the

said grand jury without ever having been read by or to said supposed grand jury, or any member thereof; and that prior to the presenting and filing of said indictments the said grand jury never knew and had no knowledge of the contents of the indictments in this action, and never knew what crime or offense, if any, was charged therein against this defendant." It is upon the facts stated in this narrative of what took place in the grand jury room that the defendant relies to justify the averment that the indictment "was wrongfully and fraudulently presented to the court" by the grand jury, and that the grand jury "never knew what crime or offense, if any, was charged therein against said defendant." It is not averred in the plea that the alleged communication to the grand jury of Mr. Justice FIELD's wishes induced them to find an indictment against the defendant, which would not otherwise have been found. Such an impeachment of their intelligence, their integrity, and their independence, the pleader has not ventured to make. Supposing, however, the communication of Mr. Justice FIELD's wishes to have been actually made to and believed by the jury, the most that can be said is that by possibility it might have influenced them. To set aside an indictment because the jury are informed that one or more persons eminent for their official position or their social standing, or that a considerable number of their fellow-citizens or of the public journals, desire an indictment to be found, would be to adopt a rule which would in very many cases prevent the finding of any indictment whatever. But the averments in the plea present no such case. All that can be gathered or inferred from them is that the grand jury were induced by the alleged wishes of Mr. Justice FIELD and the statement by the district attorney that it would take three hours to read the indictments, to dispense with the reading of them. The usual, and, I believe, invariable, method of procedure in cases submitted to grand juries in this court must, in the absence of any averment or suggestions to the contrary, be presumed to have been followed. The district attorney informs the grand jury of the nature of the charge, and calls their attention to the provisions of the statutes supposed to have been violated. The witnesses are then produced and examined, and it is only when the jury is satisfied that the offense has been committed by the accused that the district attorney is directed to prepare the formal indictment. This case was, therefore, passed upon, and the bill substantially, though not technically and formally, found, before the alleged communication to the grand jury of the alleged wishes of Mr. Justice FIELD was made to them. The jury, saw fit to dispense with the reading of the indictments, relying, as they had a right to do, that the district attorney had, in framing the bills obeyed their directions. No imputation is cast, either by averment or suggestion, at the bar upon the fairness, high sense of duty, or capacity of that officer. Neither the intelligence nor the integrity of the jury is impeached except by the use of the word "fraudulent" (probably through inadvertence) with respect to the presentment of the indictment to the court. The indictment shows that no less than 17 witnesses were examined by the jury. It decided on their testimony to sustain the charge,

and directed the indictment to be prepared. When the indictment was brought in to them, the nature of the offense charged was apparent from the indorsement upon it. They might not have known what was alleged in all the counts, but how can it be said that "they never knew what crime or offense, if any, was charged therein against the defendant?" No case has been cited, nor can any, I believe, be found, where the court, on a state of facts like this, has allowed a record to be contradicted by the evidence of grand jurors impeaching their own finding; and this on an application addressed to the discretion of the court, which must be "satisfied beyond a reasonable doubt" that a legal or constitutional right has been violated, and that manifest injustice and injury to the defendant have been done. If an indictment, duly presented to the court with the concurrence or acquiescence of the grand jury, can be set aside on the testimony of one or more of them that he was ignorant of its contents (or of the particular allegations in one or more of the counts) because it was not read to him,—not that he demanded its reading and it was refused, but that he with his fellows dispensed with the reading, or that, if read, he, through illness, weariness, preoccupation, or other causes, did not hear or understand its contents, and that, if he had, he would not have concurred in finding it, or some of the counts contained in it,—every indictment would be at the mercy of grand jurors who might be willing or be induced to give such testimony.

The testimony of even trial jurors, whose verdicts, if adverse, are convictions, and not merely accusations, is not received to impeach their verdict.

Upon grounds of public policy the courts have almost universally agreed upon the rule that no affidavit, deposition, or other sworn statement of a juror will be received to impeach the verdict. *Thomp. & M. Juries*, § 440. For this familiar rule a great number of cases are cited by the learned authors. Thus it is not admissible to show by the oath of a juror that he did not agree to the verdict as rendered, or that he consented to the return of it without concurring in it, in order to secure his discharge, or because his health required him to be released from confinement. Nor will such testimony be received to show that the jury did not in fact agree upon the verdict, or that the verdict rendered was not in fact the verdict of particular jurors, or that the verdict was by mistake returned as the verdict of the whole jury, when some of them in fact were in favor of finding it for the other party, or that they misunderstood the charge of the court or the result of the finding, or that they agreed upon the verdict by average or by lot. *Id.* §§ 440-442, and cases cited. And it is observed by the authors of the work just cited that "the last thing that a court will listen to is an affidavit of a juror contradicting the verdict which he has solemnly rendered in open court under the obligation of his oath as a juror. If he does not agree to the verdict when it is announced in court, he must speak then, or afterwards hold his peace." *Id.* p. 542, in note.

The sixth article alleges that "the district attorney was present during the expression of opinion of the grand jury upon the charge made in said

indictment, and during the expression of their opinions and the giving of the votes thereon." It is not alleged or suggested that the district attorney exercised, or attempted to exercise, any influence upon the grand jury to induce them to find a bill. Whether he was present when the jury voted that he should be instructed to prepare a bill, or afterwards, when the bill was presented to them and voted on, or on both occasions, does not distinctly appear.

It seems that in England it is not unusual for the public prosecutor to remain with the grand jury while they are deliberating upon or deciding any question of finding a bill. 1 Chit. Crim. Law, 317. The district attorney was necessarily present at the expression of their opinion, when they instructed him to prepare the indictment.

Section 925 of the Penal Code of this state provides that no person must be permitted to be present during the expression of their (the grand jurors') opinions or giving their votes upon any matter before them, and, if so present during the session of the grand jury, and when the charge embraced in the indictment is under consideration, the indictment must be set aside. This language would include the case of a porter or servant called in to make a fire or light the gas, whose presence could have had no conceivable influence on the action of the jury. If, as in this case, the unauthorized person whose presence is supposed to vitiate the indictment be the district attorney, that consequence must flow as a conclusive legal presumption that the grand jurors have been so weak and so unmindful of their duty as to have been induced by the mere presence of the district attorney to find a bill which they would or might otherwise have ignored. A presumption so derogatory to the character and intelligence of the jury, no court, unless compelled by positive statute, should entertain. The provisions of the Penal Code of California are not binding on the federal tribunals, and they can have but little force as a rule necessary in the opinion of the legislature for the protection of the accused, when the state law allows any person charged with crime, even the highest, to be brought to trial on an information filed and subscribed by the district attorney without the intervention of a grand jury. Pen. Code Cal. § 809. The United States Statutes contain no such provision. The mere presence of the district attorney when the voting takes place is at most an irregularity, which, when there is no proof or averment of injury or prejudice of the defendant, is a matter of form, and not of substance, within the scope of § 1025, Rev. St. U. S. *U. S. v. Tuska*, 14 Blatchf. 5; *U. S. v. Ambrose*, 3 Fed. Rep. 283.

The seventh and eighth articles allege that the grand jury, though requested, refused to hear certain witnesses for the defendant. It is enough to say that an accused person has no right to appear in person or by counsel before the grand jury, or to have witnesses in his behalf produced and examined.

The only portion of the ninth article necessary to be considered is the allegation that the grand jury requested the district attorney to subpoena certain witnesses in behalf of the defense, which the district attorney refused to do, and instructed the grand jury that no witnesses for the de-

fense should be subpoenaed, called, or heard before the said grand jury, and that such were the instructions of the judges in bank, and that he refused on the same ground a similar request made to him by the defendant's attorney. The district attorney was clearly right if he merely informed the grand jurors that, as a general rule, the defendant had no right to produce witnesses in his defense, nor had they any right to hear them; in other words, that the proceedings were *ex parte*, and not a trial of the case, the general rule being that the grand jury are to hear evidence only in support of the charge, and not in exculpation of the defendant. Hale, P. C. 157; 2 Hawk. P. C. c. 25, § 145, note; Add. (Pa.) appendix, 38; *Luno's Case*, 1 Conn. 428; *Respublica v. Shaffer*, 1 Dall. 255; *U. S. v. Palmer*, 2 Cranch, C. C. 11; *U. S. v. Blodgett*, 35 Ga. 336. In the last case ERSKINE, J., observes:

"To allow evidence, either oral or written, to go before the grand inquest on behalf of a defendant would be subversive of the ancient and well-settled rules of courts of justice."

The policy of this rule has been explained and vindicated with great force by ADDISON, J., (Add. Pa., *ubi supra*,) and by MCKEAN, C. J., in *Respublica v. Shaffer*, 1 Dall. 236. But its seeming hardness has led to some qualification of it. Thus the right to send witnesses for the defense to the grand jury with the consent of the prosecuting attorney, but not without it, appears to be recognized by that great judge, Mr. Justice WASHINGTON, in *U. S. v. White*, 2 Wash. C. C. 29, 30. On this point Mr. Chitty observes that "*prima facie* the grand jury have no concern with any testimony but that which is regularly offered to them with the bill of indictment; * * * their duty being merely to inquire whether there be sufficient ground for putting the accused party on his trial before another jury of a different description. But, if they are unable to satisfy themselves of the truth sufficiently to warrant their determination, they may properly seek other information relative to mere facts, but further than this they cannot proceed." 1 Chit. Crim. Law, 318. In accordance with this view Mr. Justice FIELD charged a grand jury of the circuit court as follows:

"You will receive all the evidence presented which may throw light upon the matter under consideration, whether it tend to establish the innocence or the guilt of the accused. And more: If in the course of your inquiries you have reason to believe that there is other evidence not presented to you within your reach, which would qualify or explain away the charge under investigation, it will be your duty to order such evidence to be produced." 2 Sawy. 670.

Legislative provisions substantially similar to the instructions given by Mr. Justice FIELD in the last sentence of his charge have been adopted in California, New York, and several other states. The diligence of the district attorney has failed to find any judicial decision in which the construction, application, and effect of these statutes have been construed. Whether the order to the district attorney to produce further testimony is to be made by the unanimous vote of the jury or by a majority of those investigating the charge, or by at least 12 of the body; whether their

belief that further evidence would qualify or explain away the charge is to be founded exclusively on a consideration of the evidence already produced, or upon suggestions of outside parties; whether the bare refusal of the district attorney to obey the orders of the grand jury will *per se*, and without giving him an opportunity to explain his reasons therefor or the circumstances of the case, vitiate the indictment,—are questions upon which judicial decisions throw no light. It is to be observed, however, that neither in California nor in any of the states that have adopted this rule has such refusal been declared a statutory ground for setting aside the indictment. No adjudged case has been cited in any federal court where this relaxation or modification of the common-law rule has been recognized or adopted. That its adoption might lead to serious evils is apparent. The grand jury is necessarily left to be the sole judges whether there is “reason to believe that other evidence not presented would qualify or explain away the charge.” If testimony contradictory or in rebuttal of the evidence before them is to be received, the district attorney must be at liberty to show that the witnesses produced are from their general reputation unworthy of belief, or that they have given a different account of the circumstances to which they testify; or, by proving an *alibi*, to show that they could not have been present at the occurrences to which they testify. This evidence the defendant should in turn have the right to rebut, and thus the grand jury would practically enter upon the trial of the case,—a proceeding “subversive of the ancient and well-settled rules of the courts of justice.” If the doctrine that it is the right and duty of grand juries to hear, without the consent of the prosecuting attorney, witnesses for the defense shall be incorporated into the federal jurisprudence in criminal cases, it must, I think, be restricted in its application to cases where the evidence already produced fails “to satisfy the jury of the truth sufficiently to warrant their determination,” (Chit. Crim. Law, *ubi supra*.) and where from that evidence they believe that other testimony is attainable, not to rebut and disprove the evidence already adduced, but, consistently with the substantial truth of the latter, will explain away or qualify the charge. Such, I think, is the true construction to be given to the language of Mr. Justice FIELD and to have been his meaning in giving his instructions. If the district attorney in the case supposed declines to summon the witnesses, the jury may apply to the court, or, if they are led to believe that such application would be useless, they may refuse to find the indictment. But, if they find and duly present the bill to the court, that fact shows that (unless they have violated their duty and their oaths) the evidence before them has been sufficient to satisfy them of the truth of the charge, and that the case in which they would be entitled to call for further evidence has not arisen. Certainly, in the absence of all judicial authority and precedent, I shall not be the first to go beyond the provisions of any of the Penal Codes of the states which have adopted the rule under consideration by deciding that the mere refusal of the district attorney to summon witnesses for the defense at the request of the grand jury is a good ground for setting aside the indictment.

On the whole case it may, I think, be justly said that while the rigorous and apparently harsh, though ancient and well-settled, rules of the common law have in some instances been departed from, it has always been in the interest of substantial justice, and to prevent a manifest wrong to the defendant; and, conversely, where it is plain that substantial justice will not be promoted, nor a manifest wrong to the defendant prevented, the indictment should not be set aside on grounds of technical errors, informalities, or irregularities. Such I believe to have been the intention of congress in enacting section 1025 of the Revised Statutes.

NOTE BY THE COURT.

In his chapter relating to the proceedings of grand juries, Mr. Bishop observes: "We come now to a class of questions which are not surpassed by any other in point of practical difficulty. The authorities appear at the first impression to be almost as conflicting as the cases are numerous, and, when we seek to reconcile or to choose between them by a recurrence to the principles of law, we find it difficult to say that, in a matter of mere practice, principle points in one direction rather than in another."

The difficulties here alluded to illustrate the perpetually recurring conflict between the conservatism or inflexible opposition to change with which our profession is often reproached, and the spirit which regards "innovation" as equivalent to "reform," and "change" synonymous with "progress." This conflict of opinion is greatly a matter of personal temperament, and while, on the one hand, obstinate conservatism may lead to a bigoted adherence to rules because they are ancient, the opposite spirit may lead to crude legislation, and sometimes to hasty decisions, where judges, impressed with the hardness of particular cases, are led to violate ancient, and on the whole beneficial, rules. The history of the evolution of jurisprudence in England and in this country is replete with instances of the stubborn opposition with which reforms in law, even the most salutary, or modifications of ancient rules, the most indispensable, have been resisted by eminent members of the profession. On the other hand, the legislation of our states, and sometimes, perhaps, the decisions of the courts, disclose a rash and equally dangerous spirit of innovation. Of the former class may be mentioned the opposition made to the legal reforms introduced at various times by Lord Brougham and others into the legislation of England; the long contest between the courts of equity and the common law, resulting in the triumph of the former, respecting the true nature of a mortgage, and the rights of the mortgagor and the mortgagee; the resistance with which the introduction into the jurisprudence of England of the rules of the *lex mercatoria*, or the customs of merchants, encountered at the hands of the more bigoted disciples of the common law.

On the other hand, the statutory innovations upon the ancient rules respecting indictments and proceedings of grand juries have been in some cases crude, and productive of evil results. The provisions of our own statute, already noticed, which declare that an indictment shall be set aside if the district attorney is present when the vote upon it is taken, while the same law provides that he may bring to trial any person who has been held to answer by a committing magistrate, upon an information filed by himself without the intervention of a grand jury, present an illustration of the contradictory, if not absurd, legislation, which has sometimes been adopted. The rule, too, under which a grand jury may, after indictment found, be examined upon *voir dire* as to their qualifications, bias, etc., by an accused person, who had not previously been held to answer, introduces a novelty in practice leading to delays and obstructions to the administration of justice, and which seems anomalous when we consider that; by the law of the country from which we derive that venerable institution, the grand jury might find a bill upon the knowledge of one or more of its number. The obstinacy with which ancient rules have been adhered to in the construction of indictments, presents, on the other hand, an instance of the stubborn adherence of judges and courts to precedents which have lost, if they ever possessed, any claim to adoption as practical rules in the administration of justice. Thus, if one be accused of the larceny of a horse, and it is alleged to have been a black horse, if the proof shows it to be a gray horse the variance is fatal. Yet the pleader may allege in several counts, where only one offense has been committed, several larcenies of a black or gray or brown horse, and the indictment is good; and this, though the theory of the indictment is to give to the prisoner accurate and precise information of the crime with which he is charged. So it is fatal to an indictment if time and place be not alleged for every material averment, and yet when so alleged the prosecution is not obliged to prove the time as laid, but may prove the offense to have been committed at any time within the statute of limitations, and prior to the finding of the indictment. So, too, if an averment in an indictment is in the alternative or disjunctive, and the word "or" is used instead of "and," the defect

is fatal, and yet in different counts he may vary the terms of the charge, producing the same result as if in the original averment he had been allowed to make the charge in the alternative. These rules, which the courts do not feel themselves at liberty to depart from, seem to savor of scholastic subtlety and over-refinement. They probably owe their origin to a revolt of the humanity and sense of justice of the courts against the barbarism of a Draconian code, upon nearly every page of which the scaffold could be seen, and which punished with the highest penalties of the law trivial, and almost venial, offenses. There seems to be now no reason, when such cruel laws no longer prevail, either in England or this country, that these ancient precedents should be adhered to. What is the true *via media* between stubborn adherence to ancient rules and a rash spirit of innovation it is not always easy to discover or define, but if the rules suggested in the foregoing opinion, to the effect that while salutary and established rules or principles should in general be adhered to, yet the court in particular cases, in its discretion, may relax or introduce exceptions to the rule, where substantial justice manifestly requires it, be followed, perhaps the practical administration of the criminal law will in some respects cease to deserve the reproaches of uncertainty and inefficiency which are now so freely made against it.

RAYMOND *et al.* v. BOSTON WOVEN HOSE CO.

(Circuit Court, D. Massachusetts. July 12, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

A preliminary injunction against the infringement of a patent will be denied where plaintiff does not show a prior adjudication sustaining the validity of the patent, or public acquiescence on which a presumption of validity may be based, and where it does not clearly appear that there is an infringement.

In Equity. Bill to restrain infringement of patent.

Clarke & Raymond, for complainants.

David Hall Rice, for defendant.

COLT, J. The complainants are the owners of two patents, numbered, respectively, 197,716 and 197,717, dated December 4, 1877, granted to J. A. Caldwell, the first being for an improved strap for securing hose to the coupling, and the second for an implement for fastening such hose-straps. The defendant is charged with infringement of these patents. The present hearing is upon a motion for a preliminary injunction. The first ground of defense is that the plaintiffs have shown neither prior adjudication sustaining the validity of the patents, nor public acquiescence upon which a presumption of validity may be based, and that, therefore, whatever the decision of the court may be upon final hearing on the merits, the present motion, under a well-settled rule of law, must be denied. I think this point is well taken. It is admitted that there has been no prior adjudication upholding the validity of these patents. As to public acquiescence the evidence goes to prove that this strap and implement have never been put upon the market. The reason assigned by the complainants for not making and selling the Caldwell strap, namely, that it is more costly than the Adlan and Earle straps, does not affect the question of public acquiescence. In the absence of the manufacture and sale of the patented article it can hardly be said that there has been public acquiescence. If nobody had use for the article during the time of the alleged acquiescence, or its merits were prized so low that nobody cared to adopt it, no lapse of time has any tendency to raise a presump-

tion that the patent is valid. Walk. Pat. § 668. But further than this I have some doubt on the question of infringement. As to the tool patent, I have serious doubt whether the defendant infringes. The claim of the patent specifically recites that the grooves or notches in the jaws of the pivoted levers shall be located out of line with each other, and this feature seems to be necessary for the practical working of the tool when applied to fastening a Caldwell hose-strap. In the Hudson or alleged infringing tool we find, in place of notches out of line, two holes punched in the jaws in alignment with each other. In the case of the strap patent it must be admitted that the question of infringement is closer. The specification states that the band is made of self-annealed wire, of such length that the enlarged ends will extend beyond and overlap each other, so as to admit of their being twisted by turning the implement, whereby they are locked or hooked together, and the portion of the hose under the band is thus forced into the corrugations of the coupling, and securely held. A wire band, provided with enlarged ends, is one of the main features of the claim of the patent. The defendant's hose-band does not have the enlargement shown in the Caldwell band, though I am aware that the language of the specification is very broad on this point. The defendant uses hooks at the end of the band, instead of the Caldwell enlargements. I do not think the defendant's band, in spite of the opposite contention, can be practically applied with the Caldwell tool. The manner of operation and the purpose of the defendant's hooks cannot be said to be the same as the Caldwell enlargements. Construing these patents in the light of the prior state of the art, I am not free from doubt on the question of infringement. Upon all the facts of this case, as presented in the papers before me, I am satisfied that the motion for a preliminary injunction should be denied.

THE PIETRO G.

(District Court, S. D. New York. June 29, 1889.)

1. SHIPPING—BILL OF LADING—DEMURRAGE.

Upon a bill of lading issued by a chartered vessel, making the goods deliverable to order, the bill of lading itself is the only contract between the ship and a *bona fide* purchaser and indorsee, who accepts the goods under the bill of lading, without knowledge or notice of the charter; and if he detains the ship in receiving the goods, and the bill of lading specifies no rate of demurrage, nor refers to the charter, the ship can recover only according to the value of her use, and not an amount in excess thereof specified in the charter, though the charterer was the shipper of the goods.

2. SAME—CHARTER.

The charterer of the bark P. G. loaded her partly with his own goods, and took from the master a bill of lading, deliverable to order, making no mention of the rate of demurrage, nor referring to the charter. The charter specified demurrage at the rate of £12 per day. The shipper having sold the goods and indorsed the bill of lading, the purchaser detained the ship on delivery. On suit for demurrage, *held*, that the bill of lading was the only contract enforceable between the ship and the consignee, and that the latter was not liable to charter rates of demurrage of which he had no knowledge, but only for the value of the use of the vessel during her detention.

In Admiralty. Libel for recovery of demurrage in delivering cargo.
Wing, Shoudy & Putnam, for libellant.
D. Ullo, for the *Pietro G.*

BROWN, J. The bark *Pietro G.*, having been found entitled, on the decision of the cause, (38 Fed. Rep. 148,) to demurrage for delay of the consignee in not taking his goods "as fast as the ship could deliver," the parties have submitted to the court the question of the rate of demurrage to be allowed, upon a stipulation as to the facts, to avoid the expense of a reference. It is agreed in substance that the commissioner would find the value of the use of the vessel to be \$40 per day, while the charter rate is £12 per day, or about \$59. This court has held that in the assessment of damages in collision cases the rates of demurrage stipulated in charter-parties were not competent evidence as against third persons, being often somewhat in the nature of a penalty, and not always designed to fix exactly the value of the use of the vessel. *The James A. Dumont*, 34 Fed. Rep. 428. This fact is illustrated in the case of *The Belgenland*, 36 Fed. Rep. 504. That vessel was chartered to take a cargo of phosphates at certain rates, with six pence per ton per day demurrage; and, having lost the charter through a collision, and freights having fallen, she was rechartered for a precisely similar voyage at lower rates of freight, but with demurrage at eight pence per ton per day, or one-third higher than before; *i. e.*, when freights were high the owner could afford to take a less rate of demurrage; when freights were low, he would demand a higher rate of demurrage, to secure promptness in the delivery of the ship, so as to get the earliest advantage of any rise in freights. The *Pietro G.* was chartered to Kemp & Co. The cargo was shipped to different consignees, partly by Kemp & Co., partly by others. The bills of lading delivered to the other shippers than the charterers were made subject to "all of the provisions as per charter-party;" and such a clause would bind the consignee receiving the goods under the bill of lading to pay the charter rates of demurrage. But the bill of lading for the goods in question, shipped by Kemp & Co., and deliverable to order, did not contain this provision in regard to demurrage. In the margin was stated, "Cargo to be discharged as fast as ship can deliver," and nothing more. The charter contract with Kemp & Co. provided that the ship should have an "absolute lien on the cargo for demurrage." But Schultz, the purchaser from Kemp & Co., and the indorsee of the bill of lading, had no knowledge that the vessel was chartered, nor any notice of the charter-party, or of the rate of demurrage therein mentioned. Upon these facts I am of opinion that the ship cannot recover the charter rates so far as they are in excess of the value of the use of the vessel, as against the indorsee of the bill of lading. The indorsee and purchaser of the goods has a right to rely on the bill of lading as the contract between him and the ship, and as the only contract, so far as respects demurrage. Where the bill of lading makes no reference to any charter, and the indorsee has no notice of it, I think the bill of lading is the only contract which the ship can legally set up against him, whether she sues

for demurrage *in personam* or *in rem*. *Bradstreet v. Heran*, 2 Blatchf. 116; *112 Sticks of Timber*, 8 Ben. 214; *The Querini Stampalia*, 19 Fed. Rep. 123; *Leduc v. Ward*, L. R. 20 Q. B. Div. 479, 483. It is not just that the indorsee should be held to the terms of a charter of which he has no notice. As between the ship and the charterer, the charter would no doubt control. *The Chadwicke*, 29 Fed. Rep. 521. Justice requires that the master of the ship, when he signs bills of lading presented by the charterer, making the goods deliverable to order, should insert either the charter rates of demurrage, or some clause adopting the charter's provisions, as in the other bills of lading in this case, if he would enforce, as against *bona fide* indorsees, the rates contracted by the charter. There is the more reason for this rule in the present case, because the demurrage arose upon an additional special contract made between the master and the indorsee that the vessel should go to the Erie basin to deliver his consignment after the rest of the goods were discharged. The new contract was doubtless subject to the general terms of the bill of lading, but it is irrational to conclude that it was made with any reference to the high rates of demurrage named in the charter, of which the indorsee had no knowledge. The charter rates were no part of the contract, either in fact or by legal implication. I allow, therefore, demurrage at the rate of \$40 per day, the value of the use of the vessel, for nine days, with interest.

SERVISS v. THE CHATTAHOOCHEE.

(Circuit Court, E. D. New York. June 29, 1889.)

SHIPPING—LIABILITY OF VESSEL—NEGLIGENCE OF STEVEDORE.

A stevedore, who had finished loading coal on a steam-ship from a canal-boat along-side, took the canal-boat's line to a steam winch on the steamer to draw the canal-boat astern of the steamer. The latter's propeller was in motion, and the stevedore gave no orders to have it stopped, nor did he direct the men on the canal boat to keep her away by poles. The propeller drew in the canal-boat, cut a hole in her, and sank her. The stevedore was an employé of the steamer. *Held*, that when the stevedore undertook to move the canal-boat up the slip he assumed the responsibility of her navigation, at least until she was fully clear of the steamer's side, and for his negligence the steamer was liable. Affirming 37 Fed. Rep. 153.

In Admiralty. On appeal from the district court, 37 Fed. Rep. 153.

Libel by Deborah A. Serviss against the steam-ship Chattahoochee, for damages by sinking libellant's canal-boat. From a decree in favor of libellant, with an order of reference to ascertain the amount of damage, claimant appeals.

Rice & Bijur, for appellant.

Hyland & Zabriskie, for appellee.

BLATCHFORD, Justice. I concur in the views of the district court in regard to this case. 37 Fed. Rep. 153. Let a decree be entered for the libellant for \$581.22, with interest from June 12, 1888, and for the costs of the district court, taxed at \$103, and for the costs of this court, to be taxed.

UNITED STATES v. TOZER.

(District Court, E. D. Missouri, N. D. June 1, 1889.)

1. CARRIERS—INTERSTATE COMMERCE ACT—CONTEMPORANEOUS SERVICES.

To carry two barrels of sugar for one person on a given date, and to carry one barrel of sugar for another person, between the same points, over the same route, two days later, are contemporaneous, and like services within the meaning of section 2 of the interstate commerce act.

2. SAME—DIFFERENCE IN QUANTITY OF PATRONAGE.

The fact that defendant's road received much more traffic from the first shipper than from the second does not make the circumstances and conditions under which the two services were rendered substantially dissimilar.

3. SAME—LOCAL AND THROUGH RATES.

Defendant's company received from a connecting carrier at Hannibal, Mo., under an alleged traffic arrangement, two barrels of sugar shipped by the latter company from Chicago, and carried it to Hepler, Kan., for 34 cents per cwt., that being defendant's company's proportion of a rate of 51 cents per cwt. from Chicago to Hepler. About the same time it charged a local shipper at Hannibal 46 cents per cwt. for carrying a barrel of sugar from there to Hepler. *Held*, that on these facts the two services were rendered under substantially dissimilar circumstances and conditions.

4. SAME—UNDUE PREFERENCE.

Whether the difference of 12 cents per cwt. between defendant's company's local rate from Hannibal to Hepler and its proportion of the through rate from Chicago was an undue and unreasonable preference or advantage over the local shipper, within the meaning of section 3 of the interstate commerce act, was a question for the jury.

Indictment against George K. Tozer for Violation of the Interstate Commerce Act.

Geo. D. Reynolds, U. S. Atty., (*T. P. Bashaw* and *C. C. Allen*, of counsel,) for the United States.

Thos. J. Portis and *W. A. Martin*, for defendant.

THAYER, J., (*charging jury*.) Section 2 of the interstate commerce act reads as follows:

"If any common carrier, subject to the provisions of this act, shall directly or indirectly, by any special rate, rebate, * * * or other device, charge, demand, collect or receive from any person or persons a greater or less compensation for any service rendered * * * in the transportation of passengers or property subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons, for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic, under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby declared to be unlawful."

The first count of the indictment is framed under section 2, and charges in substance that defendant, as agent of the Missouri Pacific Railway Company, collected and received of the Hayward Grocery Company for the transportation of sugar from Hannibal, Mo., to Hepler, Kan., more than he charged the Chicago, Burlington & Quincy Railroad Company for a like and contemporaneous service rendered under similar circumstances and conditions. In arriving at a verdict on this count you must

consider and determine the four following questions: (1) Was defendant agent of the Missouri Pacific Railway Company at Hannibal, Mo., June 15 and 17, 1887? (2) Did he, while acting in the capacity of agent for the Missouri Pacific Railway Company on June 17, 1887, willfully collect or receive from the Hayward Grocery Company 46 cents per 100 pounds for the transportation of one barrel of sugar over the line of the Missouri Pacific Railway Company from Hannibal, Mo., to Hepler, Kan., or knowingly or willfully suffer or permit any subordinate agent of the road who worked under his direction and supervision to charge and collect such sum for such service? (3) Did the defendant on June 15, 1887 knowingly and willfully charge or demand of the Chicago, Burlington & Quincy Railroad only 34 cents per 100 pounds for the transportation of two barrels of sugar from Hannibal, Mo., to Hepler, Kan., or knowingly and willfully suffer or permit a subordinate agent of the Missouri Pacific Railway Company, who worked under his supervision and orders, to charge the Chicago, Burlington & Quincy Railroad such rate between the points named? (4) Was the charge so made the Chicago, Burlington & Quincy Railroad for transportation of two barrels of sugar a charge for a service like that rendered the Hayward Grocery Company, and was it also a contemporaneous service, rendered under conditions and circumstances substantially similar to the circumstances and conditions attending the service rendered the Hayward Grocery Company? If you answer all the above questions in the affirmative, convict on the first count. If you answer either question in the negative, acquit on the first count.

Section 3 of the interstate commerce act is as follows:

"It shall be unlawful for any common carrier, subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any * * * person, company, firm, or corporation on any * * * description of traffic in any respect whatever; or to subject any * * * person, firm, company, or corporation * * * to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The second and third counts of the indictment are framed under the third section, the second count charging in substance that defendant gave the Chicago, Burlington & Quincy Railroad an undue and unreasonable preference and advantage over the Hayward Grocery Company in rates on sugar, and the third count charging that he subjected the Hayward Grocery Company to an undue and unreasonable prejudice by giving the Chicago, Burlington & Quincy Railroad a lower rate on sugar than was given the Hayward Grocery Company. In arriving at a verdict on the second and third counts, you will have to consider and determine the same questions, among others, that arise under the first count; that is to say: (1) Was defendant an agent of the Missouri Pacific Railway Company? (2) Did he charge the Hayward Grocery Company 46 cents per 100 pounds for transporting sugar from Hannibal to Hepler, Kan.? (3) Did he charge the Chicago, Burlington & Quincy Railroad Company only 34 cents per 100 pounds for transporting sugar from Hannibal, Mo., to Hepler, Kan.? and (4) Was the service rendered the Chicago, Burlington & Quincy Railroad a like and contemporaneous service to

that rendered the Hayward Grocery Company, and was it rendered in the transportation of a like kind of traffic under "circumstances and conditions" substantially similar to those attending the service rendered the Hayward Grocery Company? The second count of the indictment charges that the defendant gave the Chicago, Burlington & Quincy Railroad an undue and unreasonable preference, and the third count charges that he subjected the Hayward Grocery Company to an undue and unreasonable prejudice and disadvantage; but the court holds, and so instructs you, that if the defendant charged the Hayward Grocery Company a greater rate than it charged the Chicago, Burlington & Quincy Railroad for a "like contemporaneous service," done under "substantially similar circumstances and conditions," then such act was within the meaning of the law both an undue and unreasonable preference and advantage given to the Chicago, Burlington & Quincy Railroad, and an undue and unreasonable prejudice or disadvantage to which the Hayward Grocery Company was subjected. Therefore, if you find in the affirmative on all four of the questions that I have proposed and before stated, you must return a verdict of guilty on the second and third counts, as well as on the first count. Now, gentlemen, I presume you will have no difficulty in answering the first three of the questions as they are simple questions of fact. The fourth proposition is more difficult, because it involves the inquiry as to what is meant by the statute when it speaks of "a like and contemporaneous service in the transportation of traffic under substantially similar circumstances and conditions." It is impossible for me to explain that phrase in a manner that will fit all cases; hence I shall not attempt it. I will take the precise case that you have to decide, and, in view of the facts testified to, give you a few directions with respect to the clause in question.

In the first place, the service rendered to the Hayward Grocery Company on June 17, 1887, was contemporaneous with that rendered to the Chicago, Burlington & Quincy Railroad on June 15, 1887, within the meaning of the law. In the second place, the service so rendered for the Hayward Grocery Company was like that alleged to have been rendered to the Chicago, Burlington & Quincy Railroad within the meaning of the law, because the same kind of property was carried for each party for the same distance over the same route. The next question is, was the service in both cases rendered under substantially similar circumstances and conditions? This is the vital point. The defendant says the circumstances and conditions were substantially dissimilar, because the Chicago, Burlington & Quincy Railroad Company furnished more traffic, or, if not more traffic, nearly as much traffic to the Missouri Pacific Railway Company as the Hayward Grocery Company and all other Hannibal shippers combined. Well, suppose that to be the fact. It did not under the law render the service to the Chicago, Burlington & Quincy Railroad a service rendered under substantially dissimilar circumstances and conditions to that rendered for the Grocery Company, within the meaning of the interstate commerce law, and did not justify a difference in rate. The fact that one man is a large shipper and another a small

shipper does not entitle the carrier to make a difference in the rate, if the property carried in each case is of the same class, and the distance and route is the same. Defendant next says the circumstances and conditions of the two alleged shipments were substantially dissimilar, because one shipment originated at Hannibal and the other at Chicago, and that in the case of the two barrels of sugar the property was being carried through from Chicago to Hepler, on a through rate of 51 cents per 100 pounds, agreed upon by and between the Missouri Pacific Railway Company on the one hand and the Chicago, Burlington & Quincy Railroad Company on the other. This presents a different question, and on this point I instruct you as follows: If you believe and find from all the evidence in the case that the lines of railroad of the Chicago, Burlington & Quincy Railroad Company and of the Missouri Pacific Railway Company form a continuous line of railroad from Chicago, Ill., to Hepler, Kan., passing through Hannibal, Mo., it being an intermediate shipping point, and that the two roads connect at Hannibal, and interchange traffic at that point; and if you find that prior to June 15, 1887, the Chicago, Burlington & Quincy and the Missouri Pacific Railway Companies had agreed upon and established a through rate from Chicago to Hepler on all property shipped from Chicago to Hepler via Hannibal over such continuous line, and that such established through rate on sugar was 51 cents per 100 pounds from Chicago to Hepler; and if you find that the two barrels of sugar on which defendant is alleged to have charged the Chicago, Burlington & Quincy Railroad at the rate of 34 cents per 100 pounds for the transportation thereof from Hannibal to Hepler was sugar that was received by the Chicago, Burlington & Quincy Railroad Company at Chicago, to be carried over said continuous line to Hepler for said agreed and established rate of 51 cents per cwt.; and that the Chicago, Burlington & Quincy Railroad Company, on receipt of said two barrels of sugar, issued to the shipper thereof the bill of lading for two barrels of sugar that has been read in evidence,—then the court instructs you that the charge for transportation on said two barrels of sugar from Hannibal to Hepler, alleged to have been made by defendant, was not a charge for a service rendered the Chicago, Burlington & Quincy Railroad Company under circumstances and conditions substantially similar to the circumstances and conditions attending the service rendered the Hayward Grocery Company, within the meaning of the interstate commerce act, and you should find the defendant not guilty of the charge laid in the first count of the indictment.

Now, gentlemen, in the event that you find under the last instruction that the services rendered the Chicago, Burlington & Quincy Railroad Company and the Hayward Grocery Company were not rendered under similar circumstances and conditions, and accordingly acquit under the first count, then a further question arises under the second and third counts, which you must consider and determine. Under the third section of the act it is made an offense to give one person an undue and unreasonable preference or advantage, or to subject a person to an undue and unreasonable prejudice or disadvantage. As before remarked,

the second and third counts are under this section. It is shown by the testimony that the Missouri Pacific Railway Company's proportion of the alleged through rate from Chicago to Hepler on sugar is 34 cents per 100 pounds, and that its local rate on sugar from Hannibal to Hepler is 46 cents per 100 pounds. Now, conceding that some difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate is permissible, owing to the different conditions affecting the two shipments, the question that I submit to you under the second and third counts is whether the difference shown in this case between the two rates of 12 cents per 100 pounds is, under all the circumstances of the case, a reasonable difference, or an undue and unreasonable difference, not justified by the different circumstances under which through shipments from Chicago and local shipments from Hannibal are made. If you find that the difference in rate of 12 cents per 100 pounds is an undue and unreasonable difference, and, as before explained, that defendant, as agent of the Missouri Pacific Railway Company, knowingly and willfully gave the Chicago, Burlington & Quincy Railroad the advantage of such difference in the shipment of the two barrels of sugar mentioned in the indictment, then you may return a verdict of guilty on the second and third counts, although you acquit on the first count. If, on the other hand, you find that the difference in the rate now in question is neither undue nor unreasonable, considering all the circumstances and conditions affecting local as compared with through shipments, you will render a verdict of acquittal on the second and third counts. In determining the last question submitted to you, as to the reasonableness or unreasonableness of the difference between the local rate and the Missouri Pacific Railway Company's proportion of the through rate, I give you full liberty to consider all the facts, circumstances, and reasons adduced by the various witnesses in justification of the difference shown, and I ask you to consider the same carefully and fairly without any prejudice or bias whatsoever.

NEW ORLEANS CANAL & BANKING CO. *et al.* *v.* REYNOLDS *et al.*

(*Circuit Court, E. D. Arkansa, W. D.* July 31, 1889.)

1. EXECUTORS AND ADMINISTRATORS—STATUTE OF NON-CLAIM.

Creditors' right of action against the administrator of their deceased debtor accrues from the time the administrator's final account showing assets is settled and approved, notwithstanding appeals are taken from the decree; and on the subsequent death of the administrator's surety their claims are barred by the Arkansas statute of non-claim unless presented against his estate within two years thereafter.

2. SAME—ADMINISTRATOR DE BONIS NON.

The fact that an administrator *d. b. n.* of the estate of the original debtor presented a claim on behalf of that estate against the estate of the administrator's surety, amounts to nothing, as he had no claim to the proceeds of assets already administered.

B. SAME—RIGHTS OF CREDITORS—LACHES.

The administrator, in 1869, reported a certain sum as the proceeds of a sale of property of the estate, and the court by an order of record, directed his attorney not to turn the money over to the administrator, but to keep it subject to the order of the court; but on the administrator's final settlement in 1873, the amount was charged and accounted for as received by him. *Held*, that a suit, brought in 1886 by creditors of the estate against the attorney, was barred on the ground of laches.

In Equity. On final hearing.

Clark & Williams and *W. B. Street*, for complainants.

D. H. Reynolds, for defendants.

BREWER, J. This case is now submitted on pleadings and proofs. The facts necessary for the determination of the questions presented are, briefly, these: Francis Griffin died November 6, 1865. Edward P. Johnson was appointed administrator January 6, 1866. Lycurgus L. Johnson and Cyrus R. Johnson were sureties on his bond. Complainants are creditors of that estate. Their claims were probated July 23, 1866, and April 23, 1867. The defendants are D. H. Reynolds individually and as trustee, and the widow and heirs of Lycurgus L. Johnson, the surety, now deceased. The suit was brought February 11, 1886. The administrator, Edward P. Johnson, died in April, 1872, and in May, 1872, D. H. Reynolds, his counsel, was appointed his administrator. In 1876, Lycurgus L. Johnson, the surety, also died, and J. M. Worthington and T. Johnson were appointed administrators on August 30, 1876. In September, 1873, the final account of E. P. Johnson as administrator of Francis Griffin was settled and approved by the circuit court, a court having jurisdiction of estates, and a balance found due the estate. Exceptions were taken to this settlement, and appeals taken to the supreme court, and the litigation continued until April 17, 1883, when the account was finally settled in the circuit court. An appeal was again taken to the supreme court, but that appeal was not prosecuted, and the creditors had a transcript filed, and the appeal dismissed in the supreme court on the 21st day of March, 1885. Complainants, as creditors of the estate of Francis Griffin, seek to recover the amount found due the estate upon the final settlement of the accounts, and the defenses are the statutes of non-claim and limitation. The statute of non-claim of this state bars all claims against an estate unless presented within two years.

Noticing, first, the case as it proceeds against the widow and heirs of Lycurgus L. Johnson, the bill seeks to charge them as in possession of property which equitably belongs to his estate, but it will not be doubted that no claim can be enforced against them on this account which is not also enforceable against the estate. If the estate be discharged, they who hold property which equitably belongs to the estate are also discharged. Now, administration was taken out on the estate of Lycurgus L. Johnson on August 30, 1876, and this suit was not brought until nearly 10 years thereafter. If the claims were in condition to be enforced against the estate at the time administration was taken out, the

statute of non-claim long since barred them as against the estate. This is the settled law of Arkansas, which, of course, is binding on this court. When the final account of the administrator of Francis Griffin was stated and settled, the balance in his hands was due to the creditors or heirs of the estate; and, if it was not paid, a cause of action instantly arose upon the bond. These creditors could have proceeded at once against the sureties, and upon the death of the surety, Lycurgus L. Johnson, could have presented their claim against his estate. Failing to do so, their claim was barred within two years thereafter. The fact that appeals were taken to the supreme court in respect to this final account, and litigation continued for years, in no manner abridged their right to proceed on their account as stated and settled, and when stated and settled by the circuit court. It is true that an administrator *de bonis non* was appointed of the estate of Francis Griffin, who presented a claim in behalf of that estate to the administrators of Lycurgus L. Johnson, but the act amounted to nothing. He had no claim as administrator *de bonis non* against the estate of the administrator or the sureties on his bond for the proceeds of assets already administered. This was the common law, and this, by the decision of the supreme court of the state of Arkansas, is the law of this state. *Beall v. New Mexico*, 16 Wall. 535; *U. S. v. Walker*, 109 U. S. 258, 3 Sup. Ct. Rep. 277; *Finn v. Hempstead*, 24 Ark. 117; *Oliver v. Rottaken*, 34 Ark. 144; *Williams v. Cubage*, 36 Ark. 315. Hence, as the creditors failed to present their claims in time against the estate of Lycurgus L. Johnson, they cannot now proceed against the estate or against those said to have property which equitably belongs to the estate. So far as the defendant D. H. Reynolds is concerned, it appears that in July, 1869, the administrator had under orders of the court sold certain property for \$6,700. His report of sale was filed on November 6, 1869. It was then confirmed by the court, and the defendant Reynolds, the attorney of the administrator, was directed by the court not to turn the money over to the administrator, but to keep it, subject to the order of the court, and this, it is claimed, made him a special master to hold these funds. It appears, however, that in the final settlement of accounts this amount was charged to the administrator as received by him, and accounted for in the final settlement; and the present complainants are pursuing the heirs of the administrator's surety to recover the balance as established by that settlement, including therein this amount of \$6,700. Whether they are estopped by this proceeding it is immaterial to inquire, for, if the order was one which the court had power to make, it was an order placed upon the records, and of which the complainants, as creditors, are charged with notice, and they are guilty of laches in thus waiting 17 years before seeking to charge him personally, especially as for 13 years the report of the administrator has been on file, showing the receipt of the money by him. My conclusion, then, is in favor of all the defendants; that the laches of complainants and the statute of non-claim interpose a perfect bar to any recovery. Decree will be entered dismissing the bill.

THE BORROWDALE.

(District Court, D. Oregon. July 16, 1889.)

1. STATUTES—EVIDENCE—OREGON COMPILATION.

The compilation of the general statutes of Oregon, provided for in the act of February 26, 1885, and published in two volumes, with the certificate of the governor, of August 9, 1887, prefixed thereto, as required by said act, is *prima facie* evidence of the general statutes of Oregon then in force, which may be cited and referred to in both judicial and legislative proceedings, by the chapter, title, and section as therein arranged, set down, and enumerated.

2. SAME—AMENDMENT AND REVISION.

An act amendatory of another act should contain the sections of the latter act as amended, at full length, but it need not also contain such section as unamended. The act amended need not be published at full length in the amendatory act, unless the amendments thereto amount to a revision of the same, by producing some change in every section thereof.

3. SAME—TITLE—EXPRESSION OF SUBJECT-MATTER.

An act entitled merely "An act to amend a certain section of the Compilation of 1887," is void for want of expression of the subject of the same in the title thereof; but an act entitled "An act to amend an act relating to pilotage" purports itself to be an act relating to pilotage, and the subject thereof is therefore sufficiently expressed in the title.

(Syllabus by the Court.)

In Admiralty. Libel for pilotage.

Horace B. Nicholas and Edward N. Deady, for libellant.

Cyrus A. Dolph, for defendant.

DEADY, J. This suit is brought by the libellant, T. F. Neil, against the ship Borrowdale, to recover a balance of \$92.06, alleged to be due the libellant for pilotage.

It is alleged in the libel that on May 30, 1889, the libellant was a duly-licensed pilot for the Columbia river bar, and that on that day he took charge, as such pilot, of the Borrowdale, and brought her in over the bar to her anchorage at Astoria; that the Borrowdale then drew 20 feet of water, and her registered tonnage was 1,197 tons; and that for said service the libellant is entitled to demand and receive the sum of \$176, of which sum only \$83.94 has been paid, leaving a balance due the libellant of \$92.06.

The master and claimant, George Guthrie, excepts to the libel, stating that it appears therefrom that the libellant has received for his services all that by law he is entitled to demand or receive therefor.

This exception is in the nature of a demurrer to the libel, and raises the question whether the rate of compensation which the libellant is entitled to receive is that fixed by the law as it stood prior to February 18, 1889,—\$8 per foot for the first 12 feet of draught of the vessel, and \$10 per foot for each additional foot,—or that prescribed by the act of that

date, (Sess. Laws, 11,)—\$4 per foot draught, and two cents a ton for each ton over 1,000 tons registered measurement.

For the better understanding of this question it may be well to premise that on October 20, 1882, an act was passed entitled "An act to provide for pilotage on the Columbia and Willamette rivers." By section 28 of this act the compensation for bar pilotage was fixed at \$6 a foot for the first 12 feet draught, and at \$8 for each additional foot.

On February 18, 1885, an act was passed, entitled "An act to amend an act entitled" as above. Sess. Laws, 34. By this act, said section 28 was so amended as to make the compensation of bar pilots \$8 a foot for the first 12 feet draught and \$10 for each additional foot. On November 25, 1885, an act was passed entitled "An act to amend section 21 of an act entitled" as last above. Sess. Laws, 23. The act referred to as being thereby amended has no section 21, and what was probably meant was section 21 of the act of 1882, which was amended by section 1 of the act of February 18, 1885. However, the compensation of pilots was not thereby affected. On February 21, 1887, an act was passed entitled "An act to amend an act entitled" as last above, "and also sections 3 and 28 of the act of February 18, 1885." Sess. Laws, 95. But the last-named act had no section 28, and the section 28 doubtless intended was the section so numbered in the original pilot act of 1882, which was amended, as above, by the act of February 18, 1885. Neither did this amendment change the rates for bar pilotage.

On February 26, 1885, an act was passed entitled "An act to provide for collecting, compiling, and distributing the laws of Oregon, with annotations." Sess. Laws, 142. This act authorized the secretary to purchase 1,000 copies of such Compilation when prepared; the same to be first "submitted to the governor for examination," and to be by him certified "to contain all the general statutes in Oregon in force, * * * arranged * * * in the order and method of a code, and in sections numbered consecutively from one to the end of the entire body of general statutes, with marginal notes showing the date of the passage of each section." This "Compilation" was to be in two volumes, and so arranged that the codes should be in the first volume, and the other general statutes in the second one.

Section 4 of the act provides: "From and after the time when the said *compilation* shall be examined and certified by the governor, as hereinbefore provided, it shall be in force, and shall be received in all the courts of the state as an authorized compilation of the statutes of Oregon."

On August 9, 1887, the governor prefixed his certificate to a "Compilation of the Statutes of Oregon," published in two volumes, made by "William Lair Hill," copies of which appear to have been purchased and distributed by the secretary in pursuance of said act of February 26, 1885, and properly known as the "Compilation of 1887."

The pilotage act of 1882, and the several acts amendatory thereof, passed in 1885 and 1887, as above stated, constitute title 1 of chapter 66 of this compilation.

On February 18, 1889, in this state of the law on the subject of pilotage, an act was passed entitled "An act to amend title 1 of chapter 66 of Hill's Annotated Laws of Oregon relating to pilotage at the Columbia river bar and on the Columbia and Willamette rivers."

By this act, sundry sections of this title were amended so as to read as therein set forth. Among these is section 3918, which appears, from the subject-matter and the marginal note thereto, to be section 28 of the original act of 1882, as finally amended by section 2 of the act of 1887.

The enactment of this section in the amendatory act is in this form:

"Sec. 7. That section 3918 of Hill's Annotated Laws of Oregon be, and the same is hereby, amended so as to read as follows:

"Sec. 3918. The compensation for piloting a vessel upon or over the bar pilot grounds per foot draught of said vessel is as follows: For piloting an inward or outward bound vessel to or from Astoria over the bar, or from within the bar to the open sea, four dollars per foot draught of said vessel, and two cents a ton for each ton over one thousand tons registered tonnage of said vessel. * * *

The compensation which the libelant has received is all that the act of 1889 allows him to demand.

Admitting this, the libelant contends that this act is invalid, because passed in contravention of sections 20 and 22 of article 4 of the constitution. It is also admitted that if the contention of the libelant, in this respect, is right, he is entitled to demand and receive the compensation provided in section 3918 of the Compilation of 1887 of section 2 of the act of 1887.

The special grounds on which the validity of the act is impugned are these:

(1) The "subject" of the act is not expressed in the title thereof, as required by section 20 of article 4 of the constitution, which declares, "Every act shall embrace but one subject, * * * which subject shall be expressed in the title."

(2) The act or title sought to be amended is not set forth and published at full length, as required by section 22 of said article, which declares, "No act shall ever be revised or amended by mere reference to its title, but the act revised or section amended shall be set forth and published at full length."

(3) The reference in the act to "section 3918 of Hill's Annotated Laws of Oregon" is "meaningless," as there are no such "Laws" known to the law of Oregon.

It would have been proper and convenient if the act of 1885 had declared by what name the compilation of the laws therein provided for should be known and cited, but this was not done, and the sufficiency of any designation of the same, or reference to it, must depend on the circumstances of the case.

The act of 1885 contemplates that the general laws of the state will be "collected, compiled, and annotated by W. Lair Hill;" and the certificate of the governor, prefixed to what purports to be such compilation,

states that it was compiled and annotated by "William Lair Hill," who is assumed to be the same person as "W. Lair Hill."

Section 4 of the act of 1885 designates the work as a "Compilation," and declares that when certified by the governor, as required by the act, "it shall be in force and shall be received in all the courts of the state as an authorized compilation of the statutes of Oregon."

It is not admitted that the legislature could by any such means make a law, and therefore the words "shall be in force" may be rejected as surplusage.

But it was competent for the legislature to authorize this compilation of the laws otherwise "in force," and to provide that the volumes in which it should be published, and the designation of the laws therein by chapters, titles, and sections, with the corresponding sections of the original acts in the margin, should thereafter be evidence of what are the general statutes of Oregon, and how they are divided and enumerated in chapters, titles, and sections. For instance, the legislature may provide that section 2 of the act of February 21, 1887, prescribing the compensation of the Columbia bar pilots, may hereafter be cited and known as "section 3918 of a Compilation of the General Laws of Oregon." And, in my judgment, that is what the legislature has done; so that said section 2 may now in all cases, in the legislature and the courts, be cited and referred to as "section 3918 of the Compiled Laws of Oregon." See *People v. Pritchard*, 21 Mich. 241.

Still the question remains: Does the reference in the act of 1889 to "section 3918 of Hill's Annotated Laws of Oregon" sufficiently indicate the compilation of the laws authorized by the act of 1885?

As the act has not provided by what name this compilation shall be known, it may be designated by any word or phrase which will indicate with reasonable certainty that it is meant or intended.

The most proper and natural designation of the publication is that used in the act authorizing it,—compilation. The work is not a "code," although it contains the Codes of Oregon as well as the miscellaneous laws, "arranged under appropriate heads and titles in the order and method of a code." The annotation is a collateral and subordinate part of the work; and the phrase, "Annotated Laws," is by no means an accurate or definite designation of the publication. The "Compilation of the General Laws of Oregon (1887)" is a full and complete title of the work, which in common practice may be conveniently shortened to "Compilation (1887)." And to this may be prefixed, according to the taste of individuals, and for greater certainty, the name of the compiler.

It was said, on the argument of the exception, that the work does not contain "all the general statutes of Oregon," and a particular omission was mentioned. It did not, however, relate to the subject of pilotage. Besides, the certificate of the governor is *prima facie* evidence of the fact that it does contain all the statutes of a general nature, in force at the date of the certificate.

I say "*prima facie*," for certainly it may be shown, by a comparison with the original roll, that there is an error in the compilation, either

of omission or commission. But probably this could not be done by a comparison with a certified copy of the roll, as that would be the certificate of the secretary of state against that of the governor.

The volumes to which the governor's certificate is prefixed are *prima facie* the compilation provided for in the act of 1885. The section 3918 of the same appears, by the marginal note therein, to be section 2 of the act of 1887, regulating the compensation of Columbia bar pilots; and the amended section 3918, as "set forth" in the act of 1889, is upon the same subject, and almost in the same words. If the act of 1889 had referred to the section thereby amended as "section 3918 of the Laws of Oregon," there being no such section except in this authorized publication, the inference would be reasonable that such was intended by the legislature. The additional words "Hill's Annotated," prefixed to the words "Laws of Oregon," only serve, under the circumstances, to strengthen this conclusion, because it appears that Mr. Hill prepared and annotated this Compilation.

This is not like the case of *Harland v. Washington Territory*, 3 Wash. T. 131, 13 Pac. Rep. 453, cited by counsel for the libellant. In that case an act entitled "An act to amend section 3050 of chapter 238 of the Code of Washington Territory," said Code being, as appears, a private and unauthenticated compilation of the laws of Washington, was held void and inoperative, because there was no such section known to the laws of the territory as the one sought to be amended.

My conclusion on this point is that the Compilation of August 9, 1887, is an authentic publication of the general statutes of Oregon then in force; that it may, for both judicial and legislative purposes, be properly cited or referred to by the designation of chapter, title, and section as therein arranged and set down; and that the legislature intended to and did refer to section 3918 of said Compilation, in the passage of said act of 1889, at section 7 thereof, for the purpose of amending the same as therein set forth.

On the second point but little need be said. The act of 1889 is not, in my judgment, a revision of the act of 1882, as amended by the acts of 1885 and 1887, and compiled and published in title 1 of chapter 66 of the Compilation of 1887. The purpose of the former act, and the effect of it, is to amend certain sections of the latter or the compilation thereof, each section so amended being the subject of a separate enactment, and set forth in the amendatory act and published therein at full length.

What is a revision of an act as distinguished from an amendment thereof, within the purview of the constitution, which makes it necessary to set forth at full length in the amendatory act the act as revised, it is not necessary now to decide. No authority was cited by counsel on the point. My impression is that, as long as there is one section of the original act untouched, there is no revision, and it is sufficient to set forth and publish in the amendatory act only the sections actually amended, and as amended. In this case an act or title containing 101 sections was amended by changing only 10 of them and repealing 2. Neither is

this an amendment by a "mere reference" to the title of the act amended. On the contrary, each section amended is referred to by its number in the compilation, and "set forth and published at full length" in the amendatory act, as amended. The claim, once made, that it is necessary to set forth and publish at full length, in the amendatory act, the section amended, both before and after amendment, is long since denied. *Portland v. Stock*, 2 Or. 69; *People v. Pritchard*, 21 Mich. 241.

The case of an amendment of a section of an act of compilation, by simply repealing a distinct paragraph, clause, or subdivision thereof, or by adding thereto such a paragraph, clause, or subdivision, the same being supplemental in its nature, whereby the operation or effect of the words of the original section is not changed or affected, but the operation of the section, as amended, is merely enlarged or made to include additional subjects, or become operative under other circumstances, is a peculiar one, and probably no other publication or setting forth is necessary, in the first instance, than that of the amendatory or repealing act, and, in the second one, of the additional paragraph, clause, or subdivisions.

On the first point, counsel for the libelant insist that the "subject" of the act is not expressed in the title thereof, because it appears therefrom that the object of the act is "to amend title 1 of chapter 66 of Hill's Annotated Laws of Oregon," and it does not appear therefrom what is the "subject" of such title 1.

The purpose of the constitution in requiring the "subject" of an act to be expressed in the title thereof is apparent, and has often been stated by courts and judges with great unanimity. Briefly, it is to give notice to the members of the legislature and others concerned of the general scope and purpose of the proposed legislation, and to prevent the enactment of laws containing clauses and provisions not indicated by the title, or having no proper connection with the subject as therein expressed. Therefore, the constitution is not complied with in this respect by the expression of a or any subject in the title, but the subject of the act must be truly expressed. *People v. Hills*, 35 N. Y. 453. "But," as was said by Mr. Justice COOLEY, in *People v. Mahaney*, 13 Mich. 495, "this purpose is fully accomplished when the law has but one general object, which is fairly indicated by its title." See, also, *People v. Banks*, 67 N. Y. 571.

If the title of this act ended with the words "Laws of Oregon," there is no doubt in my mind that the act would be void for want of the expression of its "subject" in the title. An act simply entitled "An act to amend a certain section of this Compilation," contains no statement of the "subject" in the title, and is void. No one can say from the reading of the title what the "subject" of the act is. *Harland v. Washington Territory*, 3 Wash. T. 142, 13 Pac. Rep. 453, is a case directly in point. It was there held that the "subject" of the act was not expressed in such title, and that the act was, therefore, void. The question is thoroughly considered in the opinion of the court, and the conclusion maintained by argument and authority which are unanswerable.

The "subject" must be expressed, stated, set forth in the title. It is

not sufficient if it (the subject) may be found elsewhere, as in the section to be amended, from what is said or suggested in the title of the amendatory act.

But the title of this act goes further, and says "laws of Oregon relating to pilotage at the Columbia river bar and on the Columbia and Willamette rivers." No expression of the "subject" of the act need be more explicit than this. From the whole title of the act it appears that the "subject" of the title of the Compilation, which it is the object of the act to amend, is "pilotage" on the waters therein mentioned.

If the "subject" of an amendatory act is ever sufficiently expressed in the title thereof, when the same contains the title of the act to be amended, in which the "subject" of the latter act is sufficiently expressed, then this is a good title.

An act entitled "An act to amend an act relating to pilotage," purports in such title to relate to pilotage also. That is the subject of the act as expressed; and, if there is anything in the act which does not relate to pilotage, the constitution avoids it. In my judgment an act entitled "An act to amend an act entitled 'An act to provide for pilotage on the Columbia and Willamette rivers,'" does express the subject thereof in the title. Such is the title of the amendatory act of February 18, 1885. Sess. Laws, 34. An act purporting by its title to be an act to amend another act relating to pilotage does thereby itself purport to be an act relating to pilotage, as much so as if it had been expressed in so many words.

But if the law is otherwise on this point, and it is not enough that the subject of the act to be amended is expressed in its title, which title is incorporated in the title of the amendatory act, the words in the title of the act in question ("to amend title 1 of chapter 66 of Hill's Annotated Laws of Oregon") may be omitted therefrom as surplusage. The title would then read: "An act relating to pilotage at the Columbia river bar and on the Columbia and Willamette rivers." This is certainly a good title, and would have been so if it had ended with the word "pilotage."

It is not necessary that the title should also show that the act is an amendatory one. It is sufficient if the "subject" thereof—the person or thing on or concerning which it is intended to operate—is expressed therein. If it is intended thereby to amend some prior act on that subject, that must be done by proper and apt words and references in the body of the act, as prescribed in the constitution.

My conclusion is that this act was passed in conformity with the fundamental law, and is therefore valid. This being so, the libellant is not entitled to recover anything beyond the sum already paid to him for his services as pilot on the Borrowdale.

The exception is sustained, and the libel dismissed.

BIRTWELL v. SALTONSTALL, Collector.

(Circuit Court, D. Massachusetts. August 6, 1889.)

CUSTOMS DUTIES—CLASSIFICATION—IRON BEAMS.

Pieces of iron specially manufactured, fitted, purchased, and shaped as parts of a particular floor frame are not dutiable, under 22 U. S. St. at Large, 499, as "iron or steel beams, girders, joists * * * and building forms, together with all other structural shapes of iron," but fall within another clause of the schedule covering "manufactures, articles, or wares not specially enumerated, * * * composed wholly or in part of iron," although they might be merchantable as beams, or other articles specifically enumerated, when the frame is taken to pieces.

At Law.

Action by Joseph Birtwell against Leverett Saltonstall, collector of the port of Boston, to recover duties improperly collected.

C. L. Woodbury and *J. P. Tucker*, for plaintiff.

T. H. Talbot, Asst. U. S. Atty., for defendant.

COLT, J. The plaintiff in this case imported from Antwerp the iron-work for the foundation or frame of the floor in the third story of the new court-house in Boston. Each piece of iron was manufactured, fitted, punched, and shaped for its special place in the floor frame. The defendant exacted a duty of 1½ cents per pound upon all of this iron, under that provision of schedule C, of the act of March 3, 1883, which provides as follows:

"Iron or steel beams, girders, joists, angles, channels, car-truck channels, T's, columns, and posts, or parts or sections of columns and posts, deck and bulb beams, and building forms, together with all other structural shapes of iron or steel, one and one-fourth of one cent per pound." 22 St. at Large, 499.

The plaintiff contends that this iron-work should only have been assessed with a duty of 45 per cent. *ad valorem*, under the following provision in the same schedule:

"Manufactures, articles, or wares, not specially enumerated or provided for in this act, composed wholly or in part of iron, * * * and whether partly or wholly manufactured, forty-five per centum *ad valorem*."

The contention of the plaintiff is that the description of iron provided for in the clause of the law under which the defendant acted refers to such described forms and shapes of iron in their ordinary completed condition as such forms and shapes, and does not refer to or include such described forms and shapes after they have been advanced, or taken for a special, particular use, and manufactured into a new product. On the other hand, the collector contends that as the importation was composed of beams, girders, etc., although they may have been designed for a special purpose, the duty was properly assessed, and, further, that the general words, "all other structural shapes of iron or steel," in the last part of clause referred to, are broad enough to cover this importa-

tion, if it cannot, strictly speaking, be classified under the first enumeration.

Upon the face this case seems to raise a nice question of construction under the two provisions of the statute which have been cited; but, when we come to examine the policy of the courts and the treasury department in their interpretation of similar laws relating to the assessment of duties, I do not think the proper solution of the question is very difficult. It must be always borne in mind that what was imported in this instance was not the beams, girders, and angles as known to commerce, nor a structural form, commercially speaking, but a new article of manufacture. The fact that this floor frame may have been composed of beams and other articles specifically enumerated in the same clause of the statute, or that when the frame was taken to pieces the beams might have been sold as beams, or have become, in a commercial sense, merchantable beams, (which is not proved, the weight of evidence being rather to the contrary,) does not, in my opinion, change the classification which should be made. A steam-engine or a loom may be made up of many things specifically enumerated in the statute, and it may be when separated into their parts some of those parts might become merchantable, commercially speaking, but, for purposes of revenue classification, the article imported retains its identity as one thing. If the thing imported has passed through a process of manufacture, the stage or degree of manufacture seems to have no weight in the determination of a proper assessment. *Spring Works Co. v. Spalding*, 116 U. S. 541, 6 Sup. Ct. Rep. 498, is an instructive case. The article there imported was known as "steel tire blooms," and it was made by reheating and hammering a round ingot of steel. The court held that it was properly assessed under the provision "all manufactures of steel * * * not otherwise provided for, * * * but all articles partially manufactured, shall pay the same duty as if wholly manufactured;" and that it did not come under the provision, "steel in any form not otherwise provided for." So, in the present case, the articles were once beams, girders, and angles, but from being ordinary beams, girders, and angles they have passed through a stage of manufacture, by fitting, shaping, cutting, and punching, and they have become component parts of a frame for the foundation of a floor in a particular building. When the materials composing this frame were manufactured into something else, designed for a special purpose, they were no longer dutiable as such, but the product became dutiable as a manufacture of iron. In *Badger v. Ranlett*, 106 U. S. 255, 1 Sup. Ct. Rep. 346, 350, the importation was strips of band and hoop iron, cut a certain length, and tied up in bundles, with buckles attached to each bundle. The law provided for "band or hoop iron," and also for manufactures of iron not otherwise provided for. The collector exacted duties as upon band and hoop iron, while the importer contended that they were a manufacture of iron not provided for, namely, cotton ties, and the court so held. In the unreported case of *Whitney v. Arthur*, in the Southern district of New York, referred to in executive document, No. 22, p. 52, of the

47th congress, the merchandise was galvanized iron, cut into sheets, and ready for use as roofing iron. It was classified for duty as galvanized iron, but the importer claimed that its correct classification was under manufactures of iron not otherwise provided for. The trial resulted in favor of the importer, and the department acquiesced in the decision, and directed the payment of the excess of duties exacted. In *Scott v. McClung*, tried in the circuit court for the Southern district of Ohio, in 1883, and referred to in treasury synopsis as decision 6,138, the article imported was corrugated sheet-iron. The law provided for "sheet-iron, common or black," also for "manufactures of iron." The jury found for the plaintiffs, classifying the imports as manufactures of iron, and the department accepted the decision as conclusive.

The treasury department have made many rulings enforcing the principle of interpretation contended for by the plaintiff in this case. In 1869, synopsis 513, the importation was tin plates turned down at the ends, and fastened together for use as roofing tin, and they were held to be dutiable as manufactures of tin, and not as tin in plates or sheets. In 1888, synopsis 8,880, sheets of zinc specially made for printing purposes were held dutiable as manufactures of zinc, and not as zinc in sheets. Other instances might be given, but enough has already been said to show the rulings of the courts and of the department on this question.

I had some doubt in my own mind, at first, as to what might properly be included under the term "structural shapes of iron," as used in the clause relied upon by the collector; but I am satisfied, from the specific enumeration which precedes, and from the evidence of those engaged in this branch of business, that these words were not intended by congress, and do not, in a commercial sense, cover the importation in controversy in this case. It appears from the evidence that, speaking in a broad commercial sense, the term "merchantable iron" is limited to rounds, squares, and flats; that anything else, such as beams, girders, angles, etc., having any special shape, and intended to be used in the form of a structure, is a structural shape. In this sense this floor foundation may be said to be manufactured of structural shapes. To give these words a wider signification would be to extend them beyond known commercial usage, and if we do that it may be difficult to draw any line; for, in one sense, most every article of iron imported may be said to possess structural shape.

For these reasons I am of opinion that judgment should be entered in this case for the plaintiff for the excess of duties exacted by the defendant. Judgment for plaintiff.

*In re MITCHELL.**(Circuit Court, E. D. Virginia. July 30, 1889.)***FINES—COSTS—PAYMENT IN VIRGINIA COUPONS.**

When a person, arrested under a *capias pro fines* in favor of the commonwealth of Virginia for the satisfaction of certain fines and costs due the state, tenders the amount of the same in genuine coupons cut from the state bonds, which by law are receivable for all fines due the state, he is entitled to his discharge, and the acceptance of the coupons cannot be refused on the ground that the costs belong to the officers, as there is no indebtedness on the part of the prisoner to the officers individually for their work and labor. The costs are a part of the punishment, and the officers claim them not individually, but as officers of the state.

Application for *Habeas Corpus*.

A. B. Guigon, for petitioner.

R. A. Ayers, Atty. Genl., for respondent.

BOND, J. The petition for this writ alleges that Marion Mitchell is illegally confined by the authorities of the state of Virginia, and in violation of the constitution of the United States forbidding a state to pass any law to impair the obligations of a contract. The petitioner shows that he was convicted of a misdemeanor on the 18th of July, 1889, in the hustings court of the city of Manchester, and by that court was fined the sum of \$50 and \$19.20 costs, which he was adjudged to pay or stand committed until the said fine and costs were paid. And that at a subsequent time in the same court he was fined \$20 after conviction for a similar offense, and \$13.20 costs, which he was likewise adjudged to pay or stand committed until he did so. The petition alleges that after his said conviction and the imposition of the said fines and costs he tendered the amount of the same in genuine coupons cut from the bonds of the state of Virginia, which by law were made receivable for all debts, taxes, dues, and demands of the state of Virginia, but that the officers of the state refused to receive them in payment of the said fines and costs, and he was committed to jail, where he now illegally languishes. The return to the writ, made by H. Fitzgerald, the sergeant of the city of Manchester, shows that he holds the petitioner in custody by virtue of two writs of *capias pro fines* in favor of the commonwealth of Virginia, which are in these words:

"The Commonwealth of Virginia, to the Sergeant of the City of Manchester, Greeting: We command you that you do not omit for any liberty in your bailiwick, but that you take Marion Mitchell, if he be found within the same, and him safely keep until he satisfy us fifty dollars, which we lately in our corporation or hustings court for the city of Manchester recovered against the said Marion Mitchell for a fine assessed on him on conviction of a misdemeanor against our peace and dignity; also nineteen dollars and twenty cents which to us in the same court were adjudged for our costs in that behalf expended, whereof the said Marion Mitchell is convict as appears to us of record, and have this writ, &c., in the usual form."

The other *capias* is a counterpart of the one recited, except that the amount of fine and costs is less. The return admits the tender of coupons for the fine and costs, and states that the sergeant was willing to receive them in payment of the fines imposed, but refused to receive them the costs, because such costs belonged, not to the state of Virginia, but to the officers of the hustings or corporation court of Manchester. The question, then, is whether the coupons in question are receivable as well for the costs as the fines imposed by the hustings court. The court of appeals of Virginia has decided that such coupons are receivable for all fines due the state, and we are under no necessity to determine whether or not a fine imposed for a misdemeanor is a public due or demand. The *capias* which we have quoted sets out in plain words that the costs were adjudged to "us," for "our" costs in that behalf expended. If any other body or person has recovered anything against the defendant, Mitchell, it does not appear by the *capias*. It shows that what he is held in custody for is the demand which the court has allowed the commonwealth to make for certain costs which the state has expended, in punishing him for his offense against its peace and dignity. The claim of the court's officers is not mentioned in the commitment.

Now, how the state may remunerate her officers for their services to her in this behalf is nothing to the purpose. When the party pays what is demanded of him, if he pay in coin, the state may allow its court officers to deduct the fees due them by statute, and pay the balance into the state treasury, or she may require the whole amount to be paid into the treasury at once, and parcel out the statutory costs to her officers as she may by law provide. But in no sense can it be claimed that there is any indebtedness on the part of Mitchell to these officers in their individual capacity for their work and labor in his behalf expended. The costs are a part of his punishment for disobeying the laws of the state. They are imposed by statute, and the officers of the court claim them, not in their individual capacity or name, but in their capacity as officers of the state, and in her name, as the *capias* sets out. If these costs be debts due the officers, personally, they could sue Mitchell, the petitioner, for them, each in his own name. But after recovery he could not be imprisoned for non-payment of the judgments, for the laws of Virginia forbid all imprisonment for debt, except under peculiar circumstances; and yet, here it is claimed he can by virtue of this *capias* be arrested, a *capias ad satisfaciendum* issue, and be imprisoned for a debt not due the state, but personally to its officers. In my judgment the petitioner is entitled to his discharge, after surrendering to the sergeant the coupons heretofore tendered for his fines and costs.

WEBSTER *et al.* v. OVENS.

(Circuit Court, N. D. New York. July 16, 1889.)

PATENTS FOR INVENTIONS—PRIOR USE.

Letters patent No. 269,535, granted to Walter S. Ovens, December 26, 1882, for an improvement in cake-machines, claims as novel a machine with an intermittingly-moving endless apron for carrying the tray along as the cakes are deposited thereon, combined with a vertically-movable dough-box, and a pan-supporting table, and a material box and mechanism for moving one towards and away from the other, thus depositing the material in the pan. Defendant's machine had a stationary dough-box, with a vertically-moving apron, and it had been in public use for more than two years before the Ovens patent was applied for. *Held*, that a bill to restrain defendant's use of his machine as an infringement of the Ovens patent should be dismissed.

James A. Allen, for complainants.

John J. Bonner, for defendant.

BLATCHFORD, Justice. This is a suit in equity brought by George B. Webster, Horace J. Harvey, and Francis J. Henry against Jeanette Ovens for the infringement of letters patent No. 269,535, granted to Walter S. Ovens, December 26, 1882, for an "improvement in cake-machines." Only claims 1 and 4 of the patent (there being 5 claims) are alleged to have been infringed. In regard to the subject-matter of those claims the specification of the patent says:

"Cakes such as my invention is adapted for making have heretofore been made by means of a canvas or rubber-cloth bag held and worked by the hands of the operator, the bag being provided with a small opening at the bottom. Into this bag a sufficient quantity of the soft cake material is placed, the opening at the bottom being kept closed by the hand until it is required to drop some of the material to form a cake, when the hand is opened slightly, and the necessary quantity drops onto the tray; or, if it does not flow fast enough, a slight pressure from the hand forces it out. The bag is now quickly moved up, and, if required, the opening in the bag is closed by the hand. This operation drops and separates a sufficient quantity to form a cake, and is repeated until the tray is filled. The object of my invention is to produce a machine for making such cakes more rapidly, more uniformly, and more cheaply than can be made by hand; and it consists of a cake-machine provided with the usual endless apron, and a suitable means for giving it an intermittent movement, in combination with a vertically-reciprocating dough-box provided with the usual follower and mechanism for forcing the dough or cake material through one or more openings in the bottom of the box. The object in making the dough-box movable vertically is that it may deposit a portion of the cake material upon the tray, from each opening, during its downward movement, and separate the same from the bottom at some point, during its upward movement, as will be more clearly hereinafter shown."

The specification also describes, and the drawings of the patent show, a modification wherein the endless apron moves vertically up and down to and from a stationary dough-box. Claims 1 and 4 are as follows:

"(1) In a cake machine, an intermittingly-moving endless apron for carrying the tray along as the cakes are deposited thereon, in combination with a vertically-movable dough-box provided with a follower, L², and a suitable

mechanism, substantially as specified, for giving it the necessary movements."

"(4) In a cake-machine, the combination, with a material box, of a pan-supporting table, and mechanism for vertically moving one towards and away from the other, whereby, when the machine is in operation, the material flows from the nozzle upon the pan, and, when the deposit is made, the connection between the deposit and the box breaks, substantially as set forth."

It is not contended that the defendant has not used mechanism covered by claim 4. The plaintiffs contend that claim 1 has also been infringed. In the defendant's machine the dough-box does not move vertically, but is stationary, and the endless apron moves vertically up and down to and from a stationary dough-box. The answer sets up in defense that, prior to the alleged invention by the patentee of the improvements covered by his patent, they were used at the city of New York by various persons named, and also at Chicago, Ill., by two persons named. This defense is satisfactorily established by the evidence in regard to claims 1 and 4, in respect of machines like that used by the defendant, with a vertically-moving endless apron. So, also, is the defense in regard to the same machines which the answer sets up were in public use by the same persons, and at the same places, for more than two years prior to the application of the patentee for his patent. The bill is dismissed, with costs.

UNION PAPER-BAG MACHINE CO. *et al.* v. WATERBURY *et al.*

(Circuit Court, S. D. New York. July 13, 1889.)

1. PATENTS FOR INVENTIONS—REISSUE—PAPER BAGS.

Reissued letters patent No. 10,083, granted April 11, 1882, to Mark L. Deering, describe an invention consisting in a novel mode of folding and pasting a piece of paper into the form of a quadrangular, flat-bottomed bag. The original patent described the process as follows: "By making, in a sheet of paper or blank the folds, B and C, then pasting together the two ends, A, A, forming the body or tube of the bag, then forming the fold E, at one end of said body or tube, and the inwardly projecting triangular folds, H, H, side folds, G, G, and fold, I, upon which is then folded the lap, J, secured in place by pasting." The reissued letters omitted in terms the second step, "forming the fold, E, at one end of said body or tube," but recited as its second step, "then spreading open one end of said body or tube." *Held*, that this was the equivalent of the original, as it involved the previous formation of the fold, E, or an equivalent determination of the part of the tube to be made into the bottom of the bag.

2. SAME.

The reissued patent contained a second claim for "a bag consisting of a bellows-sided tube having a satchel bottom and inward triangular folds, which form part of its two sides when distended." The application for the original contained a claim similar to this for a bag, irrespective of the process, but it was rejected, apparently because anticipated, and the claim was withdrawn. *Held*, that the patentee thereby waived his claim for a bag as a new article of manufacture, and that the reissue was obtained for the mere purpose of enlarging the monopoly of the patent.

3. SAME.

Under such circumstances it is immaterial that the application for a reissue was made within two years from the time of the original grant.

4. SAME—INFRINGEMENT.

In the process described in the patents granted subsequent to the patent in suit to William A. Lorenz and William H. Honiss, the determination of the transverse line to define the part of the paper that is to be made into the bottom of the bag is effected by the use of a presser plate which marks the line without doubling back the part of the paper to be manipulated, as is done in the patent in suit, and the order of making the final laps, I and J, is changed, so that lap J is made first. *Held*, that the differences are immaterial, and bags made under these patents infringe complainants' patent.

In Equity. Bill for infringement of letters patent.

George Harding and Francis T. Chambers, for complainants.

Albert H. Walker and Frederick H. Betts, for defendants.

WALLACE, J. This suit is brought upon reissued letters patent No. 10,083, dated April 11, 1882, granted to Mark L. Deering, assignor to the Union Paper-Bag Machine Company, for improvements in the manufacture of paper bags. The original patent was granted to Deering, May 11, 1880, and the application for the reissue was filed November 29, 1881. The defendants are manufacturing paper bags by using machinery for which patents were granted to William A. Lorenz and William H. Honiss, subsequent to the date of the patent in suit. The defenses are non-infringement, the invalidity of the reissue, and priority of invention by Felix W. Leinbach. The invention which is described in the patent consists in a novel mode of folding and pasting a piece of paper into the form of a quadrangular, flat-bottomed bag. The invention is an ingenious and very useful one. The bag can be folded into a flat piece of paper, and thus a large number can be included in a bundle, occupying but a small space, in a convenient form for transportation, and ready for immediate use; and the grocer has merely to grasp it at the upper side, and "give it a flip through the air" as he lifts it from the counter, and it at once becomes a square box, which will stand upon its bottom. The shape and symmetry of the package when filled, and the facility with which its contents can be wholly emptied, there being no folds or loose pockets inside, commend it at once as a simple, servicable, and exceedingly convenient contrivance. The conception that such a bag could be made was a felicitous one; but the development of the conception into the completed invention by selecting and pursuing the necessary folding and pasting operations to transform the piece of paper into the bag would seem to have involved hardly more than the exercise of the ordinary skill of the calling. The description of the invention, as set forth in the specification of the reissue, is, without material changes, the same as in the specification of the original. The nature of the invention is such that an adequate understanding of it must largely be derived from the drawings which illustrate it. The specification and drawings point out the process of making the bag to consist of five operations, some of which are merely folding operations, and some of which involve pasting besides folding. These are: (1) A fold to make the well-known bellows-folded tube, and the pasting of the sides folded in. (2) The folding of one end of the

tube over upon the body to make the lap, E. The making of this lap is only necessary to define the part of the paper to be operated upon to make the bottom. (3) The turning up of the part defined by the lap, E, at about a right angle to the body of the tube, distending it, and forming across the ends a crease, F, as shown by the drawing, (Fig. 6.) This is done by pushing inward the paper above the crease, and folding it down upon the bag, to make the laps, G, G, shown in the drawing. (Fig. 5.) This manipulation of the bag forms, not only the two side laps, G, G, but also the triangular folds, H, H, as shown in Fig. 5. The two remaining operations necessary to complete the bag involve pasting, as well as folding, to make the laps, I and J, and are such obvious ones as not to require description. The only part of the whole process which is not perfectly simple and obvious is that which involves the making of the side laps, G, G, and the triangular folds, H, H; and it would be manifestly impossible to describe the precise method of manipulating the paper to make these side laps and triangular folds otherwise than by showing the form in which the paper is to be folded. The claims of the reissue are as follows:

"(1) The herein-described process or method of forming paper bags, by making, in a sheet of paper or blank, the folds, B and C, then pasting together the two sides, A¹, A², forming a bellows-sided body or tube of the bag, then spreading open one end of said body or tube, then forming the inwardly-projecting triangular folds, H, H, side laps, G, G, and laps, I, J, which latter are secured in place by pasting or otherwise, substantially as described. (2) A bag consisting of a bellows-sided tube having a satchel bottom and inward triangular folds, which form part of its two sides when distended."

The claim of the original patent was as follows:

"The herein-described process or method of forming the bottoms of paper bags, by making, in a sheet of paper or blank, the folds, B and C, then pasting together the two ends, A, A, forming the body or tube of the bag, then forming the fold, E, at one end of said body or tube, and the inwardly projecting triangular folds, H, H, side folds, G, G, and fold, I, upon which is then folded the lap, J, secured in place by pasting or otherwise, substantially as set forth."

The paper bags made by the defendants embody, although with immaterial differences, the invention described in the claim in the complainants' patent. The determination of the transverse line to define the part of the paper that is to be made into the bottom of the bag, which in the patent is effected by doubling over the part upon the body of the tube, is effected in the process of the defendants by the use of a presser plate, which marks the line without doubling back the part of the paper to be manipulated; and the order of making the final laps, I and J, is changed, so that the lap, J, is made before lap, I, instead of subsequently, as in the process of the patent. The making of a transverse line to define the part of the tube to be operated on according to the method of the defendant is an equivalent of the method of the patent, as appears by the patents to Howlett of 1874, and Webster of 1875; and the relative order of making the two final laps is a matter merely of expediency, and is stated to be so in the specification of the patent. Of course it is immaterial that the instrumentalities by which the several operations are

performed are, in the one case, the machinery used by the defendants, and, in the other, the manual manipulation of the paper without the assistance of machinery. The consideration that the invention of this machinery has invested the invention of the patent with its principal commercial value cannot derogate from the rights of the complainants.

The more serious questions in the case are presented by the defenses, which assert the invalidity of the reissue and the priority of the invention by Leinbach. The first claim of the reissue omits a recital in terms of the second step of the process described in the specification, and in this respect differs from the claim of the original; but this step, or an equivalent one, is necessarily implied by the words "then spreading open one end of the tube," which appear in the claim of the reissue, and were absent from the claim of the original. This language is to be read as importing into the claim the operation of "turning up the lap, E, at a right angle to the body of the tube, and distending it, as shown in Fig. 5," as described in the specification; and this operation necessarily requires the previous formation of the lap, E, or an equivalent determination of the part of the tube which is to be made into the bottom of the bag. This seems to be not only a fair interpretation of the first claim of the reissue, but the construction which its language imperatively requires. It follows, therefore, that this claim is, in substance, the claim of the original patent.

The second claim of the reissue, if it could be upheld as valid, would subordinate to the monopoly of the patentee any bellows-sided, satchel-bottom bag, having the inward triangular folds, irrespective of the process or method by which the bag is made; consequently the claim is for a broader invention than that specified in the claim of the original patent. According to the testimony of the expert witness for the complainants, it would enable the patentee to appropriate the invention shown in the patent to Daniel Appel, granted September 9, 1879, the application for which was filed a few days subsequently to the original application of Deering. The application of Deering had been prepared with a view to a claim for a bellows-sided, satchel-bottom bag, irrespective of the process of making the fold and laps, and contained a claim which was, in substance, like the second claim of the reissue. This claim was rejected by the patent-office, apparently because it was anticipated by the old bellows-folded bag; and the applicant amended his application by withdrawing the claim. He could have readily pointed out that the rejection was based upon false premises, or could have amended his claim so as to remove any doubt of its correct phraseology. Instead of doing this, he acquiesced in the action of the office, and accepted a patent with a claim for the process only. Under these circumstances it must be held that the patentee waived the claim for the bag as a new article of manufacture, and that the circumstances are inconsistent with the theory that there was any mistake inadvertently committed in the terms of the patent as granted. It is plain that the reissue was obtained, not for the purpose of correcting a mistake, inadvertently committed in the wording of a claim, but for the mere purpose of enlarging the monopoly of the

patent; and, under such circumstances, it is quite immaterial that the application for the reissue was made within two years from the time of the original grant. *Mahn v. Harwood*, 112 U. S. 354, 5 Sup. Ct. Rep. 174; *Coon v. Wilson*, 113 U. S. 268, 5 Sup. Ct. Rep. 537.

The question of fact presented by the defense of the priority of invention of Leinbach is close; but the conclusion is reached that this defense has not been so cogently established as to overthrow the presumption arising from the granting of a patent. It will not be profitable to enter upon an analysis of the testimony. It must suffice to state that the testimony of Mr. Edson, Mr. Allison, Mr. Brightman, and Mr. Fletcher, to the effect that Deering exhibited to them, respectively, previously to March, 1878, bags substantially like the bag of the patent, is accepted as true. The usual decree for an injunction and an accounting is ordered for the complainants, but without costs, and conditioned upon the filing of a proper disclaimer of the second claim.

THE EXCELSIOR.

BRYANT *v.* THE EXCELSIOR.

(*Circuit Court, E. D. New York. July 10, 1889.*)

COLLISION—BETWEEN STEAM AND SAIL—LIGHTS—NEW YORK BAY.

A steamer, properly manned, was going down the bay of New York, bound to sea. The night was clear, but dark, and the steamer, heading S. by W., was running at about 9 or 10 knots per hour. The master noticed a white light ahead, but upon examination could discover no colored lights. He concluded that the light was on a vessel going in the same direction with the steamer, and, determining to pass on the west side, changed his course half a point. After going ahead a few minutes, he discovered that something was wrong, and immediately stopped his engine, and reversed, but it was too late to avoid collision. The vessel carrying the white light proved to be a schooner bound into port, heading N. by E. After seeing the steamer's lights she luffed a little. *Held*, that the collision was caused by the faults of the schooner in exhibiting a white light, and in failing to display a green light, as required by international rules 1885. Affirming 33 Fed. Rep. 554.

In Admiralty. On appeal from district court. See 33 Fed. Rep. 554. *Goodrich, Deady & Goodrich*, for libelants. *Charles H. Tweed and Robert D. Benedict*, for claimant.

BLATCHFORD, Justice. In this case I find the following facts:

1. On the evening of December 14, 1886, the steam-ship *Excelsior* was going down the bay of New York, bound to sea. She was well and competently manned, tackled, and appareled, and her lights were set and burning according to law. Her master, who was a competent navigator, was on the bridge, and in charge of her navigation. She had a competent lookout,—the first mate,—properly placed forward, and at

tending to his duties, and competent men were in charge of her wheel and of her engine.

2. The night was clear but dark, there being no moon, and the wind was about west, a fresh breeze. The tide was flood.

3. The steam-ship was running at the rate of about 9 or 10 knots an hour. She was going down the channel below the Narrows, heading about south by west, and having the Chapel Hill and Conover Beacon range-lights ahead of her and in range.

4. The lookout of the Excelsior, and her master, saw a white light ahead of her, a little on her port bow. It was reported by the lookout, and examined by the master with his night glasses, and was made out by him to be a white light. No colored light was visible. The master of the Excelsior concluded, as he had the right to do, that the light was upon a vessel which was going down the bay in the same direction the Excelsior was going. This light was seen at a sufficient distance to have enabled the Excelsior to keep clear of the vessel, if the latter had not misled the Excelsior as to her course.

5. As there were visible the lights of other vessels coming up on the eastward side of that light, the master of the Excelsior determined to pass the vessel which carried that light on the west side of her, and he accordingly ported the Excelsior's wheel, and changed her course half a point to the westward, and then steadied her wheel, and went on for several minutes, when, from the appearance of the vessel and the reflection of lights upon her, he was led to think there was something wrong, and the helm of the Excelsior was at once put hard a-port, and her engine was immediately stopped and reversed.

6. Before her headway could be completely stopped, her stem struck the vessel on the starboard side, aft of the fore rigging, at the angle shown on the diagram of the witness Reed, and cut in to the main hatch.

7. The vessel was the schooner Hannah F. Carlton, belonging to the libelants. She was going about five knots an hour, bound up the bay, and had been heading on a course of about north by east or north half east. After the Excelsior's lights were seen by her, she luffed up a little.

8. The schooner did not exhibit to the Excelsior the green light required by law.

9. The schooner exhibited to the Excelsior, before the collision, a white light.

10. The master of the Excelsior was misled by the exhibition of such white light, and by the failure to exhibit a green light, on the part of the schooner.

11. The measure adopted by the master of the Excelsior, of porting his wheel, would have been sufficient for the avoiding of the schooner, if the latter had been going down the bay, as was indicated by the failure to show a green light and the exhibition of the white light, instead of coming up the bay.

12. The schooner was at all times before the collision on the port bow of the Excelsior.

On the foregoing facts I find the following conclusions of law:

1. The schooner was in fault in exhibiting to the Excelsior such white light.
2. The schooner was in fault in failing to exhibit to the Excelsior a green light, as required by law.
3. The collision was caused by such fault or faults on the part of the schooner.
4. The master of the Excelsior had the right to understand, from seeing a white light and not seeing a green light on the schooner, that she was not coming towards the Excelsior, but was going away from her, on the same course.
5. The Excelsior was free from fault.
6. The libel should be dismissed, with costs of the district court, taxed at \$281.20, and costs of this court, to be taxed.

THE BRITANNIC.

THE CELTIC.

BRITISH & FOREIGN MARINE INS. Co., Limited, *et al.* v. THE BRITANNIC AND THE CELTIC. UNIVERSAL MARINE INS. Co. v. SAME.

(District Court, S. D. New York. July 3, 1889.)

1. COLLISION—FOG—EXCESSIVE SPEED—CHANGE OF COURSE—REVERSING.

In fog so thick that vessels cannot be seen within a quarter of a mile of each other, when fog-signals are heard almost ahead and near, (in this case within three-quarters of a mile.) steamers proceeding at about full speed are bound at once to stop and reverse, and not to change their courses without knowing the position or direction of the other.

2. SAME.

The steamer B., with the libelants' goods on board, bound from New York to Liverpool, and the C., from Liverpool to New York, both belonging to the White Star Line, came in collision at sea, about 365 miles out from New York. The C. was in a dense fog, the B. in a fog less dense, but the vessels could not be seen until within 300 or 400 yards of each other. They were going under a full speed "stand by," from $13\frac{1}{2}$ to $14\frac{1}{2}$ knots each. Fog-signals were first heard about two minutes before collision. The C., on hearing the B.'s first signal, slowed; on hearing the second signal, starboarded; and, when the B. was seen, she at once reversed, about half a minute before collision. The B., on hearing the C.'s first signal ahead, first ported, and then came up towards her course, and, on hearing the second signal a minute after the first, hard a-ported, and kept on at full speed till the collision. There would have been no collision had either vessel kept her course, or reversed at once. *Held*, both in fault, (a) for immoderate speed in fog; (b) for not reducing speed as much as possible when the first signals were heard; (c) for keeping on and changing their courses, without knowing the position or heading of the other.

3. SAME—BILLS OF LADING—EXCEPTIONS OF NEGLIGENCE—NEGLIGENCE OF ANOTHER VESSEL OF SAME OWNERS.

Exceptions in the bills of lading of damage "by collision, * * * even when occasioned by negligence of the master or other servants of the ship-owners," apply only to negligence of the master or ship-owners' servants connected with the vessel on which the goods were shipped, or with the performance of the contract of transportation, and do not exempt the owners from liability for the negligence of another ship belonging to the same owners by which the goods were damaged.

4. SAME—PRACTICE—JOINT STIPULATION.

Under the law of this country making each vessel liable *in solido* in case of collision by mutual fault, the owners of the C. are liable for the whole damage to the goods on the B., whether the exception in the B.'s bill of lading is valid or not; and both vessels being released under one stipulation for value in a gross sum, the libelants are entitled to full recovery, without determining the validity of the exceptions.

In Admiralty. Libel for damage to cargo.

Butler, Stillman & Hubbard and *Wm. Mynderse*, for libelants.

Wheeler & Cortis, for claimants.

BROWN, J. The above libels are filed by the insurers of cargo shipped by Bingham Bros. and by Fearon, Low & Co. on board the steam-ship *Britannic*, at this port, in May, 1887, for transportation to Liverpool. When about 365 miles out from New York, the *Britannic* came in collision with the steam-ship *Celtic*, whereby the cargo of the *Britannic* was damaged; and the libelants, having paid the assured, became subrogated to their rights, and claim in these suits a recovery over against the steamships,—in the one case \$5,418.62, and in the other \$10,832.94,—on the ground that the collision arose through the negligence of both steamers. Both belong to the White Star Line, and to the same owners. The defenses are—*First*, that there was no negligence; *second*, that, if there was negligence, the vessels are not liable, because the stipulations of the bills of lading except liability for negligence of the officers, crew, and servants of the ship-owners; and, *third*, that this bill of lading, with its exception of liability for negligence, was the result of such special deliberation, negotiation, and agreement between the parties as to take the case out of the general maritime law of this country, which holds void such exceptions by common carriers.

1. Negligence. The evidence as to the facts of the collision is comparatively meager, and barren of many of those details that are commonly given in collision causes. There is little dispute as regards the main facts. The collision took place between 5 and 6 o'clock in the afternoon of Thursday, May 19th. The vessels were running on nearly opposite courses. The *Celtic*, coming west, was headed to the southward, and across the *Britannic*'s course, about half a point. For three days previous the *Celtic* had been much of the time enveloped in fog, and she was running by dead reckoning. For some time before the collision she was sounding her fog-horn regularly at intervals of one minute. Only two of these signals were heard on the *Britannic*. The first whistle heard was thought to be nearly ahead, by the chief officer, who was on the bridge in charge at the time; and the helm of the *Britannic* was at once ported somewhat. The captain, who was in the chart-room, hearing that order, came upon the bridge, and, being told that a whistle was heard nearly ahead, ordered the helm hard a-port, but soon afterwards steadied, and ordered the vessel on her course again. Before the *Celtic*'s whistle was heard, the *Britannic*'s whistle had not been sounded, because, as it is said, the sun could be seen, and objects distinguished at a considerable distance upon the water. But the *Celtic*, when her whistle

was heard, could not be seen, and the engineer says the "stand by" was rung on 10 minutes before collision. A signal of one whistle was given in reply to the Celtic's whistle, and a minute afterwards another signal; to both of which the Celtic replied. Upon hearing the Britannic's first whistle, the Celtic's engines were reduced to "dead slow;" at the Britannic's second whistle, the Celtic gave a signal of two blasts, and star-boarded her helm and swung about a point and a half to port, when the Britannic first came into view, about 300 or 400 yards distant; whereupon the Celtic reversed full speed, but the vessels came in collision, the Celtic's stem striking on the port side of the Britannic, just abaft of her engine-room bulk-head, a succession of from 6 to 10 blows, which carried away her boats, rigging, and bulwarks on that side nearly to the stern, and stove in a hole, filling one of her compartments with water. Before the signals were heard the Celtic was going at the rate of $13\frac{1}{2}$ knots; the Britannic, $14\frac{1}{2}$ knots. Full speed for each is about one knot greater. The Britannic did not reduce her speed at all, but when the Celtic was seen about 300 yards distant, the order was given to go ahead strong, in the hope of passing the Celtic if possible; or, if not, to lessen the force of the blow.

Experiments with the Britannic going at the rate of 12 knots show that she would come to a dead stop in 2 minutes 13 seconds, going 1,100 feet; going 15 knots, and reversing full speed, she would come to a standstill in less than 3 minutes, going 1,500 feet; and she begins to swing in 11 seconds after the order hard a-port is given. The Celtic is a sister ship, and works substantially like the Britannic; the Celtic being 437 feet long, the Britannic 455; and the latter being 5,000 tons gross tonnage, the former 3,867. The testimony does not state the heading of either vessel at the time of the collision, nor the angle of the blow. When the vessels first came in sight of each other, as Capt. Irving, of the Celtic, says, the Britannic was about four points on the Celtic's starboard bow, heading for her bridge. The master of the Britannic says that the Celtic was at that time about three or four points on his port bow, and that she seemed to come up suddenly out of a fog-bank, and was crossing his course nearly at right angles. These statements are not reconcilable. The Britannic could not be heading for the bridge of the Celtic if the latter was three to four points on the Britannic's port bow. From the testimony of Capt. Irving in regard to the whistles it is plain that the collision occurred not much, if any, more than two minutes after the Britannic's first whistle was heard. The Celtic's starboarding "a point and a half" on hearing the Britannic's second whistle would occupy only about half a minute; and the Britannic, coming then in sight, only about 300 or 400 yards distant, the reversal up to the collision could not have much exceeded a half a minute more, as the Britannic was at full speed. The engineer, Fleming, confirms this in saying that the time the Britannic was rung full speed ahead under the ring-up bell was not over a minute before collision. As it takes the Celtic, going $13\frac{1}{2}$ knots, $2\frac{1}{2}$ minutes to come to a stop on reversing full speed, she must have been going at the rate of nearly 5 knots, at least, at the time of the collision; for during the minute and a half that her engines were not reversed, but going

ahead slow, her speed could not have fallen from $13\frac{1}{2}$ knots below 9 knots; and, as it requires 133 seconds backing at the full speed of 15 knots for her to come to a stop when going at the rate of 12 knots, computation shows that it would take about three-fourths of a minute to reduce her speed from 9 knots to 5.¹

Assuming that the Britannic changed her course some five or six points to starboard, and the Celtic about one to port, (allowing for her swing back half a point or a point to starboard while reversing,) making the angle of collision of six to seven points, it follows that when the whistles were first heard the Britannic was from half a point to a point on the Celtic's starboard bow, and the Celtic a little less on the Britannic's starboard bow, and that the Celtic, at her second whistle, bore nearly ahead of the Britannic, as the latter was then heading. Considering that steamers like the Britannic and the Celtic, under a hard a-port or a hard a-starboard helm, change a point in a little less than a length, examination shows that the position, distance, and courses of the vessels cannot have been very materially different from the above. Capt. Irving's testimony is substantially in accord with this, except that the whistles heard were much less off his starboard bow than three points. The testimony of Capt. Perry, of the Britannic, however, that when the Celtic hove in sight she was three points on his port bow, is evidently grossly erroneous. If that were her bearing, the collision could not have happened. This was an important fact, if true, to excuse his keeping ahead at full speed, as well as his attempt to cross the Celtic's course. So important is this misstatement, (the fact being that the Celtic's stern must have been then but little, if any, on his port bow,) that it necessarily detracts from the credit to be given to Capt. Perry's testimony as to the amount of fog, or thickness of the weather, at the time and before the Celtic's whistle was heard. Though it is not impossible that the Britannic might suddenly run into a bank of fog, yet the circumstance to which Fleming testifies, that the "stand by" had been rung on 10 minutes before collision, and the fact that the Britannic did not slow at either of the two signals heard from the Celtic, though the latter could not be

¹The formula submitted by counsel in reference to stopping, and the remark that "the rate of stopping increases constantly" under reversed engines, is, I think, erroneous, though not considering that when backing there is no resistance by air and water to the retarding force. On the contrary, that resistance largely aids the force of the engine. If the Celtic's full speed was 15 knots, then the resistance of air and water when she is going ahead at that speed is just equal to the whole power of the engines; otherwise she would continue to gain in speed. If she then reverses at full speed, the initial retarding force exerted upon the hull is twice the power of the engine. The force of the engine in backing is constant; the retarding force derived from the resistance of wind and water is constantly diminishing with the diminishing speed in proportion to the square of the velocity from time to time. If the power of the engine be represented by 15, the whole initial retarding force upon reversal, when going ahead at a speed of 15 knots, will be represented by 30; when reduced to 12 knots, by 24.7; when at 9 knots by 20.4; at 6 knots, by 17.4; at 3 knots by 15.6; and as it takes 133 seconds to reduce the Celtic from 12 knots to zero, she would retard from 12 knots to 9 in about 26 seconds; from 9 knots to 6 in about 31 seconds; from 6 to 3 in about 36 seconds; from 3 to zero in about 40 seconds; and from 8 knots to 4 in 45 seconds. So when, at $13\frac{1}{2}$ knots, her engines being put at "dead slow" ahead, supposing even that her engine exerted no effective propulsive force, she would occupy about 102 seconds in falling to 9 knots. If she then reversed full speed for three-fourths of a minute before collision, her speed would be reduced to about 5 knots; and this is as favorable a result to the Celtic as the testimony will warrant.

seen, satisfy me that she was deliberately running at nearly full speed, though the weather was known to be thick.

Upon the above findings it follows that there would have been no collision had each vessel kept her course, or even had either done so, notwithstanding the other's changes. Collision came about (1) because both vessels were going at nearly full speed in such a fog that they could not be seen within hailing distance, and therefore could not avoid each other when they came in sight; (2) because each changed her course without knowing the position or the course of the other; (3) because, when their whistles were heard near and nearly ahead,—*i. e.*, within three-quarters of a mile and less,—neither stopped or reversed. These were faults in each vessel alike, by the highest English authorities, as well as by our own. The duty to stop and reverse and not to change course, when a whistle is heard approaching near and ahead, in a thick fog, was affirmed in the privy council in the case of *The Frankland*, L. R. 4 P. C. 529; *The Kirby Hall*, L. R. 8 Prob. Div. 71; *The Dordogne*, L. R. 10 Prob. Div. 6, 9; *The John McIntyre*, L. R. 9 Prob. Div. 135. In the case last cited Lord BRETT says:

"It may be laid down as a general rule of conduct that it is necessary to stop and reverse, not indeed, every time that a steamer hears a whistle or fog-horn, in a dense fog, but when in such a fog it is heard on either bow, and approaching, and is in the vicinity; because there must then be a risk of collision."

The same rule has been applied in this country. *The Lepanto*, 21 Fed. Rep. 651, 659; *The Pottsville*, 24 Fed. Rep. 655. Both vessels were also running in plain violation of the statute, because they were under substantially full speed in a fog. *The Colorado*, 91 U. S. 692; *The Pennsylvania*, 19 Wall. 125; *The State of Alabama*, 17 Fed. Rep. 852; *The Pennland*, 23 Fed. Rep. 555; *The City of Alexandria*, 31 Fed. Rep. 431. Though the handling of the *Britannic* was more flagrant and reckless in continuing on full speed after the *Celtic's* whistle was heard, the *Celtic* was probably in a denser fog, and the more to blame for maintaining nearly full speed up to the moment of hearing the *Britannic*. Each was in fault for not stopping and reversing, in this case, as soon as the whistle of the other was heard comparatively near. This duty was the more imperative because each was then going at nearly full speed; and each had, therefore, a double duty to repair as speedily as possible the previous fault of excessive speed, and to reduce the danger to a minimum. These faults in each vessel, moreover, contributed to the collision, plainly enough on the part of the *Britannic*, and clearly also on the part of the *Celtic* upon the facts as above found, since no collision would have occurred, notwithstanding the *Britannic's* faults, had the *Celtic* been going at say "half speed," (which for her would have been about 9 or 10 knots,) or had she promptly stopped and reversed on hearing the *Britannic's* first whistle, or kept her course without change until the position of the *Britannic* became known. *The City of New York*, 15 Fed. Rep. 624, 628, 629, 35 Fed. Rep. 604, 609. I must therefore find both vessels to blame.

The bills of lading purport to exempt the owner from liability for

"collision, stranding, or other accidents of navigation, even when occasioned by the negligence of the master or other servants of the ship-owner." If this exception were valid, and the English law applied, the libelants would be entitled to recover half their damages in the present case against the Celtic. *Chartered Mercantile Bank v. Navigation Co.*, L. R. 10 Q. B. Div. 521. In that case the exceptions included "collision," and the "negligence or fault of the pilots, master, or mariners, or other servants of the company, in navigating the ship." Although the language in the present bills of lading is slightly different, the words "in navigating the ship" being omitted, the meaning and legal construction are the same. The context imports negligence of the master, mariners, servants, etc., in connection with the vessel on which the goods are shipped, not those connected with any other vessels having no relations with the Britannic. The language of Lord BRETT in the case just cited is applicable as respects the subject to which these exceptions refer. "It seems to me," he says, (p. 533;) "wholly unreasonable to suppose that at the time of making the contract in this bill of lading, which is a contract not to carry the goods generally, but to carry them in a specific ship, and deliver them after having carried them in that ship, the parties were considering the conduct of the ship-owner's servants on board another ship which would not have anything to do with the carriage of these goods." And so I must hold, of this bill of lading, that it has no reference to negligence on board of other vessels, or to the masters of other vessels. It would be unreasonable to assume that the libelants intended by this clause to take the risks of damage to their goods from all other vessels that might belong to the same owners, and from all other masters and servants of theirs who had nothing to do with the Britannic or her contract of transportation. The respondents must therefore answer for the fault and the tort of the Celtic, precisely as they would be bound to answer if they were not owners of the Britannic. Under the English rule in the apportionment of damages where two vessels are in fault, as established by the decision in the case of the Milan, (1 Lush. 388,) one-half the loss only is charged upon each vessel; and it was only in consequence of this rule of practice that the libelants in the case of the *Chartered Bank of India*, *supra*, recovered, as in tort, the one-half of their damages. That rule of division having been rejected in this country, and the supreme court holding that each vessel is liable *in solido* for the full damage, it follows that the libelants are entitled to a decree for the full amount of their damages against the Celtic. *The Atlas*, 93 U. S. 302; *The Juniata*, Id. 337. As neither vessel is in custody, and as both were released upon one and the same stipulation in each case, it is immaterial whether one or both vessels are held. In either case the libelants in each libel are entitled to judgment for the respective amounts claimed, to be enforced against the stipulators. Without determining the question of the validity of the exceptions of negligence in the Britannic's bills of lading, under the peculiar circumstances appearing in the proofs, so elaborately argued by the eminent counsel in the case, I direct judgment for the libelants on the above grounds, with costs.

UNITED STATES v. FIFTY-NINE DEMIJOHNS AGUADIENTE AND FOUR BARRELS OF CIGARETTES.

(District Court, S. D. Florida. June 15, 1889.)

INTERNAL REVENUE—CIGARETTES—FORFEITURE SALE.

The term "tax," as used in the last clause of section 3369, Rev. St., is not intended to include import duties, and cigarettes, when forfeited, may be sold and delivered when they bring enough to pay the internal revenue tax, although they may not bring enough to pay that and the customs duties.

(Syllabus by the Court.)

Seizure. In admiralty Condemnation of property for being fraudulently brought into the United States.

L. W. Bethel, U. S. Dist. Atty

LOCKE, J. This property has been condemned and forfeited for a fraudulent bringing into the United States, and the question now arises as to the disposal of a portion of it. It has been ordered sold, and the aguadienite has been already sold and delivered, but it appears from the report of the marshal that the cigarettes are packed in packages of 12 in a package, and are unstamped, that they have been offered for sale, and, as far as properly could be, before being properly packed and stamped, sold for two cents a package. This is more than enough to pay the internal revenue tax, but not enough to pay that and the import duties.

The sixteenth section of the act of March 1, 1879, (20 St. at Large, p. 348,) provides that imported cigarettes shall be repacked, and stamped with both custom inspection and internal revenue stamps, and such stamps canceled, before being delivered for consumption. Whether such restrictions, intended for manufacturers and importers, should be considered as binding when found opposed to the enforcement of a judicial sale, it is not necessary to determine, as the reasons for complying, where it may be so easily done as in the present case, seem satisfactory and sufficient.

The last clause of section 3369, Rev. St., provides that, whenever forfeited cigars—and cigarettes come under the same provision—offered for sale "will not bring a price equal to the tax due and payable thereon, such goods shall not be sold for consumption in the United States," and the commissioner of internal revenue is authorized to order the destruction of the same. Under this section the practice of the officers of the customs of this district, whenever the amounts of cigarettes forfeited have been too small to require judicial action, has been to construe the term "tax" as relating both to the internal revenue tax and the import duties, and unless when offered for sale they would bring enough to pay both such amounts, report the same for destruction. I have not been referred to, or have I been able to find, any judicial or department decision in support of this construction, but it has been followed so long in practice that it would seem to require careful examination before being changed.

The property has been forfeited, and become the property of the United States, and a public sale directed by section 939, Rev. St., unless there is a more recent enactment prohibiting it. Do the provisions of Rev. St. § 3369, do so?

It is true the word "taxes," in its most extended sense, may include all contributions imposed by the government, of whatsoever kind or description, whether against person or property; but in its more confined sense it is used in contradistinction to duties and imposts. Section 8, art. 1, of the constitution, uses the term "tax" in this sense apparently, and provides that congress shall have power to lay and collect taxes, duties, imposts, and excises. In which sense has congress used the word in this connection,—in its more extended or its more restricted meaning? and what was the intention in prohibiting the sale, and authorizing the destruction, of this class of property?

The act of July 20, 1868, being an act imposing taxes on spirits and tobacco, invariably uses the term "tax" or "taxes" when referring to the internal revenue; but whenever it speaks of the amounts to be collected by the customs department it denominates them "duties," or "import duties." In section 77, speaking collectively of the amounts to be collected on tobacco and snuff, the language is, they, "in addition to the import duties, shall pay the tax prescribed." The same language is used in regard to cigars in section 93. Section 87 provides that the commissioner of internal revenue shall cause to be prepared suitable stamps for the payment of the "tax" on cigars; and section 103, that when any tax is imposed the same shall be established by the regulations of the commissioner of internal revenue. In the act of June 6, 1872, "to reduce duties on imports and internal taxes," in the thirty-first section of which the provisions of law under consideration are found, every section, to the eleventh inclusive, where the subject treated of is imported goods and collections on them, in speaking of such, invariably uses the term "duty" or "duties," and from the twelfth section forward, where the provisions relate entirely to internal revenue, the word "tax" is used alone. In a careful examination of the numerous instances in which the word "tax" is used throughout the entire statutes of the United States, I have failed to find one where it can, with any degree of satisfaction, be applied to duties on imports. The history of the legislation of the country upon revenue appears to show it to have adopted the restricted use of the term, and to have used it in no other sense. It seems unquestionable to me that it was so used in the act from which the section was taken, deliberately and intentionally; that the term "tax" was only intended to apply to the internal revenue, and the term "duty" or "import duty" to customs; and when both were intended both were used, as in sections 77 and 93 of the act of July, 1868; and that, where the word "tax" was used alone, as in section 3369, it was not intended to include import duties; and there is therefore no prohibition against selling cigarettes, where they bring more than enough to pay the internal revenue tax, notwithstanding they may not bring enough to pay the import duties. The customs laws are revenue laws,

and proceedings for forfeiture must be strictly construed. Whatever questions of protection to manufacturers may incidentally arise are for political, and not judicial, consideration. Outside of the section referred to, I know of no special or general provision of law which would prevent the sale of any property forfeited for violation of the customs laws, regardless of the price it may bring. The aguadiente in this case did not bring as much as the duty would be on it, but I know of nothing that would permit a destruction instead of a sale. Whatever property brings, be it much or little, goes to increase the revenue to that extent, with no profit to those through whose fault or crime it has been forfeited.

But the provisions regarding the repacking and stamping are direct, positive, easily complied with, and should be observed. The collector of internal revenue is custodian of the internal revenue stamps, and although it is provided that upon requisition they may be furnished to the officer without payment, that was undoubtedly intended to apply to property forfeited under the internal revenue law, where the entire proceeds were finally placed to the credit of that division of the treasury; but, where the proceeds are to be paid to the department of customs, it seems but proper that the amount due the internal revenue should be paid from the proceeds, and it is so directed. The marshal will therefore procure from the collector of internal revenue and the collector of customs the proper stamps; have such cigarettes properly repacked in packages of 10, 20, or 50, properly stamped, the stamps canceled, and the cigarettes delivered in accordance with the terms of the sale, and bring the proceeds into the registry of the court.

SOWLES v. WITTERS *et al.*

(Circuit Court, D. Vermont. July 25, 1889.)

1. DESCENT AND DISTRIBUTION—EFFECT OF PROBATE DECREE.

H. left a will, of which defendant was executor and S. residuary legatee. S. also made defendant her executor, and complainant, defendant's wife, her residuary legatee. Defendant administered on both estates, and converted many of the assets, taking leases, deeds, mortgages, and assignments of property belonging to or purchased with funds of the estates in his own name, or as executor. Complainant petitioned the probate court to decree to defendant all the assets of H.'s estate, and to decree to complainant all of the residuary estate of S., without finding the amount in defendant's hands under either will, and stating that she accepted the property without inventory, and exonerated defendant from all further liability. The court decreed according to her prayer. *Held*, that the decree was conclusive on complainant, who could thereafter claim nothing except under the decree.

2. SAME—EXECUTOR'S LIABILITY.

Defendant would thenceforth be liable for only such assets of the estate of S. as he had not converted and become chargeable with at the date of the decree, including leases already executed, and mortgages assigned to him as executor.

3. SAME—HUSBAND AND WIFE.

While at the date of the decree complainant, being a married woman, could not personally bind herself by a contract, she was able to dispose of her separate estate, and the decree, founded on her consent, was valid.

4. SAME—WIFE'S PERSONALTY.

The possession of the personality by defendant as executor would not amount to a reduction into possession as husband of complainant, so as to extinguish the latter's title as residuary legatee.

5. BANKS AND BANKING—STOCKHOLDERS—ASSESSMENTS.

Defendant, for the purpose of helping a bank, of which complainant was a stockholder, in a financial crisis, loaned it certain securities belonging to complainant, and when complainant was informed of the fact she did not object. She was assured by the bank's officers that if the bank was saved the securities would be returned, and if it failed the avails would be credited on her assessment as a stockholder. The bank failed, and the securities were not returned. *Held*, that she was not entitled, as against other creditors, to set off the value of the securities against her assessment, but was, as to such value, on the same footing as any other creditor.

In Equity.

Bill by Margaret B. Sowles, a married woman, suing by her next friend, against Edward A. Sowles, her husband, and Chester W. Witters, receiver of the First National Bank of St. Albans, to recover the avails of certain stocks and notes, and to have set aside or transferred to her certain leases and a mortgage.

Henry A. Burt, for complainant.

Chester W. Witters, *pro se*.

Edward A. Sowles, *pro se*.

WHEELER, J. The defendant Sowles is the husband of the oratrix, who is a niece of Hiram Bellows. He died leaving much real and personal estate, and a will, of which the defendant Sowles was executor, and in which many bequests and devises were made, and Susan B. Bellows, his widow, was residuary legatee. She died leaving a will making nearly the same bequests and devises, and the same person executor, and the oratrix residuary legatee. The executor took possession of the assets of both estates, and managed and disposed of same according to his pleasure. He discharged a mortgage on the Bremmer farm belonging to the estate, and took a new mortgage to himself; he bought the Smalley farm with moneys of the estate, and took the title to himself; he took the title of the Fairfax house to himself, in discharge of a debt due to and for a house belonging to the estate; he bought the Yandro house with moneys of the estate, and took the title to himself; he purchased a mortgage on the American House in Swanton with moneys of the estate, and took a second mortgage on it for a debt due the estate, foreclosed both as executor, and took a quitclaim deed of the mortgagors to himself, for which he paid \$20 to shorten the time of redemption and get possession; he purchased a note against Francis and Duclos with funds of the estates; he took 29 shares of Northern Pacific railroad stock transferred in blank, in payment of a debt due the estate; he exchanged some redeemable leases belonging to the estate for others running to himself, and some for others running to himself as executor; of old Chicago,

Rock Island & Pacific railroad stock belonging to the estate he exchanged 100 shares for 200 shares of new stock, 100 of which were issued to himself, and the other 100 to him as executor; and he paid and satisfied some of the legacies and bequests. After all these, among other things, had been done by him, he applied to the probate court having and exercising jurisdiction for an order for the settlement of his account, and of notice thereof to all persons interested therein, according to the laws of the state, which was granted, and the notice was given. Whereupon the oratrix appeared and presented this petition to the court:

"To the Honorable Judge of Probate for the District of Franklin and State of Vermont: You are hereby requested to decree the amount of real and personal property named in Hiram Bellows' will to E. A. Sowles, executor therein named, according to the terms of said will, without finding any definite amount in said executor's hands; and you are also requested to decree to the undersigned all the residuary portion of real and personal property named in Susan B. Bellows' will, or owned by her, without finding any definite amount in E. A. Sowles' executor's hands, without any inventory or specification of items or articles or estate, and I accept the same without further specification, and exonerate said E. A. Sowles as executor named in said wills from further duty or liability in the premises.

"New York, March 30, 1881.

MARGARET B. SOWLES,

"Residuary Legatee Named in Said Wills."

Thereupon, and upon hearing had, the court found and stated of record that the order of notice had been complied with, and decreed payment of the legacies of the will of Hiram Bellows by the executor, and the remainder to the executor of the will of Susan B. Bellows, and stating the petition of the oratrix decreed payment of the legacies of the will of Susan B. Bellows and the remainder of that estate to the oratrix. No appeal was taken by any one from these decrees.

The defendant Sowles became largely indebted to the bank of which the defendant Witters became receiver, and delivered the certificate of 100 shares of Rock Island stock taken to himself to the bank on his indebtedness, which the bank appropriated, and credited to him. Afterwards, while the bank was in distress caused by a run, he delivered the 100 shares of the same stock which he took as executor, as stated, and other 100 shares of the same standing in his name as executor, 10 shares of stock in the National Car Company, standing in the name of the oratrix, and the 29 shares of Northern Pacific stock, to the bank, to aid it in its necessities; and further, afterwards, he mortgaged the American House, the Fairfax house, the Bremmer farm, and the Smalley farm, assigned some of the leases taken to himself and some of those taken to himself as executor, and delivered the Francis & Duclos note to the bank for security of his debt.

This bill is brought to have the avails of these stocks and the note and the receipts from the leases and the leases decreed to the oratrix, and the mortgage set aside in her favor.

The defendant receiver claims that the stocks were delivered to the bank to be applied upon the debt of the defendant Sowles, with the consent of the oratrix. Upon the whole evidence the fact is not so found.

She was a stockholder in the bank, liable to an assessment upon her shares. *Witters v. Sowles*, 32 Fed. Rep. 130, 38 Fed. Rep. 700. The stock appears to have been delivered upon the exigencies of the occasion without her knowledge, for the purpose before stated. When the transaction came to her knowledge she appears to have been assured that if the bank was saved those or like stocks would be returned to her, and if it failed the avails would apply on her assessment, and on these assurances to have assented to their retention. The rights of the respective parties to the property involved are to be determined upon substantially these proceedings and facts. In Vermont, these probate courts have exclusive jurisdiction of the settlement of estates, and of the accounts of executors and administrators. R. L. Vt. § 2018; *Adams v. Adams*, 22 Vt. 50; *Boyden v. Ward*, 38 Vt. 628. In *Adams v. Adams*, REDFIELD, J., said:

"It was clearly the intention of our legislature, from the very first, to give the entire jurisdiction of settlement of estates to the probate courts in the same manner and to the same extent that the jurisdiction of other matters of contract, or tort, *inter vivos*, was given to the common-law courts."

Section 2096 provided that "an executor or administrator shall be chargeable in his account with the goods, chattels, rights, and credits of the deceased which come to his possession; also with the proceeds of the real estate sold for the payment of debts and legacies, and with the interest, profit, and income which come to his hands from the estate of the deceased;" and section 2150, that "a debt secured by mortgage with the mortgaged premises belonging to the estate of a deceased person," when not foreclosed in the life-time of the deceased, "shall be personal assets in the hands of the executor or administrator, and administered and accounted for as such." When the defendant Sowles was before the probate court for the settlement of his accounts as executor of each of these wills he was chargeable, at the instance of the oratrix, or any of the legatees, or of any one interested, with all the property and the avails of all property of either estate, including mortgages which he had taken to himself. *Holmes v. Bridgman*, 37 Vt. 28. They did not prosecute their right to charge him for any of these things, but he was specially exonerated of record by the oratrix from being charged for any of them, and on her petition acquiesced in by the others, all charges for them were waived and omitted by the court in its decree covering the whole subject of them. This decree, unappealed from, became final and conclusive against any right to charge him for these matters. *Rix v. Smith*, 8 Vt. 365; *Probate Court v. Vanduzer*, 13 Vt. 135; 2 Redf. Wills, 895. That right to charge him for the property so appropriated to himself was the only remedy those interested in the estate then had for the recovery of it. *Probate Court v. Chapin*, 31 Vt. 373. The property of the executor in the assets was a special and limited one, but he had full power of disposition over them, and when he had sold or converted them to his own use the title had passed, and his accountability in this proceeding only remained to those interested as their right of action. Letting the decree which covered this accounting pass without making or

attempting to make him chargeable, by the act of the oratrix and acquiescence of the others, extinguished their right of action and left the avails of that part of the property in his hands, without further liability for them, except as provided by the decree. *Brooke, Abr. "Executors,"* 114; *Fryer v. Gildridge*, Hob. 10a, note; *Platt v. Sheriff*, Plow. 36; *Woodward v. Lord Darcy*, Id. 184. The effect was the same as if the accounting had been prosecuted and he had been charged with this property, or the right to charge him had been disallowed in his favor. No obligation rested on him afterwards in respect to it but to perform the decree as it was made, and left to stand and become absolute. The property taken by the executor to himself was altered by the law at the election of the oratrix and of the others interested in the estate. Id. 186; *Emthorpe v. Eltrington*, Year Book, 2 Hen. VII. 8. The legatees had, respectively, their rights of action against him personally, and the oratrix had the right, as residuary legatee, to the remainder of the property. *Bellows v. Sowles*, 57 Vt. 411; *Weeks v. Sowles*, 58 Vt. 696, 6 Atl. Rep. 603. The defendant receiver claims that all right of the oratrix to any part of the estate became extinguished by these proceedings. But she did not exonerate the executor to that extent; neither did the decree. She asked that the residuary portion be decreed to her, and exonerated him "from further duty or liability in the premises." The residue and remainder was decreed to her, and became hers.

This defendant further claims that the executor, as husband of the oratrix, became vested with the right and title to this residue. But he had done nothing in assertion of his right as husband. Being in his hands as executor wrought nothing in that direction. 2 Redf. Wills, c. 5, § 26, subs. 4; *White v. Waite*, 47 Vt. 502. Counsel for the oratrix insist that she was, as wife, without power to part with her right to any of the property, or to take or consent to proceedings to divest herself of it. *Merriam v. Railroad Co*, 117 Mass. 241. In Vermont, at that time, a wife could not bind herself personally by any contract. *Brown v. Sumner*, 31 Vt. 671; *Ingram v. Nedd*, 44 Vt. 462. But she had, however, full control over the disposition of her separate estate, so far as could be done without creating a personal obligation. *Child v. Pearl*, 43 Vt. 224; *White v. Waite*, 47 Vt. 502; *Witters v. Sowles*, 38 Fed. Rep. 700. The proceedings and decree appear to have been binding upon all, and to have effect upon the property involved, of all. These considerations are to be applied to the several parcels of property as they existed on March 30, 1881, the date of the decrees.

The Duclos and Francis note and the Smalley farm had been bought with moneys of the estate, for which he was chargeable. These were left his property. The Derrick house appears to have been conveyed by license from the probate court in such manner as to leave him chargeable with the avails. He appropriated them and debts due the estate to the purchase of the Fairfax house to himself. He was chargeable for these avails and debts, and the Fairfax house was his. The Yandro house was purchased with moneys of the estate for which he was chargeable, and it was his. He converted the mortgage on the Bremmer farm

to his own use by discharging it and taking another to himself, and foreclosing his own. He was chargeable for the mortgage which had belonged to the estate, and the farm was his. The leases of the farms which were his were taken to himself, and followed his title to the land, and belonged to him. The 100 shares of Rock Island stock which he took to his own name were converted to his own use, and he was chargeable with the value of what he gave for them. They became his. The 29 shares of Northern Pacific stock had not been converted by him. Neither had the other 200 shares of Rock Island stock, which stood in his name as executor. The Willey lease remained in his name and hands as executor. He bought a mortgage on the American House with moneys of the estate, and took another for a debt due the estate, and foreclosed them in his name and right as executor. The quitclaim deed taken to himself to shorten the time of redemption and give possession did not divest the mortgage title. That remained in him as executor. The \$20 paid by the executor for the quitclaim deed was involved in his account, and was merged, and the right to it disappeared with that. These were of the residue and remainder of the estate, and the right to them passed to the oratrix by the decree to her as residuary legatee.

The avails of these stocks were retained by the bank upon her consent after she was informed of their transfer. The bank failed, and could not return those or similar stocks to her. The assessment is for the enforcement of the liability of the shareholders to the creditors of the bank. Rev. St. U. S. § 5151. It is enforced by the comptroller and receiver for their benefit. Section 5234. There was no one to agree in their behalf that if the bank failed these stocks should apply on her assessment. The bank held these stocks or their avails at the time of the failure on an understanding which it could not carry out. It was liable to her for them or for their avails. This liability was like that to its depositors, or its other obligations. She seeks to recover the avails of the stocks, and is a *quasi* creditor to their amount on an equality with the other creditors. *Case v. Bank*, 100 U. S. 446. The avails of the stocks amounted to \$26,034.75. The receiver has collected \$40 rent on the Willey lease. She was not a creditor of the bank for this, and this amount should be returned to her; and she is entitled to have the mortgage as to the American House and the assignment of the Willey lease set aside and her title to them quieted.

Other legatees have sought to become parties here with the oratrix, but they have no rights in common with her as residuary legatee, and their motion in this behalf is denied.

The costs in equity cases are within the discretion of the court. And as this decree is in favor of each party in substantial proportions, neither appears to be justly entitled to costs against the other, and none are allowed. Let a decree be entered that the defendant receiver pay to the oratrix \$40 out of the assets of the bank in his hands; that the oratrix is a creditor of the bank to the amount of \$26,034.75, and that he pay her dividends thereon out of the assets of the bank in his hands at the same rate dividends have been paid to other creditors, before paying

other creditors further, and that she stand equal with the other creditors as to future dividends; that the mortgage of the American House and the assignment of the Willey lease be set aside, and enjoining defendant receiver, and his successors, perpetually, from setting up any claim thereto, and denying the prayer of the bill as to the residue, without costs to either party.

ERIE TELEGRAPH & TELEPHONE Co. v. BENT.

(Circuit Court, D. Massachusetts. May 21, 1889.)

ARBITRATION AND AWARD—ACTION ON AWARD—STATUTORY SUBMISSION.

No action at common law can be maintained on an award of arbitrators rendered under a statutory submission which does not comply with the statute.

At Law. Action on award.

B. F. Butler, for plaintiff.

G. F. Richardson and *H. R. Bailey*, for defendant.

COLT, J. This is a suit at law, brought to enforce an alleged award in favor of the plaintiff against the defendant for the amount of certain fees and costs paid by the plaintiff. The case was heard by the court, jury trial having been waived. The underlying question to be determined is whether an award rendered under a statutory submission can be enforced at common law in a case where the statutory award has been rejected by the court as not being in conformity with law. On December 31, 1885, the parties to this suit entered into an agreement to submit their demands to arbitration. It is clear from the record that this was a statutory submission. The attorney for the plaintiff corporation was authorized by the board of directors to execute a statute reference, and the agreement was for a statutory submission. This is further shown by the supplemental agreement of June 4, 1886, which extended the time six months "within which the report of the arbitrators within named is to be filed in the superior court for the county of Middlesex." The whole form of proceeding shows that a statutory submission was intended by the parties, and we do not understand that this position is seriously controverted by the plaintiff. The supreme court of the state rejected the award on the ground that it was not returned to the superior court within the time specified in the submission, and that the extension, though signed by the parties in writing, was invalid because not acknowledged before a justice of the peace. Under these circumstances it was held that the superior court had no jurisdiction to accept the award. *Bent v. Telegraph Co.*, 144 Mass. 165, 10 N. E. Rep. 778.

If the plaintiff in this action can recover it must be on the ground that an action at common law can be maintained upon an award made in pursuance of a statutory submission, even though the submission is inop-

erative by reason of a non-compliance with the statutory requirements. This question has been settled in Massachusetts in the case of *Deerfield v. Arms*, 20 Pick. 480, where it was held that no action at common law could be maintained upon a statutory submission which was ineffectual under the statute. The ground of the decision in that case was that an agreement for submission at common law was different from an agreement for submission under the statute, and that you cannot substitute one for the other without changing the contract which was entered into by the parties. The reasoning of the court in *Deerfield v. Arms* seems to me to be sound, and I think that decision should be followed by this court. See, also, *Sargent v. Hampden*, 32 Me. 78. Under the agreement of submission in the present case the arbitrators awarded that this defendant pay the costs and expenses of the submission, but, the award having been rejected by the supreme court of Massachusetts, I do not see how under the law any part of the award can be enforced in this court in any form of action. It follows that judgment should be entered for the defendant, and it is so ordered. Judgment for defendant.

JONES v. UNITED STATES.

(District Court, S. D. Alabama. August 7, 1889.)

1. CLERK OF COURT—FEES—FILING PAPERS IN CRIMINAL CASES.

The clerk of the United States district court is entitled to fees from the government for filing separately, in criminal cases, the process or copy of process, the bail-bond, and the recognizance of witnesses sent up by the commissioner.

2. SAME—COPIES OF SUBPŒNAS.

The clerk may issue separate subpoenas for witnesses in criminal cases when necessary to secure their immediate attendance.

3. SAME—ACTION FOR FEES—SET-OFF—BURDEN OF PROOF.

In a suit by an officer for fees under the act of March 3, 1887, (24 St. at Large, 505,) when the United States pleads any affirmative matter such as set-off the burden is on them to prove it, and not on the petitioner to disprove it.

4. SAME—APPROVAL OF OFFICERS' ACCOUNTS—FEES.

All proceedings connected with the approval of officers' accounts against the government, under the act of February 23, 1875, (18 St. at Large, 333,) are for the convenience and at the expense of the United States, and include the certified copy of order of approval indorsed on the original account sent to the treasury department as well as the original order entered on the minutes. But there is no law or regulation for indorsing a certified copy of the order on the duplicate account retained in the clerk's office.

5. SAME—COPIES OF ORDERS TO MARSHAL.

Copies of orders to marshals to pay witnesses, jurors, special deputies, or supervisors, to be used as vouchers in his accounts, are at the expense of the United States, but seals to such orders are unnecessary.

6. SAME—FILING VOUCHERS.

The clerk is entitled to fees from the United States for filing each separate voucher covered by the marshal's account with the government.

7. SAME—FINAL RECORD.

The final record to be made by the clerk of all the proceedings of court embraces the final commitment by the court in a criminal case, but does not the preliminary bail-bond and justification of sureties taken before the commissioner, as these are proceedings of the magistrate and not of the court.

8. SAME—SCIRE FACIAS ON RECOGNIZANCE—ISSUING NOTICE.

In *scire facias* on a forfeited appearance bond in a criminal case a separate notice must issue to each obligor. This is in the nature of a writ, and to be paid for by the United States.

9. SAME—OFFICE FILES.

The clerk is not entitled to charge the United States for making for his office files copies of reports required by department regulations to be made to the solicitor of the treasury, nor for keeping a record of witness certificates separate from his subpoena record.

At Law. On two petitions by clerk of court under act of congress of March 3, 1887, (24 St. at Large, 505,) for fees charged against the United States in criminal cases, but disallowed by the comptroller of the treasury. The petitions were consolidated by the court. In addition to the facts appearing in the opinion it may be noted that the subpoena charged for as item 2 was one for a witness, who, though embraced in the *præcipe* with others in his county, happened to be at time of trial in the city of Mobile, and was wanted *instante*. The clerk issued a separate subpoena for him. Item 4 was a balance unpaid on an account which was allowed in full. The treasury officials declined payment because they claimed the clerk had been paid as much on a former account for services never rendered. The district attorney on the trial pleaded a set-off of this amount, but introduced no proof in support of it. The machinery of approval of a United States official's accounts was shown to be the presenting of the accounts and vouchers in duplicate to the court, and the making of an order of approval, entered on the minutes, and certified copies indorsed on the original and duplicate accounts. The original account and vouchers are then forwarded to the treasury department for allowance and payment, while the duplicate account and vouchers are filed in the clerk's office for preservation. Items 5 to 16, 18 to 23, 25 to 28, 29 to 48, and 49 relate to different parts of this procedure. A regulation of the treasury department requires the clerk to report new cases in which the United States are interested, and also their final disposition. The clerk was allowed fees for these reports, but was disallowed for copies of these reports made for preservation in his office. Item 57 was a book kept by him showing in separate columns for each case the different items on which are based the certificates issued to witnesses. This was highly commended by an examiner of the department of justice, but payment refused by the treasury officials.

Hamiltons & Gaillard, for petitioner.

M. D. Wickersham, U. S. Dist. Atty.

Toulmin, J. The plaintiff sues to recover certain fees claimed to be due him as clerk of said court, and which are specifically set forth in the accounts annexed to the petition filed in the cause. It is not denied that the services charged for were performed, but compensation for them has been disallowed, either on the ground that the same is not payable

by the United States, or that the services were not necessary or required.

Item 1. My opinion is that the plaintiff is entitled to fees for filing at least three papers from commissioners, viz., the process or copy of process, the bail-bond, and the recognizance of witnesses. These papers are required by law to be returned to the clerk of the court, and when they come to his office, in contemplation of section 1014 of the Revised Statutes of the United States, and of sections 4298 and 4425, Code Ala., they should be filed by him for identification and ready reference. He charges for filing three separate papers in each case from commissioners, which he is allowed. Rev. St. § 828.

Item 2. The rule is that there should be but one subpoena issued for all the witnesses in a cause. But this rule is subject to exceptions. The proof brings this case within the exceptions, and shows that the issue of the subpoena charged for was necessary and proper. The plaintiff is entitled to the fee charged therefor.

Item 3. He is entitled to the fee for entering order overruling motion to quash indictment. He is required to enter all the orders of the court, (Rev. St. § 794,) and the statute provides a fee for such service. The proof shows that the item was for this service, and not for "entering the motion to quash," as appears from the face of the account.

Item 4. The proof shows that the services charged for and covered by this item were not only actually performed, but that the account therefor had been stated and allowed by the treasury department. It became then a stated account. But the government claims that it was improperly allowed and paid, seeks to recharge it against the plaintiff, and now pleads a set-off to the extent of said item. This is an affirmative plea, and it devolves on the government to sustain it by proof, which it fails to do.

Items 5 to 16 inclusive. The charges for entering orders of the court approving marshal's accounts are allowed as legal and proper charges. The law requires such orders to be made, and it is the duty of the clerk to enter them up. And certified copies of such orders are required to be attached to said accounts, and to be forwarded to the treasury department. The clerk is entitled to his fees for entering the orders and for making certified copies of them, and these fees are justly chargeable to the government. But I do not think the clerk is entitled to be paid for two copies of the same order. The law requires the account to be made in duplicate, but not the order approving the account. The original account with a certified copy of the order is forwarded to the treasury department, and the duplicate account is retained by the clerk and filed in his office. Only one copy of the order, then, is necessary.

Item 17. What is said as to the charges for copies of orders approving the marshal's accounts is applicable to the charges made for copies of orders for marshal to pay supervisors of election and special deputies. Seals to copies of orders for marshal to pay supervisors, special deputies, and witnesses are, in my opinion, not necessary, and the charges therefor not allowable, unless they are required by some regulation of the department of which I am not advised.

Items 18 to 23, and 25 to 28, inclusive, and item 49. These are charges for filing the marshal's accounts and vouchers. The law requires this service of the clerk presumably for the convenience and protection of the government. He is entitled to his fees for it, and they are clearly chargeable to the government. Each should be filed separately for easy identification and ready reference.

Items 24 and 56. Charges for making final record. It is the duty of the clerk to record, after the determination of any prosecution, all the proceedings of the court relating thereto. It seems to me clear that an order of commitment made by the court is an important part of the proceedings in a criminal cause, and that it should be made a matter of record. But I think it equally clear that a justification of sureties on a bail-bond taken by the committing magistrate is no part of the proceedings of the court, and that its entry on the record is unauthorized and unnecessary. And the same may be said as to the bond itself. The charge for the two items last mentioned is not allowed.

Items 29 to 48 inclusive. These are charges for entering orders approving marshal's, commissioner's, and district attorney's accounts. What has already been said as to items 5 to 16 inclusive applies to these items.

Item 52. Charges for *scire facias*. They are legal and proper, and are allowed. Whenever an undertaking of bail is forfeited by the failure of the defendant to appear, as required, a conditional judgment must be rendered in favor of the United States against the parties to the undertaking for the sum therein expressed, and a notice of the rendition of such judgment must be issued by the clerk to each defendant. This notice is called *scire facias*, and is in the nature of a writ. Code Ala. §§ 4434, 4869. The clerk is entitled to a fee for each writ issued by him. Rev. St. § 828. The proceeding by *scire facias* is a civil action, and the notices issued in it are original. These must be executed by the marshal, and should be returned by him with the proper return thereon indorsed. The usual mode of executing process of this character is by leaving a copy of it with the defendant.

Items 53 and 54. What I have said under item 17, as to charges for copies of order for marshal to pay supervisors and special deputies, and as to the necessity for seals to such copies, applies to the charges for copies of order to pay witnesses and jurors, and seals thereto.

Item 55. The charges for making duplicate report to the solicitor of the treasury is not required by law, or the regulations of the department, is unnecessary, and not allowed.

Item 57. This charge for entering certificates for payment of witnesses is disallowed as not required by law, and unnecessary in the manner and form in which the same is made. When the court causes an order to be entered for the payment of witnesses, the clerk should enter on the record the names of such witnesses, stating days attended, mileage, and amounts, etc., and for this service he is entitled to be paid for making the record. And it is the duty of the clerk to keep a subpoena record for all cases, in which must be entered the cases in which any subpoena issues, the names of the witnesses, the time of the issue, and the return

of the marshal. For making this record he is entitled to compensation. But I do not understand from the accounts sued on, and from the proof submitted, that the charge made is for making either of the records referred to. As bearing on many of the questions raised in this case, and as sustaining my conclusions on them, I cite the following cases: *Goodrich v. U. S.*, 35 Fed. Rep. 193; *Stanton v. U. S.*, 37 Fed. Rep. 252; *Erwin v. U. S.*, Id. 470.

FINDING OF FACTS.

(1) That the plaintiff is the clerk of the United States district court for the Southern district of Alabama, and was such clerk on and before July 1, 1887; and (2) that he as such clerk actually performed the services charged for in the accounts sued on as therein stated.

CONCLUSION OF LAW.

That the plaintiff is entitled to have and recover from the United States the sum of \$292.35, as due him on said accounts.

SULZER v. WATSON.

(Circuit Court, D. Vermont, July 1, 1889.)

PRACTICE IN FEDERAL COURTS.

Under Rev. St. U. S. §§ 648, 649, making all issues of fact in the circuit court triable by jury except in proceedings in equity, bankruptcy, admiralty, and in cases of maritime jurisdiction, an action of book-account can be tried only by a jury, though section 914 provides that the practice in the federal courts shall be similar to that in the courts of the state in which the case is tried, and the action mentioned is triable under the state practice only by auditors.

At Law. Action of book-account.

Wilder L. Burnap, for plaintiff.

Samuel E. Pingree, for defendant.

Before WALLACE and WHEELER, JJ.

WHEELER, J. The action of book debt has always been in use in Connecticut. It has been regulated, but was not created, by statute. *Terrell v. Beecher*, 9 Conn. 348, note. It was brought from there to Vermont, regulated by statute, and called "book-account." Slade's Vt. State Papers, 456. Trials in it are always by auditors appointed by the court. Gen. St. Conn. §§ 1037, 1044; R. L. Vt. §§ 1206, 1207. In practice it is nearly concurrent with the action of general *assumpsit*. *Wilkins v. Stevens*, 8 Vt. 214; *Gassett v. Andover*, 21 Vt. 342. It lies for services performed, even under a special contract. *Myers v. Society*, 38 Vt. 614. The form of the declaration is prescribed, and runs for the recovery of money "which the plaintiff says is justly due from the defendant to balance book-accounts between them." This is an action of book-account,

brought in accordance with this mode of procedure, in this court, under the provisions of section 914, Rev. St. U. S., assimilating the forms and modes of procedure in the circuit and district courts of the United States to those existing in like causes in the courts of this state.

The plaintiff moves to proceed to the appointment of an auditor according to the usual mode in that action, to which the defendant objects. By the laws of the United States the trial of issues of fact in the circuit courts is to be by jury in all cases except those of equity, and of admiralty and maritime jurisdiction, in proceedings in bankruptcy, and where the parties, by written stipulation, waive a trial by jury. Rev. St. U. S. §§ 648, 649; *Parsons v. Bedford*, 3 Pet. 433; *Kearney v. Case*, 12 Wall. 275. This is not one of either of these excepted cases. It is an action at law, although not in any form known to the common law; and, although courts of equity have jurisdiction of some matters of account, they never have had any of matters merely in *assumpsit*, which may be involved in an action like this. These are called matters of account because they may be kept on books of account, and not by reason of any relation of trust between the parties out of which the transactions might arise, such as courts of equity take cognizance of. The adoption of forms and modes of procedure of the states is to supply those which the laws of the United States do not provide, and those of the state cannot take the place of those which the laws of the United States have otherwise provided. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. Rep. 724. A trial by jury in cases like this in this court, being expressly provided for and required by the laws of the United States, no other mode of trial can be taken from the state procedure and substituted for it, without consent of the parties in the form prescribed by those laws. *Parsons v. Bedford*, 3 Pet. 433; *Baylis v. Insurance Co.*, 113 U. S. 316, 5 Sup. Ct. Rep. 494. In this case there can be no trial by auditors, therefore no auditors should be appointed. Appointment of auditor denied.

HOYT *et al.* v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, N. D. Illinois. July 30, 1889.)

CONTRACTS—CONSTRUCTION.

Defendant leased certain premises to plaintiffs for a term of 10 years, on which plaintiffs agreed to erect a grain elevator in addition to one it then had and to furnish defendant with certain elevator facilities at all times during the term. Defendant agreed "that the total amount of grain received at said elevators shall be at least 5,000,000 bushels on an average for each year during the term of this lease, and, in case it shall fall short of that amount," defendant agreed to pay plaintiffs one cent per bushel on the deficiency. *Held*, that defendant is liable for a deficiency in the amount of actual receipts, notwithstanding large quantities of grain were from time to time tendered to plaintiffs by defendant, and by them refused for the reason that their elevators were full. The contract is intended to cover just such contingencies.

At Law. Action on contract.

John M. Jewett and Jewett Bros., for plaintiffs.

Edwin Walker and John T. Fish, for defendant.

GRESHAM, J. On the 18th day of February, 1880, the defendant leased to the plaintiffs, for a term of 10 years from January 1, 1881, lots 1, 2, and 3, in block K, of the original plat of the town of Chicago. The plaintiffs agreed to erect on the lots during the year 1880 an elevator, with storage capacity of 700,000 bushels, which they did, and pay an annual ground-rent of \$3,850, and all taxes and assessments levied against the premises, furnish the defendant at all times during the term with storage capacity for at least 1,000,000 bushels of grain in the elevator to be erected, and in another elevator then owned by the plaintiffs, and standing on lots 1 and 2 of the same block, having storage capacity of about 350,000 bushels. The plaintiffs also agreed that if, in the ordinary course of their business, the capacity of the two elevators should enable them to do so, they would receive and store all the grain carried by the defendant to Chicago for consignment. The eighth article of the contract reads:

"In consideration of the agreement aforesaid, the said party of the first part [the defendant] agrees that the total amount of grain received at said elevators shall be at least five million bushels on an average for each year during the term of this lease, and in case it shall fall short of that amount the said party of the first part agrees to pay to the said party of the second part one cent per bushel on the amount of such deficiency, settlements to be made at the close of each year. And whenever it shall appear at the close of any year that the total of grain received during so much of the term of this lease as shall then have elapsed does not amount to an average of five million bushels for each year, the party of the first part shall pay to the party of the second part one cent per bushel for the amount of such deficiency; but, in case it shall afterwards appear that the total amount received up to that time equals or exceeds the average amount of five million bushels per annum, the amount so paid to the party of the second part shall be refunded, or so much thereof as the receipts of the year shall have exceeded five million bushels, so that the whole amount paid on account of deficiency shall be refunded should the total receipts for the entire term equal or exceed fifty million bushels in all, on an average, or five million bushels for each year."

In 1886 the plaintiffs received from the defendant and stored in the two elevators 2,826,821 bushels of grain, and in 1887 they received and stored 2,957,592 bushels, the amount received during each of the two years, less than 5,000,000 bushels, being 2,173,179 and 2,042,408 bushels respectively. During this period the entire storage capacity of the elevators was constantly occupied by grain received from the defendant's cars, and although the plaintiffs repeatedly refused to receive additional grain tendered by the defendant during the same period, their refusal was always based upon the ground that the elevators were full, and contained more than 1,000,000 bushels. The plaintiffs insist that, under the contract, the defendant owes them one cent per bushel upon the deficiency of the receipts above shown, and demand judgment for that amount. By the third article of the contract the defendant agreed that, so far as it could legally control the same, it would deliver to the plain-

tiffs for storage all the grain it carried to Chicago, and by the article quoted the defendant guaranteed that the plaintiffs should annually receive into the two elevators for storage at least 5,000,000 bushels, and if, during any year of the lease, the plaintiffs should receive less than that amount, whether tendered or not by the defendant, it would pay the plaintiffs one cent per bushel on the difference between the amount actually received and 5,000,000 bushels. Under ordinary conditions the plaintiffs could and would have received from the defendant, and stored in the two elevators, more than the guaranteed amount of grain. One of the plaintiffs testified that in a single year he had received and stored in an elevator of less than 1,000,000 bushels capacity, 10,000,000 bushels of grain. The defendant knew that grain stored in the elevators would remain there until ordered out by the consignees, and that the ability of the plaintiffs to annually receive 5,000,000 bushels in elevators containing storage capacity of only one-fifth that amount would depend upon the action of the consignees. It happened that during the years 1886 and 1887 the grain received into the elevators from the defendant's cars remained in store so long that the plaintiffs were unable to receive the full amount they were entitled to handle under the contract. The parties contemplated that this might occur, and in their agreement provided for such contingency. In consideration of the promises of the plaintiffs, and the facilities to be furnished by them to the defendant for the storage of grain carried by the latter to Chicago, the defendant agreed and bound itself to do certain things specified in the contract, one of which was, that if, with a storage capacity of 1,000,000 bushels, the plaintiffs should not be able to receive and handle 5,000,000 bushels annually, and earn commissions on that basis, the defendant would pay to the plaintiffs one cent per bushel on the deficiency. If this is not what the parties intended, why was the word "receive" used as it appears in the eighth article? The meaning of the contract is plain enough when it is interpreted in view of the situation of the parties and the known methods of receiving, storing, and handling grain in elevators in Chicago. Plaintiffs are entitled to judgment for the amount sued for.

CENTRAL TRUST CO. OF NEW YORK v. WABASH, ST. L. & P. RY. CO.
et al., (PERRY *et al.*, Interveners.)

(Circuit Court, N. D. Illinois. July 23, 1889.)

COMMON CARRIERS—BAGGAGE—LIABILITY FOR LOSS.

A common carrier which, by its agent, receives and checks as personal baggage a trunk containing jewelry, the agent knowing or having reason to believe that the trunk contains jewelry, and not wearing apparel, is liable for loss of the property to the same extent as if the trunk contained nothing but wearing apparel.

In Equity. Intervening petition of Perry Bros.

R. S. Tuthill and F. C. Hale, for intervenors.

G. B. Burnett, for receivers.

GRESHAM, J. The intervenors, Perry Bros., are jobbers of jewelry and watches at Chicago. One of the firm, Arthur J. Perry, was at Springfield, Ill., with a trunk containing a stock of jewelry and watches, and, desiring to go to Petersburg in the same state, bought a ticket for passage over one of the lines of the Wabash Railway, then in possession of Humphreys and Tutt, as receivers. The station agent, who had served as such at the same place for more than 11 years, checked the trunk, which weighed 250 pounds, to Petersburg as ordinary personal baggage, charging 25 cents for overweight, 150 pounds being the amount allowed to a passenger. The nature and contents of the trunk were not expressly disclosed to the agent, and he made no inquiries upon that subject. The trunk was three feet by two and a half, iron-bound, weighed 250 pounds, and was known in the trade and to baggage-men as a jeweler's or commercial traveler's trunk. The evidence shows that the intervenors and other merchants of the same class, then and prior thereto sold their goods, in the main, directly from trunks transported from place to place over railroads, and that this road had, previously and frequently, checked and carried such trunks for the intervenors and others as personal baggage, but that the receivers no longer permitted such carriage. The train was wrecked before it reached Petersburg, and the trunk and its contents were destroyed by fire. The accident was caused by a defective road-bed and rotten ties. The master to whom the case was referred reported that the trunk and its contents—watches and jewelry—were worth \$8,227.42, for which amount he recommended an allowance, less \$612, the value of the goods rescued from the wreck.

If the station agent did not know that the trunk contained jewelry, he had reason to believe it did. He received it knowing that Perry was not entitled to have it carried as personal baggage. The agent did not believe the trunk contained wearing apparel only. It is plain from the evidence that he recognized it as a jeweler's trunk, and that he understood it contained a stock of jewelry. He was not, therefore, deceived and the receivers were not defrauded. Having checked the trunk by their agent as personal baggage, knowing, or having reason to believe, that it contained jewelry, the receivers became bound to safely transport it to its destination, which they did not do, and they are liable for the damages that resulted from a breach of the contract. They sustained to the trunk and its contents the relation of a carrier, and they are liable for the property destroyed by their negligence, just as if the trunk had contained nothing but wearing apparel, or as if they had undertaken to carry it as freight. The exceptions to the master's verbose report are overruled, and a decree will be entered in favor of the intervenors for the amount found due them.

TWITCHELL v. GRAND TRUNK RY. CO.

(Circuit Court, D. New Hampshire. August 6, 1889.)

MASTER AND SERVANT—INJURY TO EMPLOYEE.

In a suit against a railroad company to recover damages for the death of an employé by a car drifting from a side track, it is error to submit to the jury the question whether the side track was properly constructed, and with ordinary care.

At Law. Motion for new trial.

Aldrich & Remick, Ladd & Fletcher, and Mr. Frink, for plaintiff.
Ossian Ray, Mr. Strout, and Drew & Jordan, for defendant.

COLT, J. This is a motion for a new trial. The action was brought against the defendant railway company for negligence, which resulted in the death of the plaintiff's intestate, Henry F. Noyes, who was at the time a freight conductor in the employment of the company. The accident was caused by a collision of a freight train in charge of Noyes with a freight-car which had drifted from a side track. For several years Noyes had been in charge of the freight train which ran from Gorham, N. H., to Island Pond, Vt., a distance of about 48 miles, and the accident happened at a place called "Stratford Hollow." The question of negligence on the part of the defendant company turned largely on two points, namely, the defective construction of the side track at Stratford Hollow, and the failure of the company to employ stop-blocks or proper means for blocking the cars when upon the side track. The presiding judge, against the objection of the defendant, permitted the evidence to go to the jury on both these points. The presiding judge also, in his charge to the jury, said:

"Next, gentlemen, you will take up the question of whether the railroad company was negligent or not in the construction of the siding at Stratford Hollow, and in the instruments of protection which were employed there. * * * You must say (in view, of course, that this happened in 1883) whether the siding was constructed in accordance with scientific railroad construction, and whether in its construction, with respect to stop-blocks, or to securities against a car being blown out onto the main track, the company exercised ordinary care."

At the time of the trial the recent case of *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. Rep. 1166, was not brought to the attention of the court. That was a suit brought by an employé against the railroad company for negligence in the construction of a curve in the track in the yard of the company. The court, speaking through Mr. Justice BRADLEY, says:

"We have carefully read the evidence presented by the bill of exceptions, and, although it appears that the curve was a very sharp one at the place where the accident happened, yet we do not think that public policy requires the courts to lay down any rule of law to restrict a railroad company as to the curves it shall use in its freight depots and yards, where the safety of passengers and the public is not involved; much less that it should be left to

the varying and uncertain opinions of juries to determine such an engineering question. For analogous cases as to the right of a manufacturer to choose the kind of machinery he will use in his business, see *Richards v. Rough*, 53 Mich. 213, 18 N. W. Rep. 785; *Hayden v. Manufacturing Co.*, 29 Conn. 558. The interest of railroad companies themselves is so strongly in favor of easy curves as a means of facilitating the movement of their cars that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with in determining their obligations to their employes. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto, and, if they decide to do so, they must be content to assume the risks."

In the present case there was no question as to the siding having become defective after its construction, but the question, as submitted to the jury, was whether the company exercised ordinary care in its construction, and whether it was constructed according to scientific principles. Under the law as laid down by the supreme court in *Tuttle v. Railway Co.* it seems to me clear that the court committed an error, and that the defendant company is entitled to a new trial. Motion granted.

TOPPAN *et al.* v. TIFFANY REFRIGERATOR CAR CO.

(Circuit Court, N. D. Illinois. August 3, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

If the owner of a patent-right which infringes another patent licenses others to use his device, and furnishes to his licensees and those constructing his articles plans and drawings requiring the use of the prior device, without procuring, or intending to procure, the consent of the owner of such prior patent, he is an infringer, and liable in damages.

In Equity. Bill for infringement of patent.

Bill by James S. Toppan and others against The Tiffany Refrigerator Car Company, to restrain the infringement of letters patent and for an accounting.

W. Zimmerman, for complainants.

F. A. Woodbury, for defendant.

GRESHAM, J. This suit was brought by the plaintiffs as assignees of letters patent No. 228,241, granted to Arnold W. Zimmerman on June 1, 1880, against the defendant as an infringer. The patent describes and claims a device or mechanism for securely bolting or closing car and other doors, and for opening the same. The validity of the patent is not disputed, and the invention need not be more particularly described. The defendant is the owner of a number of patents for improvements in refrigerator cars, and the bill charges that the defendant has made, used, and

sold, and caused others to make, use, and sell, refrigerator cars supplied with the Zimmerman improvement. The alleged infringing device, in principle and mode of operation, is the same as the Zimmerman improvement. The real controversy in the case is one of fact. The evidence clearly shows that the defendant's licensees and others have appropriated the invention described in the plaintiffs' patent without right, and the only question is whether the defendant was a party to the trespasses. The defendant claims that since July, 1880, its sole business has been that of licensing others to use the improvements covered by its patents, which improvements relate to a refrigerator system, and have no connection whatever with the Zimmerman invention, or the running-gear, brakes, buffers, or car-couplings; and that, if any of the licensees have appropriated the Zimmerman device, they did it upon their own authority and responsibility, and that they alone are guilty as trespassers. The evidence, however, shows that, if the defendant did not own or use the refrigerator cars with the plaintiff's improvement attached to the doors, it furnished its licensees or car-builders with working plans and drawings of cars showing and requiring the Zimmerman device, and that this was done with no thought or expectation that the owner's consent would be obtained for such use. The usual decree will be entered in favor of the plaintiff.

COVELL v. BOSTWICK.

(Circuit Court, S. D. New York. July 15, 1889.)

1. PATENTS FOR INVENTIONS—LICENSES—RIGHT TO ROYALTIES.

Plaintiff, the inventor of certain improvements in metal cans under patents dated in 1864 and 1866, and also a machine for manufacturing them, patented in 1867, granted to defendant the exclusive right to manufacture and sell cans embodying the inventions, which plaintiff agreed to defend, and also the right to use at defendant's risk the machine, and all improvements in such cans, machines, and appliances which plaintiff should invent, the defendant to pay a royalty for each can. Plaintiff, in 1869, obtained another patent for a machine, and in 1871 for further improvements in the cans. Defendant manufactured cans, using the machine of 1869, and the invention of 1871, and embodying, as the parties supposed, the invention of 1864. Reports were made and royalties paid until 1877, when P., the owner of a patent similar to the invention of 1866, sued defendant for infringement. Plaintiff took the defense of the suit, and also brought suit against P. for cancellation of his patent, on the ground that it interfered with plaintiff's patent of 1864. The suits resulted in a decree against defendant for infringement of P.'s patent, and the dismissal of plaintiff's suit because the invention covered by plaintiff's patent of 1864 was for a different invention from that of P.'s, which defendant used. Afterwards defendant discovered that the device used by him, embodied in plaintiff's patents, was anticipated by an earlier patent, and P.'s suit was compromised for \$6,000, which defendant paid, and charged to plaintiff. *Held* that, as the defendant had had the use of all that the parties understood he was to have, he was liable for the royalties on the cans manufactured.

2. SAME.

The agreement also provided that, if plaintiff failed to maintain the validity of any of the inventions claimed, the defendant should pay an equitable proportion of the royalty for the parts remaining valid, to be fixed by arbi-

trators. *Held*, that this provision did not apply. Plaintiff failed in his suit against P., not because of the invalidity of his invention, but because the patent did not cover it. Besides, the failure to maintain the validity of the patents in suits brought upon them would not affect the right to royalties which had accrued before such failure, and defendant was protected in the suit by P. by plaintiff's paying the amount found due.

3. SAME.

Defendant made cans not embodying the inventions of the patents of 1864 and 1866, but they did embody those of the patent of 1871. The agreement only provided for the use of this invention on cans which should be subject to the payment of a royalty. Defendant reported the number made, but reported them as different from the others, and not subject to royalty. *Held*, that in thus using the invention of 1871 defendant became a tort-feasor, and was not liable for royalties in an action on the contract.

At Law. Action to recover royalties for use of patented inventions.

William H. Arnoux, for plaintiff.

Charles C. Beaman, Jr., and *Edward N. Dickerson*, for defendant.

WHEELER, J. This cause has been tried by the court upon written waiver of a jury. Improvements in sheet-metal cans, including an interior interlocking corner joint, were patented to Emile Peltier, August 31, 1860, in France, and August 27, 1861, in England. Letters patent of the United States, No. 43,371, for such improvements, including a corner joint like that patented to Peltier, were granted to George W. Prince, assignor, June 28, 1864. The plaintiff was an inventor of improvements in such cans, and in their manufacture, and had three patents of the United States relating to them. One, No. 42,351, granted to him April 19, 1864, was for uniting the sides of such cans by an interior interlocking corner joint, and securing the heads in place by internal grooves; another, No. 52,972, granted to him March 6, 1866, showed a corner joint like that of Peltier, and covered cans having a similar joint uniting the bottom to the sides so as to be flush with their ends; and another, No. 63,220, was for a soldering-machine for soldering such cans, granted to him March 26, 1867. He had also invented a machine for clamping the edges of such cans, for which he had applied for a patent. On March 2, 1869, he entered into an agreement in writing with the defendant, which was modified by another of December 30, 1870, by the terms of which he granted to the defendant the exclusive right to manufacture and sell sheet-metal cans embodying the inventions of these patents, which would be those of April 19, 1864, and March 6, 1866, and which the plaintiff was to maintain and defend, and to use in their manufacture, and not otherwise, at the defendant's own risk, without payment of further royalty, the soldering-machine, the machine for clamping the edges of cans, and all improvements in such cans and machines and appliances for the manufacture of cans which the plaintiff should invent or acquire by purchase, for a royalty of one cent per can, on which was to be stamped conspicuously, "Covell's Patents: April 19, 1864; Mar. 6, 1866." On September 21, 1869, the plaintiff obtained a patent for the machine for clamping the edges of cans; and on December 5,

1871, patent No. 121,490 was granted to him for an improvement in the corners of the heads of rectangular cans.

The defendant commenced the manufacture under the license of square-cornered cans, which had an interior interlocking corner joint, embodying the invention of the patents of Peltier and of Prince, and was like the joint shown in the plaintiff's patent of March 6, 1866; and those made after his patent of December 5, 1871, embodied the invention of that patent. In the manufacture of all of them the invention of the plaintiff's patent of September 21, 1869, was employed. None of them had flush heads, and none of them embodied the patented invention of the plaintiff's patent of March 6, 1866. The parties mutually understood that the interlocking corner joint used in their manufacture was covered and protected by the plaintiff's patent of April 19, 1864. The defendant so made before April 1, 1877, 11,071,290 of these cans, which he reported to the plaintiff, and paid the royalty on, from time to time, according to the terms of the agreement of license. The royalties so paid amount to \$110,712.90. At about that time the defendant commenced the manufacture of round-cornered cans, which were made by the same machinery as the square-cornered cans, and were in all material respects like them, except that the joint uniting the sides was in the curve of the round corner instead of at the angle of a square corner, and became the old and well-known joint of common stove-pipe and of tin-pails, instead of being the corner joint of any of these patents. At about the same time George W. Banker, who had become the owner of the patent to Prince, commenced suit upon it against the defendant for infringement of it by making these square-cornered cans. In the agreement of license was a clause providing that payment of royalties should be suspended during the pendency of such suit, unless the plaintiff should furnish security for refunding them in case the suit should be determined adversely to him. The plaintiff assumed the defense of that suit, and brought a cross-suit against Banker to repeal the Prince patent for alleged interference with his patent of April 19, 1864, and with his rights under it in bringing the suit against the defendant, but did not furnish security for repayment of royalties. The defendant suspended payment of royalties, but continued to make and report the square-cornered cans to the number of 1,615,983, on which he has paid no royalty. He continued to make the round-cornered cans, and reported them to the plaintiff, with a claim that they were not such as a royalty was to be paid upon, but in order that the plaintiff might know how many were made, and that any claim for the use of his patented inventions about them might be readily adjusted. The two causes proceeded to hearing under a stipulation that the same proofs should be used in both, and that they should be heard and determined together. The Peltier patent was not brought into that litigation, and does not appear to have been known to those concerned. It resulted in a decree for an injunction and an account against the defendant for the infringement of Banker's patent, and a decree dismissing the plaintiff's bill against Banker on the ground that the invention of the plaintiff's patent of April 19, 1864, was of a differ-

ent joint from that of the Prince patent, which the defendant had used. *Banker v. Bostwick*, 3 Fed. Rep. 517. After these suits were so decided the defendant employed counsel for himself, who discovered the Peltier patent, and called the attention of counsel for the plaintiff and of Banker to it, and all agreed that it was a full anticipation of the corner joints of the other patents. Thereupon the defendant, pursuant to an understanding with the plaintiff, settled with Banker, and procured him to discontinue his suit for \$6,000, which the defendant paid and charged to the plaintiff with his approval, and which was about what those concerned thought would be the expense of getting the Peltier patent into the litigation. The defendant made 11,581,719 of these round-cornered cans before this termination of the litigation, and reported them to the plaintiff, under the claim stated that they were not subject to the royalty of one cent per can. This suit is brought to recover the royalty of one cent per can on the square-cornered cans not paid for, amounting to \$16,159.83, and on the round-cornered cans, amounting to \$115,817.19. The defendant denies liability for these royalties, and sets up a counter-claim for the royalties paid.

The plaintiff's patent of April 19, 1864, was a prominent subject of the litigation with Banker. Both parties here were parties or privies to both of those suits, and the decrees in each, to the extent that they were final, are binding and conclusive upon both. 1 Greenl. Ev. §§ 523, 551. The decree in *Banker v. Bostwick*, although made in some senses on final hearing, was interlocutory merely, and did not become absolutely final before the suit was discontinued. The decree in *Covell v. Banker* was made upon the same considerations, and was final and conclusive. It established that the corner joint used by the defendant in the manufacture of the square-cornered cans was not covered by the plaintiff's patent of April 19, 1864, but was covered by the Prince patent. These cans, therefore, did not actually embody the exact invention of either of the plaintiff's patents for the use of which by the terms of the license the royalty was to be paid. The defendant, however, had and enjoyed the use of these patents of the plaintiff for exactly what they mutually understood he was to have them for. He occupied a field, as of exclusive right, which they supposed the patents covered, under them, although they did not cover that precise field. His situation in this respect was like that of a lessee who should occupy and enjoy premises supposed to be the leased premises, but which should not be precisely such. That a patent or lease should fail to cover the invention or premises bargained for by want of description would seem to be no better defense to an action for royalty or rent than if it failed to do so by want of right or title. That mere failure of the right or title does not excuse payment of royalties or rent does not appear to be doubtful, and is not disputed in behalf of the defendant. *Stott v. Rutherford*, 92 U. S. 107; *White v. Lee*, 14 Fed. Rep. 790; *McKay v. Jackman*, 17 Fed. Rep. 641. If the licensee has what he bargained for, without disturbance, he is bound to fulfill his part of the agreement. *Marston v. Sweet*, 82 N. Y. 528. The defendant has had what he bar-

gained for in respect to the square-cornered cans, except as to the payment of \$6,000 to Banker; and as this was done by the defendant with the concurrence of the plaintiff, and the amount has been charged to him by the defendant with his approval, he takes the burden of the disturbance upon himself, and relieves the defendant of it. If a lessee should become subject to pay rent to another for the premises occupied, that might amount to an eviction, and relieve him from liability for rent to the lessor. *George v. Putney*, 4 Cush. 354; 1 Washb. Real Prop. c. 10, § 8. But if the lessor, through the lessee or otherwise, assumes that liability, and relieves the lessee from it, there is no eviction by that, and the liability for rent would not be thereby altered, especially if this is done with the concurrence of the lessee. The relations of a licensee are so similar that the same results would seem to follow like events in them. *Stott v. Rutherford*, 92 U. S. 107; *White v. Lee*, 14 Fed. Rep. 790.

The agreement of license contained a clause providing that the plaintiff would defend the defendant against any and all suits in consequence of the use of inventions covered by these two patents of April 19, 1864, and March 6, 1866. With the assumption of the \$6,000 paid to Banker, the plaintiff has fulfilled this obligation, even with the patents considered as covering all that the parties understood them to cover. The agreement also contained a clause providing that, in case the defendant should be restrained by injunction from manufacturing cans embodying these inventions, the covenants therein on his part should be suspended until the dissolution of it. The defendant was not, however, restrained by injunction from making these or any of the square-cornered cans, for he made them, but he did not make them in violation of any injunction, for they were all made about three years before any injunction was ordered, and almost all of them before any suit was brought.

The agreement also contained a further clause, which provided that, in case the plaintiff should fail to establish the validity of his patents or claim for any of the inventions covered by them, the defendant should pay an equitable proportion of the royalty only for that part which should remain valid and in force, to be fixed by disinterested persons to be chosen by the parties. The suit of *Covell v. Banker* was brought upon the plaintiff's patent of April 19, 1864, and the bill of complaint in it was dismissed, not, however, because the patent was invalid, but because Banker's patent did not interfere with it. If the "claim for" inventions mentioned in this clause would cover what the plaintiff assumed, and both he and the defendant understood it did, in respect to the corner joint used by the defendant in the manufacture of the square-cornered cans, as perhaps it does, then the plaintiff failed in that suit to establish its validity to that extent. But the plaintiff's license was exclusive, and this clause appears to have been inserted to protect the defendant, in the exclusive rights which he sought to acquire, from infringers and others against whom suits might be necessary. It was in the nature of a covenant for quiet enjoyment, prospective in operation,

which would not be broken without eviction, or what by the terms of the contract would be tantamount to one. 4 Kent, Comm. 471; Rawle, Cov. (3d Ed.) 165. Failure to maintain the validity of the patents in suits brought upon them would not affect the right to royalties which had accrued before such failure. *White v. Lee*, *supra*; *McKay v. Jackman*, *supra*. The right to royalties on all these square-cornered cans had fully accrued before there was any failure to establish the claim to the corner joint used in the manufacture of these cans in that suit brought on the patent of April 19, 1864; and that suit was not brought against any infringer, but to protect the defendant from a claim of infringement made against him; and as the plaintiff saves the defendant from the consequences of that claim by letting the \$6,000, which relief from it cost, be charged to him, the protection sought by that suit is fully furnished to the defendant by the plaintiff.

In view of these considerations, the defendant appears to have had and enjoyed, in the making of these square-cornered cans, the exclusive use of all the inventions which he bargained with the plaintiff for, and to have been protected in that use not only as fully as the plaintiff agreed to protect him, but as fully as he could be protected. Upon this he appears to be bound to pay the agreed royalty, of one cent per can, on them, in fulfillment of the agreement in respect to them on his part. *A fortiori* he is not entitled to recover back the royalties already paid on the same kind of cans, made previously to these.

The round-cornered cans did not embody any of the inventions of either of the patents of April 19, 1864, or of March 6, 1866, for the use of which the royalty was to be paid. They had stamped on them when made: "Covell's Patents: Mar. 6, 1866; Dec. 5, 1871." This would be some evidence that they were made under the patent of March 6, 1866, as well as under that of December 5, 1871; but this would not be conclusive of that fact, against other evidence clearly to the contrary. The number of them was reported to the plaintiff, but not as of cans on which the royalty of 1 cent per can was to be paid. In *Pope v. Owsley*, 27 Fed. Rep. 100, cited for the plaintiff, the reports appear to have been absolute of machines as subject to the royalty. These circumstances do not bind the defendant to the contrary of the fact that these cans were not within those patents. Neither did the parties mutually understand that the patent of April 19, 1864, would cover the side seams of these cans, as was the case with the corner joint of the square-cornered cans. They had no mutual understanding about that seam. When it first appeared in the cans, the defendant reported them as different from the others, and subject to doubt about the royalty. The plaintiff is not shown to have ever dissented from this. The doubt does not appear to have been removed, nor any understanding as to these cans to have been arrived at. The defendant did not use the inventions of these patents for which royalties were to be paid about these cans at all, and did not have anything in that behalf for which he had bargained and agreed to pay the royalty of one cent per can. He was to pay for such occupation and enjoyment of the field of invention of these pat-

ents as he should have, but in the making of these cans he has not had any. The estoppels in a lease relate only to the leased premises. *Knapp v. Marlboro*, 34 Vt. 235. In *White v. Lee*, *supra*, a decree for license fees appears to have been refused because the patent did not cover what was practiced; and in *Pope v. Owsley*, *supra*, BLODGETT, J., says the question left open for the defendant in such a case "is whether the machines made by them are within the terms of the claims in the patents." These cans are not within the claims of these patents. They did embody, however, the inventions of the patent of December 5, 1871, and that of the patent of September 21, 1869, was employed in their manufacture. By the terms of the agreement the defendant was granted the right to use the inventions of these patents only about the cans which should be subject to the payment of royalties. The counsel for the plaintiff insists that, as the defendant had no right to use them except about cans for which royalties should be paid, the use of them by him about cans would give the right to the royalties on them. But that would put the use of the inventions of these collateral and merely incidental patents on an equality with those of the two main and principal ones for only which royalties were agreed to be paid, and take it materially beyond the agreement of the parties. The contract not only makes no provision for such of these inventions, but expressly prohibits it. The clause relating to fixing an equitable proportion of royalty by arbitration does not extend to such use. That seems to apply only to the use of the remainder, when the defendant should be deprived by adverse decision of the exclusive use of part of the inventions for which royalties were to be paid. The defendant was not deprived of any part of such exclusive use in the manufacture of these cans. He voluntarily made these cans without embodying in them any of the inventions for which he was to pay royalty. In using these other inventions about these cans he took them beyond where he had any right to take them. He thereby became a tort-feasor, and liable as such only, and not upon the contract. *Story*, Bailm. § 413; *Homer v. Thwing*, 3 Pick. 492; *Towne v. Wiley*, 23 Vt. 355. The defendant showed by reporting these cans to the plaintiff, as he did, that he did not intend to appropriate any of these inventions to his own use in avoidance of liability therefor, and that he did intend to make just compensation therefor; but that did not bring the use within the terms of the contract already made, nor constitute any new contract which can be enforced here. The liability for that use of these inventions appears to be wholly without the scope of this action.

The result of these considerations is that the plaintiff is entitled to recover only the royalty on the 1,615,983 square-cornered cans not paid for, amounting to \$16,159.83, after deducting the \$6,000 charged by the defendant to the plaintiff, with interest. The contract does not provide for interest on the royalties. Banker's suit was pending till it was discontinued by the settlement on November 5, 1880. The payment of these royalties was properly suspended till that time. After that they were due, and would bear interest. The payment of the \$6,000

was made then, and should be deducted as of that time. The balance is \$10,159.83, on which the interest to the time of judgment is \$5,245.83; in all, \$15,405.66. Let judgment be entered for the plaintiff for \$15,405.66.

THE BARRACOUTA.¹

BRANDOW v. THE BARRACOUTA.

(*District Court, E. D. New York. June 28, 1889.*)

SHIPPING—LIABILITY OF VESSEL FOR TORT.

Libelant, while in the pilot-house of a tug lying along-side a steamer was injured in the ear by the concussion of a cannon, fired aboard the steam-ship to indicate her departure for sea. *Held*, that the steam-ship was liable for such injury. For negligence in ship's work, the ship herself is liable.

In Admiralty.

Action against the steam-ship Barracouta for personal injuries.

Wilcox, Adams & Macklin, for libelant.

Wing, Shoudy & Putnam, for the Barracouta.

BENEDICT, J. This is an action brought by George Brandow, a pilot of a tug-boat, to recover of the steam-ship Barracouta for personal injuries received by him under the following circumstances: The steam-ship Barracouta, bound to sea, was being taken out from her pier in the East river by a tug-boat of which the libelant was pilot. The tug-boat was fast on the port side of the vessel as she went out, her pilot-house being just about opposite the muzzle of a small cannon kept on the forward part of the ship for ship's purposes. While in this position, and without notice, so far as appears from the evidence, this cannon was fired as a signal of the ship's departure on her voyage. The effect of firing the cannon when the pilot-house of the tug was so nearly opposite and close at hand was to burst several windows in the pilot-house, and to inflict upon the pilot standing in the pilot-house at his wheel a severe shock. From that time for some two weeks painful sensations in the ear which had been exposed to the cannon were experienced by the pilot, and then an abscess appeared in the ear, and the drum of the ear was found to be perforated, from which it would seem permanent injury to the libelant's hearing has resulted.

I am of the opinion that negligence on the part of the vessel is shown, in that the cannon, small as it was, was fired while the pilot-house of the tug was so near to its muzzle. The statement of the master of the steamer, that he supposed he should have to pay for the glass, confirms this conclusion. The breaking of the glass also points to the same con-

¹Reported by Edward G. Benedict, Esq., of the New York bar.

clusion. I am also inclined to the opinion that the evidence is sufficient to warrant a conclusion that the injury to the libellant's ear was caused by the concussion of the air, produced by the firing of the cannon. The libellant testifies that from the time the cannon was fired he experienced unpleasant sensations in his ear, and I see no reason to doubt the truth of his statement. This indicates that the abscess which some two weeks afterwards formed in the ear was the result of an injury to the ear caused by the firing of the cannon. No previous difficulty in that organ had been experienced, nor was it otherwise exposed to injury. To the same effect is the medical testimony. That the ship herself is liable to condemnation for the damage so caused I cannot doubt. The cannon was fired by the boatswain of the ship, in the ordinary routine of ship's duty. It may not have been necessary to the navigation of the ship to fire the cannon, but firing the cannon was incident to her navigation. It was the ship's notice of her departure with the mail on a voyage to sea. For negligence in ship's work the ship herself is liable. As to the amount to be awarded as damages, let the testimony be taken before a commissioner, and the same reported with his opinion.

THE SCOTIA.¹

UNITED STATES *v.* THE SCOTIA.

(*District Court, E. D. New York. July 3, 1889.*)

1. ADMIRALTY—VIOLATION OF PASSENGER ACT.

The provisions of section 1 of the passenger act of August 2, 1882, cannot be enforced against the master of a vessel by a civil proceeding in admiralty.

2. SAME—PLEADING.

In a proceeding against a vessel, under the passenger act of 1882, to recover a penalty for carrying an excess of passengers, it is not necessary, in order to create a liability on the part of the vessel, to allege and prove that in a criminal proceeding instituted under the statute the master has been convicted, and a fine imposed upon him equal to the sum claimed against the vessel.

In Admiralty.

On exceptions to libel against the steam-ship Scotia and her master for carrying excess of passengers.

M. D. Wilber, U. S. Atty., for libellant.

R. D. Benedict, for the steam-ship.

BENEDICT, J. This case comes before the court upon exceptions to the libel. The libel is plainly defective in that it fails to disclose what statute of the United States is relied upon. This defect may be amended.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

Treating the libel as if amended by setting up the first and thirteenth sections of the passenger act of August 2, 1882, as the provisions of statute relied upon, there remain the third and fourth exceptions to the libel taken by the master. These exceptions present the question whether the provisions of the first section of the act of 1882 can be enforced against the master of a vessel by a civil proceeding. The present is a civil proceeding in admiralty, and must, of course, be dismissed as to the master if by the statute the acts charged against the master constitute a criminal offense under the statute. On this point it is sufficient to refer to the words of the statute in question, where it is declared that, if the master of the vessel commits the acts here charged, "he shall be guilty of a misdemeanor, and fined fifty dollars for each passenger in excess, and may also be imprisoned not exceeding six months." This language is too precise to permit it to be contended that the statute can be enforced against the master by a civil proceeding like the present. The exceptions of the master to the libel must therefore be allowed, and the libel dismissed as to him.

It remains to be determined, upon the exceptions taken by the owners, whether the libel can be maintained as against the vessel. The libel being taken to aver a carriage by the steam-ship *Scotia* of 29 passengers in excess of the number allowed to be carried by the first section of the act of 1882, and also to aver that by virtue of the thirteenth section of the act a lien attached to the ship for an amount equal to \$50 for each of said passengers, to-wit, the sum of \$1,450, the objection is raised by the claimants' exceptions that the libel is fatally defective, because it omits to set forth that the master of the steam-ship has been tried and convicted for the carrying of such passengers, and in such criminal proceeding fined in the sum of \$1,450. While it must be admitted that the language employed in framing the thirteenth section of the act is poorly adapted to carry into effect the design indicated, still I incline to the opinion that it can be held sufficient for that purpose. Looking at the theory upon which the act of 1882 is framed, each section of the act may be taken as a statute by itself. In this instance the libel is to be taken as framed under the first section, by which section a definite fine of \$50 for each passenger in excess is required to be imposed by the court on the master upon his being convicted of having done the acts forbidden. This provision is supplemented by the provision in the thirteenth section, a provision applicable to all the sections of the statute, where it is provided "that the amount of the several fines and penalties imposed by any section of this act upon the master of any steam-ship * * * for any violation of the provisions of this act shall be liens upon such vessel, and such vessel may be libeled therefor in any circuit or district court of the United States where such vessel shall arrive or depart." Upon this language it has been argued that the statute requires allegation and proof of a conviction of the master in a criminal proceeding and the imposition upon him of a fine equal to the sum claimed to create a liability on the part of the vessel. But it will be observed that the statute does not speak of

finer imposed by the court. The words are, "imposed by any section of this act." The intent of the statute is to create a lien upon the vessel for the amount of any fine permitted by any section of the act to be imposed upon the master in case of his conviction in a criminal proceeding. If this be not the true construction, the result would follow that all that would be necessary to charge the vessel herself would be to aver and prove the conviction and sentence of the master. A conviction of the master might be had upon the master's plea of guilty in a proceeding to which the owners would be no party, and under the construction contended for by the owners would render the owners of the ship, through their vessel, liable to a fine without any opportunity on their part to contest the facts. In view of such a result, I think the statute must be construed as permitting the vessel herself to be proceeded against in admiralty as if personally responsible, and subject to be fined upon proof of acts done by her master which are forbidden by the statute, and permit him to be fined when the proceeding is against him. Upon amendment of the libel, as suggested, within 10 days, the exceptions to the libel in behalf of the claimants will be overruled; otherwise they are allowed.

CHUBB v. HAMBURG-AMERICAN PACKET CO.¹

(District Court, E. D. New York. June 24, 1889.)

ADMIRALTY—JURISDICTION.

Libelant is an American citizen, who sues as assignee of the owners of the British ship A., and the action is brought to recover damages caused by a collision in the English channel between the A. and the German steamer B. The steamer has never been in the United States, none of her witnesses are here, and her owner asks the court, on the above facts, to decline to entertain jurisdiction of the action. The owner of the German steamer has been requested, and has refused, to appear in an action instituted against him in a British court. *Held*, assuming, but not deciding, that it is competent for a court of admiralty, in its discretion, to decline to entertain jurisdiction of a cause of collision on the high seas where all the parties are foreigners, this case presents no grounds on which the court should so decline jurisdiction.

In Admiralty. On motion that the court decline to entertain jurisdiction.

Goodrich, Deady & Goodrich and R. D. Benedict, for libelant.

Bulter, Stillman & Hubbard, for the Borussia.

BENEDICT, J. This is an action brought to recover for damages caused to the British ship Astracana, by a collision that occurred in the British channel between that ship and the steamer Borussia. The ship Astracana was an English vessel, owned by English subjects, and the steamer Borussia was a German vessel, owned by the defendant. The libelant is an American citizen, who sues as assignee of the English owners of the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Astracana. The defendant has appeared in the action. No testimony has been taken on either side, and now the defendant requests this court to decline jurisdiction. That this court has jurisdiction to adjudicate the rights of these parties arising out of the collision in question is not denied, but it is contended that there are circumstances which should impel the court in the exercise of its discretion to decline to exercise that jurisdiction. The facts put forth in support of the application are that the steamer Borussia has never been in the United States; that none of the witnesses to be called in the cause are in the United States; and the injured vessel was a British ship. Upon these facts it is contended by the defendant that to require him to try the cause in the United States, under such circumstances, would impose hardship upon him without cause. In opposition it is shown that the defendant has been requested to appear in an action instituted against him in a British court for the same cause of action, and has refused so to do, from which it is implied that it is not possible for the libellant to secure jurisdiction of the defendant in a British court. It is evident, therefore, that a refusal by this court to entertain jurisdiction of this cause is equivalent to requiring the cause to be tried in Germany, and the question, then, is whether justice requires that the question of the liability of the German ship for the loss of this English vessel in a collision on the high seas shall be adjudicated in Germany. Assuming, but not deciding, that it is competent for a court of admiralty, in the exercise of its discretion, to decline to entertain jurisdiction of a cause of collision arising on the high seas, when all the parties are foreigners, I am unable to see any good ground upon which to decline the jurisdiction in a cause like this. The inability of the English courts to acquire jurisdiction of the defendant in behalf of the English owners of the Astracana affords no ground upon which to ask this court to decline a jurisdiction over the defendant which the laws of this country enables it to acquire. I see no hardship upon the defendant in compelling him to meet the libellant's demand in the courts of the United States. It is true, their witnesses to this collision are not here; neither are the libellant's witnesses in Germany. To transmit the libellant to Germany would therefore impose as great a hardship upon the other side as would follow by retaining the cause. The defendant has a regular agent here, and runs a line of steamers to this port. Moreover, the general rule is that when there is a choice of forums the libellant has the right of choice. To grant the defendant's application in this case would be to give to the defendant the right of choice. Still further, the libellant is an American citizen, and if, as contended in behalf of the defendant, the cause of action was assigned to him for the mere purpose of facilitating a resort to the courts of the United States, still the fact remains that the party seeking the intervention of this court is an American citizen. That fact alone seems sufficient to require the court to retain the cause. The motion is denied.

UNITED STATES v. SHAW *et al.**(Circuit Court, S. D. Georgia, E. D. January 15, 1889.)*

1. FEDERAL COURTS—JURISDICTION—AMOUNT.

The limitation as to amount in a controversy necessary to give the circuit court jurisdiction, fixed by section 1 of the act of March 3, 1887, (24 St. at Large,) does not apply to suits in which the United States is plaintiff or petitioner.

2. SAME—STATUTES—REPEAL.

The old law embraced in section 629, Rev. St., gave jurisdiction of all suits at common law and in equity where the United States are plaintiffs or petitioners, and it also contained an independent special clause, giving jurisdiction of all suits arising under the revenue, internal revenue, or postal laws. The act of March 3, 1887, conferred jurisdiction of all suits at common law or in equity where the United States are plaintiffs or petitioners, without reference to said special subjects. It is *held*, that the latter provision does not repeal by implication the grant of jurisdiction over the special subjects mentioned in the independent clause of the original statute.

3. SAME—ACTIONS BY GOVERNMENT.

It is a settled policy on the part of the United States to have its legal rights determined in its own courts,—a policy founded upon sound and vital reasons.

4. SAME—PRESUMPTIONS.

The right to sue in its own courts, having once attached, becomes a prerogative right, and congress will not be presumed to intend to deprive the government of such right, unless the intention appears in plain and unambiguous terms.

5. STATUTES—CONSTRUCTION.

When, under one of two possible constructions, a statute would divest the public of a right, violate a principle of settled policy, and avoid the methods of procedure which have been clearly indicated by many acts of previous legislation, in such case, if there is doubt about the proper construction, the doubt should be resolved in favor of the government.

(Syllabus by the Court.)

At Law.

Du Pont Guerry, for the United States.

John M. Guenard and Denmark & Adams, for defendants.

SPEER, J. This is a suit upon a postmaster's bond. It appears upon the face of the declaration that the amount in controversy is less than \$2,000. Defendants demur to the declaration, and move to dismiss the suit for want of jurisdiction. Counsel for defendants contend that if there is any jurisdiction to try this cause, it must be found in some act of congress now of force expressly conferring that jurisdiction upon this particular court; that where congress has not expressly conferred upon the courts the entire judicial power inherent in the government under the constitution, the jurisdiction of the court is limited to the express grant, and may not be helped by the residual ungranted powers that may be found in the constitution. In support of this position they rely upon the following authorities: *Kempe v. Kennedy*, 5 Cranch, 185; *Kennedy v. Bank*, 8 How. 611; *Ex parte Watkins*, 3 Pet. 207; *McIntire v. Wood*, 7 Cranch, 506; *Kendall v. U. S.*, 12 Pet. 616; *Cary v. Curtis*, 3 v.39F.NO.9—28

How. 245; *Osborn v. Bank*, 9 Wheat. 738. They further contend that the act of congress of March 3, 1887, (24 St. at Large, 552,) undertook to define and determine the jurisdiction of the circuit courts over all suits of a civil nature at common law or in equity in which the United States are plaintiffs or petitioners, and therefore by implication repealed all previous acts of congress conferring jurisdiction of the same subject-matter, and they cite *King v. Cornell*, 106 U. S. 396, 1 Sup. Ct. Rep. 312. They contend that this act confers upon the circuit court jurisdiction only of such suits as involve a controversy in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, and they insist that this court has no jurisdiction of the case at bar. In support of the position that the jurisdictional limit as to amount in a general statute applies as well to suits brought by the government as by individuals, they cite the following authorities: *U. S. v. Hill*, 123 U. S. 681, 8 Sup. Ct. Rep. 308; *Walker v. U. S.*, 4 Wall. 163; *Ross v. Prentiss*, 3 How. 771; *Gruner v. U. S.*, 11 How. 163. There can be no doubt that the authorities cited by defendants' counsel are controlling in settlement of the questions they treat, but they are not applicable to the case at bar. In the first place, it is far from clear that the jurisdiction expressly conferred by the act of March 3, 1887, where the United States is plaintiff or petitioner, is limited in any sense by the amount in controversy. If we turn to the act of March 3, 1875, of which this act is an amendment, we will find that the limitation as to amount precedes the clauses conferring jurisdiction over the special subjects therein defined in the following order: It recites, *first*, that the circuit court shall have jurisdiction of all suits of a civil nature at common law or in equity, "where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars." Then follow specifications of the subject-matters, to-wit, federal questions, "or" government suits, "or" citizenship, "or" land grants, "or" suits of aliens.

It appears, then, that in the act of 1875 the grammatical structure of the section required that the limitation as to amount should apply to each class of suits specified. But the structure of the section as amended by the act of March 3, 1887, is very different. This act recites that the circuit court shall have jurisdiction of all suits of a civil nature at common law or in equity, "where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution," etc., "or" "in which the United States are plaintiffs or petitioners," "or" "in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid," "or" land grants, "or" suits of aliens, where the matter in dispute exceeds, etc. By repeating the limitation clause as to amount after each class save one, and omitting it after the clause conferring jurisdiction over government suits, congress evidently intended to remove the doubt which might have been evoked by the language of the act of 1875, and to make it plain that the government could sue in the circuit court, without regard to the amount in controversy. The same reasoning would

inevitably induce the conclusion that the limitation as to amount does not apply to land-grant suits, were it not for another provision in a different section of the act in regard to land-grant suits, which it is unnecessary to discuss here. See *Spear*, Rem. Causes, § 21. Again, if we look to the judiciary act of 1789, as codified in section 629, Rev. St., we find that ample provision was made for suits by the government. Thus it was provided that where the United States are plaintiffs or petitioners, the circuit courts shall have jurisdiction of all suits at common law, without regard to amount, and of all suits in equity where the matter in dispute, exclusive of interest and costs, exceeds the sum or value of \$500. Subsections 2, 3, § 629, Rev. St. And besides these provisions there is a separate and independent clause granting jurisdiction without regard to amount of all suits at law or in equity arising under the revenue, internal revenue, or postal laws, excepting suits for penalties and forfeitures, and excepting, also, admiralty causes. Subsection 4, § 629, Rev. St. As the law then existed, there can be no doubt that the government could have maintained a suit, either at common law or in equity, arising under the revenue, internal revenue, or postal laws, without regard to amount, under the express provisions of subdivision 4, and wholly independent of the jurisdiction granted, or limitation as to amount contained in subdivisions 2, 3, § 629, Rev. St. Therefore, whether the provision in the act of March 3, 1887, giving jurisdiction of all suits of a civil nature at common law or in equity in which the United States are plaintiffs or petitioners, enlarges the jurisdiction by removing the limitation as to amount in equity causes, to-wit, \$500, or whether the provision raised the limitation as to amount to \$2,000, both in common-law and in equity suits brought by the government, in either case, the provision embraced only the subject-matter contained in subdivisions 2, 3, § 629, Rev. St., viz., suits at law or in equity in which the United States are plaintiffs or petitioners. It could not, therefore, be held to repeal by implication the jurisdiction over the special subject-matter provided for by subdivision 4 of the same section, to-wit, postal suits, etc. *Hess v. Reynolds*, 113 U. S. 73, 5 Sup. Ct. Rep. 377; *Venable v. Richards*, 105 U. S. 636. Again, when we look to the provisions of the constitution, the judiciary act of 1789, the subsequent amendatory statutes, the acts organizing the court of claims, and many other statutes bearing upon the question, we find a settled policy on the part of the United States to have its controversies determined in its own courts,—a policy founded upon sound and substantial reasons, vital to its governmental powers. The right, once attached, becomes a prerogative of the government, and an act of congress will not be construed to surrender such right, "except by special and particular words." *Jones v. U. S.*, 1 Ct. Cl. 383.

It was insisted in the argument for defendants that the district court is by section 563, Rev. St., given jurisdiction of all suits at common law brought by the United States, and of all causes of action arising under the postal laws, without regard to the amount in controversy, and that congress may well be presumed to have intended by the act of March 3, 1887,

to relieve the circuit court of such cases. It is undoubtedly true, if it be conceded that the right of the government to sue must be expressly conferred, and that the act of March 3, 1887, raised the jurisdictional limit as to amount in all government suits in the circuit court to \$2,000, that there would be a very large class of suits in equity over which neither the circuit nor the district courts would have jurisdiction, and the government would be compelled to resort to the state courts to assert its rights. This follows, for, except in suits under the postal laws, or to enforce a lien upon real estate under the internal revenue laws, the district court is given, by section 563, Rev. St., no equity jurisdiction in suits brought by the United States.

Could it have been the intention of congress to repeal the pre-existing laws upon this subject by implication, and force the government to relinquish all rights, or sue in the state courts in so large a class of cases, or in any case? This court can never concede such a proposition. Congress will not be presumed to have intended to deprive the government of such a right, unless the intention is expressed in plain and unequivocal words. The rule in regard to the repeal of a statute by implication does not have the same application to the government as to an individual. "Where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king shall be bound by such act, though not particularly named therein. But where a statute is general, and thereby any prerogative, right, title, or interest is divested, or taken from the king, in such case he shall not be bound, unless the statute is made by express words to extend to him." Bac. Abr. tit. "Prerogative" E. 5; *U. S. v. Knight*, 14 Pet. 301; *Fink v. O'Neil*, 106 U. S. 272, 1 Sup. Ct. Rep. 325; *Green v. U. S.* 9 Wall. 655; *U. S. v. Herron*, 20 Wall. 251; *Bank v. U. S.*, 19 Wall. 228. The principles involved in these propositions are the same. And when a statute which proposes to regulate proceedings in suits, is general, and by a doubtful application of its terms to government suits would divest the public of rights, and violate a principle of public policy, and would make provisions contrary to the policy which the government has indicated by many acts of previous legislation, in such case the statute ought not to be construed to impair the settled prerogatives of the government. *U. S. v. Knight*, *supra*. It follows, therefore, if there is any doubt as to whether the limitation as to amount in the act of March 3, 1887, was intended to apply to suits brought by the government, it ought to be construed not to apply. Indeed, it has been held that without any act of congress for the purpose, wherever the United States have rights which ought to be preserved, and for which an individual, under similar circumstances, could maintain an ordinary civil action, the United States may maintain its rights by such a suit brought in its own name, at least in some court. *U. S. v. Barker*, 1 Paine, 156. And this court is of the opinion that when the government has definitely acquired the right to sue in any of its courts exercising general judicial power, this right will be held permanent in its character, and will be maintained, subject only to such express and distinct limitations as congress may thereafter impose. Such right is

not affected by implication, save in those general statutes regulating procedure which do not divest the public of any right, and do not violate any principle of public policy. The demurrer is overruled.

BODEMÜLLER v. UNITED STATES.

(District Court, W. D. Louisiana. January, 1889.)

1. CLAIMS AGAINST UNITED STATES—FRENCH SPOILIATION—TO WHOM ACTION ACCRUES.

A claim of a citizen of France against the United States for cotton taken during the civil war was, under a treaty between the two nations, submitted to a commission for adjudication, by his widow and administratrix. The commission found and reported the sum due, but withheld one-sixth of the amount for the reason that one of the three heirs of the claimant was an American citizen, whereupon the heir sued the United States for her portion so withheld. *Held*, that plaintiff had no cause of action, as, if any existed, it accrued to the administratrix.

2. SAME—WHEN FRENCH GOVERNMENT NOT LIABLE.

The cause of action for such demand is not against the French government, as it received no money under the award for plaintiff's benefit.

3. SAME—JURISDICTION OF DISTRICT COURT.

After the commission had passed upon the claim it was no longer a "war claim," and the district court has jurisdiction of an action for its recovery.

4. SAME—AWARD OF COMMISSION—RES ADJUDICATA.

The award does not render the plaintiff's demand *res adjudicata*, as her cause of action was never submitted to the commission.

At Law.

Action by Rosalie E. Bodemüller against the United States, for money alleged to be due her as one of the heirs of her father's succession.

Alex. Porter Morse, Henry L. Garland, L. Dupre, and George A. King, for plaintiff.

M. S. Jones, Dist. Atty.

BOARMAN, J. This case was submitted in pursuance of the act March 3, 1888, which provides for suits against the government in certain cases. The facts show as follows: Jean Prevot, at the time of his death in Louisiana, was a French citizen. He left a widow, born in France, and three children, born in Louisiana. When he died he had a claim against the United States for \$4,695.94. In 1884, the widow, Teresa Prevot, was appointed in the probate court of Louisiana, and qualified as administratrix of the deceased husband's succession. Among the property of the deceased was inventoried the claim of \$4,695.94 against the government. The administratrix successfully prosecuted said claim before the French-American commission, which was provided for in a treaty made in 1880 between the United States and the French republic. That commission, composed as it was of one citizen of France, one of Brazil, and one of the United States, in passing upon said claim, made the following award:

"We allow the claim at the sum of \$2,020.94. Mrs. Bodemüller's husband appears to have been naturalized, to have voted, and held office, and we think was an American citizen. As her nationality follows that of her husband, we have deducted one-sixth of the sum otherwise allowed, leaving \$2,020.94, allowed as above; the \$2,020.94 bearing interest at 5 per cent. from May 1, 1863. Signed," etc.

Mrs. Bodemüller, plaintiff in this suit, is now a widow, and is one of the three children of the deceased Jean Prevot. Her husband, at the time of the award, was a naturalized citizen of the United States. Jean Prevot's claim was for cotton taken from him during the war. On his claim of \$4,695.94 the sum of \$2,425.15 was allowed as due him by the government. From this sum \$404.18—one-sixth of the whole amount allowed by the commission—was deducted, because, as the commission said, one of the three heirs of Jean Prevot—the plaintiff, Mrs. Bodemüller—had married a citizen of the United States. The sum, \$2,020, which was left after said deduction, was paid to the administratrix. Neither of the parents of the plaintiff herein were naturalized citizens. On this statement of facts the government denies the jurisdiction of the court, on the following grounds: (1) Because plaintiff now sues on a claim growing out of the late civil war,—the claim being one known as a "war claim;" (2) because the claim sued on has been rejected by a commission having jurisdiction to hear and finally determine such claims; (3) because the action of the plaintiff, if she has any action, is against the French government.

The claim successfully prosecuted by the administratrix for Prevot's succession, was, before it was liquidated and allowed by the commission, a "war claim;" but it is by no means clear that the cause of action now presented by the plaintiff is inherent in a war claim. Historically it may be said to have grown out of such a claim, but proximately her demand will be sustained or denied in accordance with the view the court may have as to the action and jurisdictional power of the commission in deducting one-sixth of the amount allowed the succession in this award herein stated, because the plaintiff, Mrs. Bodemüller, one of the heirs to the succession, was not, because of her marriage to a naturalized citizen, entitled to her share of the amount found to be due by the government to said succession. This suggestion as to the cause of action shown in plaintiff's petition is supported by the fact that the court in disposing of her suit on its merits will not be called on under any decision it may make to hear evidence of any kind touching the origin, right, or value of the claim or debt which the government incurred in favor of the French citizen, Jean Prevot, by taking his cotton during the war. The cause of action, as shown by the petition, grows out of, or is inherent in, the fact established by the finding of the commission, that defendant wrongfully withholds from this plaintiff a sum of money awarded to the succession of her deceased father. The claim, so long as it remained in an unliquidated condition, was a "war claim," growing out of the war; but the obligation now sought to be judicially enforced against the government is for a sum of money the recovery of which cannot be said to depend in

any way on the validity or invalidity of a "war claim." The creditor in whose favor the obligation was incurred by the government will recover, if at all, in this suit because of the unauthorized acts of the commission who liquidated Prevot's claim, in causing the government, against whom their award was made in favor of Prevot's succession, to withhold a part of the award.

The power of the commission in deducting the sum which in their opinion belonged to Mrs. Bodemüller as one of the three heirs of the deceased was of the highest judicial kind. Granting that congress did not exceed its constitutional power in vesting the commission, composed as it was of two subjects of foreign governments, with such judicial power as would authorize it to interpret and give judicial effect to the domestic or probate laws of Louisiana in the distribution of money paid or to be paid to Prevot's succession, it does not appear that the plaintiff in this suit ever submitted her cause of action upon which she now makes her demand. It cannot be said that plaintiff in her capacity as one of the three heirs to her father's succession was so represented by the administratrix as to make the commission's award, and the unwarranted deduction made by it on the sum allowed to the succession, *res adjudicata* as to her.

The cause of action set up in this suit, in whomsoever it may prove to be, is not against the French republic, to whom it is not shown that any money was paid by the United States for the plaintiff herein.

Having overruled the exceptions to the jurisdiction, as well as the exceptions of a peremptory kind filed by the defendant, the court, in its own observation, finds, in considering the merits of the suit, an objection to the right of Mrs. Bodemüller, the plaintiff herein, to recover the amount or any sum now withheld by the government in pursuance of the commission's award. This objection, though it does not come in the way of a peremptory exception, must be considered. It is in the fact that the debt incurred by the government in favor of the French citizen Prevot became at his death an asset of the succession which could be administered by, or paid only to, the administratrix of Prevot's succession, under the laws of Louisiana. The commission, under the treaty, had ample powers to hear and determine the claim made before it by the succession. It had ample powers to make the award in favor of or against the succession. But, conceding to the commission, under the treaty, judicial powers commensurate with those vested by congress in the circuit courts of the United States, it does not follow that the commission did have or would have jurisdictional power to withhold from the succession of Jean Prevot the full amount due by the government at the time of his death. If the circuit court had been employed in judicially determining the cause of action presented by the administratrix to the commission, it could not, under the pleadings and issues tendered in that case, have given judgment against the government for a sum less than the amount due to the succession; and no part of it could have been withheld from the succession on the ground that one of the heirs to the succession had married a naturalized citizen. The administratrix, in

her suit before the commission, recovered for the benefit of the succession, to which the whole sum allowed in the award was due. If the government now withholds any part of the sum declared by the commission to be due to the succession, that sum, whatever it is, may be now recoverable by the succession. The cause of action for its recovery, if there is any such cause, in the absence of any pleading or proof showing the right of plaintiff, an heir to the said succession, to bring this suit for herself under the succession laws of Louisiana, still remains in the administratrix of the succession. It does not appear that the plaintiff, as the case is now presented, has in herself any cause of action against the defendant. The suit, for the reason stated, will be dismissed.

TAYLOR MANUF'G Co. v. HATCHER MANUF'G Co.

HATCHER MANUF'G Co. v. TAYLOR MANUF'G Co.

(Circuit Court, S. D. Georgia, W. D. March 28, 1889.)

1. DAMAGES—MEASURE OF, FOR BREACH OF CONTRACT—EXPENSES AND PROFITS.

When there have been part performance, and expenditures properly made by one of the parties to a contract, which is broken by the fault of the other party, the party performing may recover his reasonable expenditures. He may also recover the profits of the contract, if he proves that direct, as distinguished from speculative, profits would have been realized. If the expenditures of the party not at fault are unreasonable, it is the duty of the opposite party to show it.

2. SAME—DIRECT AND SPECULATIVE PROFITS.

Profits remote and speculative, and incapable of clear and direct proof, cannot be recovered; but when they are the direct and immediate fruits of the contract, they may be. They are then part and parcel of the contract itself, entering into and constituting a portion of its very elements. Citing leading American case, *Masterion v. Mayor*, 7 Hill, 69.

3. SAME.

The leading English case announces the rule thus: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it." *Hadley v. Baxendale*, 9 Exch. 341-353.

4. SAME—CONTINGENT DAMAGES.

Damages which are the legal and natural result of the act done, though to some extent contingent, are not too remote to be recovered. Code Ga. § 3073.

5. SAME.

Where, by the action of the party at fault, the profits of a contract have been prevented, all recovery therefor will not be defeated because exact and absolute proof is unattainable; and, in view of the tortious refusal of the party at fault to perform its contract, the party injured is permitted to show the particular facts which have transpired, and the entire transaction upon which the claim and expectation of profits is founded, in order to prove with reasonable certainty what the profits would have been.

6. SAME—LOSS OF COMMISSIONS BY AGENT.

Where a company manufacturing agricultural steam-engines agrees to furnish an agent, who sells on commission, the engines necessary to supply the season's demand, and the agent makes large expenditures in advertising, canvassing, and otherwise building up the trade, and proves a heavy demand upon him for these particular engines largely in excess of his order to the company, the company refusing without sufficient cause to furnish the engines ordered, will be held liable for the sum of commissions on the engines ordered, and for the reasonable expenditures of the agent in their undertaking.

7 SAME—REMOTE DAMAGES—INJURY TO BUSINESS.

A claim for damages, upon the facts stated in the preceding section of syllabus, for destruction generally of agent's business, is too indefinite and uncertain to be the basis of a recovery.

8. CONTRACT—EXCUSE FOR NON-PERFORMANCE.

A clause in the contract, obliging the manufacturing company to furnish engines if the exigencies of their business permitted, gave them, under the facts, no arbitrary right to refuse. They must have a valid reason for the refusal, or its validity must be shown by evidence.

(*Syllabus by the Court.*)

In Equity. Bills for account.

Lanier & Anderson and Alex. Proudfit, for the Taylor Manufacturing Company.

Bacon & Rutherford, Hill & Harris, and Eugene Hawkins, for the Hatcher Manufacturing Company

SPEER, J. These causes have been, after much circuitry of pleading, tried upon the original bill of the Taylor Manufacturing Company, as plaintiff, and that of the Hatcher Manufacturing Company, used as a cross-bill, as defendant. After repeated preliminary hearings, the issues of law and fact were referred to the master in chancery. His report has been filed, and both parties have excepted thereto. For convenience of reference the parties are termed by the master the "Taylor Company" and the "Hatcher Company," and these designations will be here adopted.

The Taylor Company, of Chambersburgh, Pa., are manufacturers of steam-engines, suitable for agricultural uses. They made a written contract with M. J. Hatcher & Co., constituting the latter their agents for the purpose of selling the engines in a large number of the counties in this state. This contract was practically identical with a previous contract between the same parties for the year 1884. It made Hatcher & Co. the sole agents of the Taylor Company in the specified territory, and was of force from January 1, 1885, to January 1, 1886. In brief, the Taylor Company agreed to furnish the engines, and blank forms of contracts of sale, essential to the business, and the Hatcher Company agreed to carry on the business as directed by the terms of the contract. These are specially found by the master, and his finding, both as to the terms of the written contracts and the issues thereon made by the pleadings, are accurately stated, and are generally approved.

Upon the disputed issues of fact the master finds that the Hatcher Company disregarded the contract of February 3, 1884, in that they sold engines for credit, and did not exact cash for one-third of the price, and

notes at short terms for the balance; but that the breach of the contract was clearly ratified by the Taylor Company. He finds that the contract of December 8th was broken in like manner, and that there was neither authority for the breach nor subsequent ratification. He finds that the contract of 1884 was not modified by subsequent parol agreement. He finds that the Taylor Company violated the contract of December 9, 1884, in that they failed to deliver in Macon, on or about July 15th, 16 engines sold outright to the Hatcher Company, and to deliver under the terms of the agency contract 16 other engines at the same time. The master finds that these breaches are without justification. He does not attribute this failure to intentional fraud on their part, but to a desire of the Taylor Company to terminate the agency because of anticipated loss and litigation. He finds no fraud or error in a settlement of the 1st of August, 1885, but he also finds that it did not comprehend the questions of liability growing out of the Taylor Manufacturing Company's failure to deliver engines as they were bound by the contract of December 9, 1884. He finds that after August 1, 1885, the Hatcher Company had written authority to sell without exacting one-third cash, and that the Taylor Company was justified by their contract in refusing to fill the orders made by the Hatcher Company in June, 1885. He finds that the Hatcher Company was bound to guaranty to their principal all debts accepted by them in their agency. The master reports a balance against the Hatcher Company of \$8,902.29, subject to recoupments of commissions on the unpaid notes of 1884 and 1885 as such notes are paid, and he suggests that a receiver be appointed to take charge of the assets of the agency business, to sell the same, collect the notes, in order that the rights of the parties may be finally settled. There are other findings not essential to the main matters of the controversy.

To the report of the master numerous and voluminous exceptions have been filed, and the issues thus presented have been elaborately argued, orally and by brief. The court has had little difficulty in the ascertainment that the conclusions of the master, as we have said, are generally accurate, and are sustained by the law. With reference, however, to the sixth finding, which disallows the claim of the Hatcher Company for damages resulting from the failure of the Taylor Company to ship 32 engines, as ordered by the Hatcher Company, for the trade of 1885, we have had more trouble. The master was of the opinion that this claim of the Hatcher Company is without legal merit, for the reason, as stated by him on page 86 of the report, that it belongs to the category of "gains, contingent upon the productiveness of the season, the fluctuations of trade, the resources and efforts of competitive dealers," and are too uncertain to be capable of that clear and direct proof which the law requires. There may be found cases which tend to sustain this finding, but they seem adverse to the philosophy of the law. It is apparent that, the master having found, as before stated, that the failure to furnish the 32 engines above referred to was an unmistakable and unjustifiable breach of the contract, and that it has not been adjusted or settled, the Hatcher Company are only called upon to show the degree of proof es-

sential to an estimation of the damages directly resulting therefrom. To do this the Hatcher Company point out the fact that the selling price of the engines is fixed by the contract. The commissions of the Hatcher Company being perfectly definite, if it be clear that there was a sufficiently certain opportunity to sell the engines, it follows that to ascertain the amount of which the Hatcher Company have been bereft is a simple matter of computation. Now, could the Hatcher Company have readily sold these engines had they been furnished in time and in accordance with the ascertained obligation of the Taylor Company? The evidence relied on to show this is properly made a part of the exception. It is there made to appear that the Taylor Company, by its president, estimated that the Hatcher Company would sell 75 engines that season. A witness, Herron, testified that in his judgment 65 or 75 engines would have been sold by the Hatcher Company. He was familiar with the business, and his estimate was based upon the number of inquiries, the prospect of a good crop, the demand for engines by customers in person and by correspondence. Barron, another witness, gives a still larger estimate. It is made plain that the year before the sales were large, and in 1885 Hatcher & Co. had advertised the Taylor engines thoroughly; had, indeed, devoted all of their energies exclusively to the business of the Taylor Company; did not try to sell any other engines; and that there were frequent inquiries, and, in fact, a great demand, for the engines. Besides, the crop prospect in the spring and summer was fine. The witness stated in addition that there were a hundred men who wanted to buy the Taylor engines from Hatcher in 1885. The witness was employed by Hatcher. The orders were not given, because he could not promise to supply the applicants, on account of the action or non-action of the Taylor Company. Hatcher, one of the defendants, testifies substantially to the same facts, and added that the business was now established; that the Taylor's was "a good engine," and had given satisfaction; that his territory had been increased, and the engines were sold at "closer figures." There were 50 or 60 applications on the "application book," and many applications were not entered. This book was kept to show the number of persons who called to make inquiry relative to engines. It was put in evidence, and showed about 50 such applications. The demand was so definite that Hatcher at length proposed to purchase outright certain engines for the agency business; and the correspondence in evidence shows this. McDowell, the treasurer of the Taylor Company, who had gone to Macon to look after the business, writes, on August 3d, to his company: "The engines you send, ship as soon as possible, as parties coming in to buy expect to take engines with them, or have them delivered at once." Smith, a merchant who dealt in engines, a witness at once intelligent and disinterested, testified that the trade in engines was large during the selling season of 1885. This he knew from his own business. In addition to this evidence there are in the record admissions of the Taylor Company's agent, J. C. Weaver, which have valuable importance. In the letter of August 31, 1885, to the Taylor Company, he writes:

"He [Hatcher] virtually lost the entire season trade, which is now over. * * * His trade, on account of the engines not arriving, countermanded their orders, and got engines elsewhere. * * * It got winded about that Hatcher could get no engines."

The same agent, July 1, 1885, notified his principal, the Hatcher Company, that several parties had countermanded their orders on account of the Taylor Company's letters to them. So strong was the demand that, when the Taylor Company refused to fill nine orders made to Hatcher as agent, the latter offered to buy the engines outright. This is admitted by Weaver, in his letter of July 3, 1885. The Taylor Company offered no matter of fact to avoid the effect of this evidence, which itself has not been negatived by the master's finding, viz.: that there was in the refusal to ship these engines an unjustifiable breach of their contract with the Hatcher Company. They insist generally that Hatcher was a faithless agent, but there is in the record nothing sufficient to show it.

It is insisted, however, that the commissions, which can be computed upon the number of engines ordered and refused, are too remote and speculative to warrant a judgment therefor. To support this proposition the counsel for the Taylor Company rely on the case of *Manufacturing Co. v. Rogers*, 19 Ga. 416, where Rogers complained that because of the company's failure to repair the machinery of his mill, which was idle from 60 to 90 days, he was entitled to a recovery for the profits the mill would have made if it had been kept running, but the court held that such claim was founded almost exclusively on speculative profits; it was a calculation upon conjectures, and not upon facts. Substantially the same announcement is made in *Water Lot Co. v. Leonard*, 30 Ga. 560, and in *Vischer v. Railroad Co.*, 34 Ga. 536; and an analogy is sought to be drawn also from *Clark v. Neufville*, 46 Ga. 261. The master, in his careful and painstaking report, as we have seen, sustains this contention.

The consideration of the intricate topic embraced in these diverse propositions has deferred the determination of this cause, and has not been without difficulty. The most authoritative statement of the rule upon the question will be found in the *U. S. v. Behan*, 110 U. S. 338, 4 Sup. Ct. Rep. 81. The facts of that case (without elaborately stating them) are sufficiently analogous to the findings of fact of the master here to make the principles settled clearly applicable. There was part performance of the contract, large expenses on the part of the party performing. Without fault of this party the performance of the contract was prevented by the fault of the other party. The question was presented to the court of claims, and that court held that "the profits and losses must be determined according to the circumstances of the case, and the subject-matter of the contract. * * * The reasonable expenditures already incurred, the unavoidable losses incident to stoppage, the progress attained, the unfinished part and the probable loss of its completion, the whole contract price, and the estimated pecuniary result, favorable or unfavorable, to him, had he been permitted or required to go

on and complete his contract, may be taken into consideration." The court then allowed the "unavoidable losses and expenditures already incurred," but said: "We can give nothing on account of prospective profits, because none have been proved." The supreme court decides as follows, Mr. Justice BRADLEY delivering the opinion:

"We think that these views, as applied to the case in hand, are substantially correct. * * * Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed. If they were foolishly or unreasonably incurred, the government should have proven this fact. It will not be presumed. The court finds that his expenditures were reasonable. The claimant might also have recovered the profits of the contract if he had proven that any direct, as distinguished from speculative, profits would have been realized. But this he failed to do, and the court below very properly restricted its award of damages to his actual expenditures and losses."

Pausing at this point in the consideration of the law to apply the principle, with reference to expenditures incurred in part performance of the contract thus settled, to the findings of the master, it will be apparent that it has been recognized by him as applicable here. On line 19 *et seq.* of his third conclusion of law, the master declares "it is certain that the Hatcher Company is entitled to recover the amount expended on faith of said contract of December 9, 1884, which contract the Taylor Company failed to perform." He suggests that to ascertain that amount a trial by jury might be had. In this finding the master is only partially right. After stating the principle, which he did correctly, he should have accepted the undisputed evidence showing that these expenditures aggregated \$6,127.15, and this amount should have been credited to the Hatcher Company. Of these an account is annexed as an exhibit, and its correctness is fully supported by the testimony of Hatcher, and there is no evidence to dispute it. It was criticised in argument, but there is nothing on the face of the account to impeach its verity. To use the language of the supreme court in *U. S. v. Behan*, above quoted, if these expenditures "were foolishly or unreasonably incurred" the Taylor Company should have "proven this fact; it will not be presumed." And this is the final hearing, and the parties are presumed to have offered all the evidence at their command.

A more important question is: Have the Hatcher Company proven sufficiently the direct profits of their contract, as distinguished from profits of a speculative character? It is true, as held by the master, that profits too remote and speculative in their character, and therefore incapable of that clear and direct proof which the law requires, cannot be recovered. But, to quote the language of Chief Justice NELSON, in *Masterton v. Mayor*, 7 Hill, 69, cited with approval in *U. S. v. Behan*, *supra*, "where they are the direct and immediate fruits of the contract," they are free from this objection; they are then "part and parcel of the contract itself, entering into and constituting a portion of its very elements; something stipulated for, the right to the enjoyment of which is

just as clear and plain as to the fulfillment of any other stipulation." This case is cited, and its principle adopted by the supreme court of Georgia, in *Water Lot Co. v. Leonard*, 30 Ga. 560, relied upon by the Taylor Company. It is true, however, before the damages can be recovered they must be proved, and the serious question is, have they been sufficiently proven? This inquiry involves the question what proof is sufficiently direct and explicit to authorize a recovery of the profits of a contract partially performed and broken, without fault of the party performing. In his copious and valuable work upon the law of damages Mr. Sutherland announces this general proposition:

"A party to a contract is entitled to recover, against the other party, who violated it, damages for the profits he would have made out of it had it been performed. It is no objection to their recovery that they cannot be directly and absolutely proved. In the nature of things, the defendant having prevented such profits, direct and absolute proof is impossible. The injured party must, however, introduce evidence legally tending to establish damage, and legally sufficient to warrant a jury in coming to the conclusion that the damages they find have been sustained, but no greater degree of certainty in this proof is required than of any other fact which is essential to be established in a civil action. If there is no more certain method of arriving at the amount, the injured party is entitled to submit to the jury the particular facts which have transpired, and to show the whole transaction, which is the foundation of the claim, and expectation of profit, so far as any detail offered has a legal tendency to support such claim." 1 *Suth. Dam.* 113; citing *Griffin v. Colver*, 16 N. Y. 489; *Giles v. O'Toole*, 4 Barb. 261; *Newbrough v. Walker*, 8 Grat. 16.

Now, what is the legal nature of the fact involved in the finding of the master that the Taylor Company refused to deliver the engines under the contract? It is simply a tortious refusal on the part of the Taylor Company to perform an undertaking absolutely essential to the business of the Hatcher Company. The master, as we have seen, finds the breach. He finds it without excuse, and in cases of this character it is only necessary to show with reasonable certainty what the profits would probably have been. 1 *Suth. Dam.* 121, and many authorities cited. The philosophy of this rule is readily intelligible. One will not be permitted, because the injurious consequences of his wrongs are not precisely definite in pecuniary amount, to wholly absolve himself from responsibility therefor, and this would be the result were the rule otherwise. The Hatcher Company had, by diligent industry, created a large and important business, to which they had devoted their time for several years. The delivery of the engines to them was the first and most absolute essential. The Taylor Company undertake to do this. The Hatcher Company rely upon their promise. The Taylor Company utterly refuse to comply. It is impossible that it be the law, because, perchance, the Hatcher Company might have failed to sell an engine, more or less, or that because, perhaps, they may fail in specified instances to collect promptly the purchase price, that the Taylor Company will be adjudged irresponsible for their inexcusable breach of contract. But this is not all. The profits of the Hatcher Company were fixed by the

contract. The engines had a market price; and, as was said by Chief Justice NELSON in *Masterton v. Mayor*, *supra*: "If there was a market value of the article in this case the question would be a simple one." The demand was great, and it was not to be doubted, from all the evidence heretofore detailed, that the sale of all the engines was a substantial certainty. The amount of the profits of the Hatcher Company is at the least, then, the sum of their commissions on such sales. It would have been, doubtless, more, because a portion of the engines were purchased outright; but, considering the tortious character of the action of the Taylor Company, we are at the least warranted in adjudging to the Hatcher Company the amount of the sum of their commissions on the engines ordered by them, and which the Taylor Company wrongfully refuse to deliver. This is estimated at \$10,056.06, but the court will direct a careful computation. Indeed, if this be a Georgia contract, as is insisted by the Taylor Company, upon the authority of the latest decisive adjudication in *Stewart v. Lanier House Co.*, 75 Ga. 582, the rule is stronger against the Taylor Company than that announced here. There, where the lessors of an hotel failed to keep it in repair as they had covenanted, it was held that the lessee could recoup against suits for the rent, the loss of custom, and the profits he might have made if the hotel had been kept in a proper condition, and that he was only required to show facts which would enable the jury to approximate his losses. See, also, Code Ga. § 3073, which provides that "damages which are the legal and natural result of the act done, though contingent to some extent, are not too remote to be recovered." It will be advisable to consider in this connection the leading English case of *Hadley v. Baxendale*, 9 Exch. 341. There ALDERSON, B., for the court, adjudges the rule to be as follows:

"Where two parties have made a contract, which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." Page 353.

The damages claimed by the Hatcher Company here would seem to be embraced in both the classifications indicated in the rule just quoted. The finding of the master disallowing the claim of the Hatcher Company for the destruction of their business is affirmed, the claim being esteemed too indefinite and uncertain to be the basis of a recovery. It was at the option of the Taylor Company to terminate the sale of their engines by the Hatcher Company the next year if they had seen fit to do so. What the Hatcher Company might have accomplished with the sale of other machinery is in the realm of conjecture.

The view of the Taylor Company, that the clause in their contract which obliged them to furnish the engines Hatcher might require if the exigencies of the business permitted, is important, is altogether erroneous. This clause must have a practical and equitable construction. It

did not give them the power arbitrarily to decide that the exigencies of the business would not permit the engines to be furnished. They must have a valid reason for such a conclusion, and its validity must be shown by evidence. The courts of equity would never, in the absence of express declarations, construe such a clause to mean that, notwithstanding the services and expenditures of the Hatcher Company, the Taylor Company could at pleasure refuse to do anything towards the performance of the obligations they had undertaken. Nor does it follow that, because the Hatcher Company is bound by their contract to indorse all the notes, they are to be deprived of their commissions. It is judicially known to the court that the Taylor Company have taken possession of the notes, have discounted them with the banks, and that the Hatcher Company have no control of them whatever. It is not satisfactorily made to appear by the evidence what amount of these notes were insolvent, nor whether it would have been impossible to ultimately collect them, had not the business been disorganized, and the Hatcher Company harassed and discredited with the business community by the unjustifiable action of the Taylor Company before adverted to.

On the hearing of the injunction, the court, being advised of the fact that the Taylor Company had transferred and assigned all notes on which commissions are claimed to certain banks, required the Taylor Company to give a conditional bond of \$10,000 for the protection of the Hatcher Company. The banks are not parties to the suit. The court has no means of knowing the *status* of collections upon these notes, nor can the court by its receiver take possession of the notes which are out of its jurisdiction. The Taylor Company, having given the bonds, were paid the proceeds of notes as collected. This cannot, however, properly delay the litigation here, for the Taylor Company, for their own purposes, took control of the notes, and assigned them. If Hatcher has become liable on any or all of these notes, it was the duty of the Taylor Company, by appropriate evidence, to inform the court. The court will not presume an indebtedness. The makers of the notes, in the absence of proof to the contrary, are presumed to have discharged them; but, if otherwise, we repeat it was incumbent on the Taylor Company to show it. It is evident from all the evidence in this case, notwithstanding the great explicitness of the written and printed contract stipulating that one-third cash should be paid, at no period was the Hatcher Company inhibited from making sales simply because the cash was wanting. Either by ratification, or by subsequent authority relating back, the Hatcher Company were practically authorized to do the best they could for their principals, and they seem to have done this. It is impossible, after reading such cogent evidence as the contemporaneous letters of Hatcher, of the several agents, and of the company itself, to doubt the earnestness and sincerity with which Hatcher pressed at the time the demands for performance and instances of injury which he now insists upon before the court. Nor is it capable of fair doubt that the Taylor Company, without saying so openly, were doing all in their power to break off their relations with the Hatcher Company and with little regard to their inter-

est. The Taylor Company appeal to the court for the exercise of its equitable powers in their behalf—they must themselves do equity. They must pay the Hatcher Company for their expenses legitimately incurred. They must pay the profits which the Hatcher Company would have made by the engines they promised to deliver and which were refused. A reference will be made to a special master to make an accurate computation in accordance with this decision. In other respects the report of the master will stand confirmed, and a decree will be entered embodying the results of this holding.

HODGE *et al.* v. LEHIGH VAL. R. Co.

(Circuit Court, D. New Jersey April 29, 1889.)

1. RAILROAD COMPANIES—CONSTRUCTION OF ROAD—CONSEQUENTIAL DAMAGES.

A railroad company, authorized by its charter to construct its road in the usual manner, which procures by paying the agreed consideration a conveyance of the land over which the road is to be constructed, is not liable to the former owner for damages arising from the construction of the road where it has exercised reasonable skill and careful judgment in designing and constructing such road.

2. SAME—ALTERATION IN PLANS.

A railroad company, having acquired by deed the right to construct its road through plaintiff's land, used in bridging a stream three bridges, each having a span of 40 feet. The road was operated for some years without injury to plaintiff. The bridges were then reconstructed by the company, and the water-ways or spans extended to 100 feet, whereby water was thrown upon plaintiff's land. *Held*, that the company was not liable, in the absence of any evidence of neglect of duty on its part or some excess of the power conferred upon it, as the injuries thus resulting must be held to have been included in what plaintiff agreed to receive when he executed the deed.

3. SAME.

The evidence failed to show clearly that by the alteration in the spans the water was obstructed or forced out of the channel. The jury awarded a verdict greatly in excess of the injury shown, arising from this source, assuming the bridge to have been a proper subject of complaint. *Held*, that the verdict would be set aside, as the jury manifestly overlooked the rights acquired by defendant when the road was constructed.

At Law. Action by Theodore Hodge and others against the Lehigh Valley Railroad Company.

R. V. Lindabury, for plaintiffs.

Thomas N. McCarter, for defendant.

MCKENNAN, J., (*charging jury*.) The counsel in this case are so nearly in accord in their statements of the law involved in this case that I do not think it necessary to multiply words about it. The difference between them is in their application of the well-understood and well-settled principles of law to the facts in the case. Nor do I propose to advert to the evidence which you have heard, for the reason, in the first place, that I was not here during the examination of all the witnesses, and in the next

place it has been very fully and ably discussed by counsel on one side and the other. The suit is brought by the plaintiff to recover alleged damages for injury done to the land belonging to him by the defendant, the Lehigh Valley Railroad Company. The first question is, had the Lehigh Valley Railroad the right to do what they have done there, from which this injury is alleged to have accrued? The road was constructed originally by the Easton & Amboy Railroad Company, under a charter granted by the state of New Jersey. In that charter the usual powers are given to the company to construct a railroad between the points designated in the charter,—that is, between its termini,—and the powers thus given are ample to enable the railroad company to effect the object of its incorporation; that is, to build a railroad between the points named as its termini in the charter. The company had a right to make such superstructure as is usual and proper for the operation of a railroad, and to repair and maintain that road as may be necessary from time to time. The Lehigh Valley Railroad Company, therefore, was in the lawful exercise of a franchise granted by the legislature, in making the road through the land of the plaintiff. The mode of constructing, or the plans of construction, was left by the charter to the judgment of the railroad company. It was authorized to build the road by law, and neither the plaintiff nor anybody else can gainsay the exercise of that authority by the defendant—to make this road in a manner which is usual and proper in such structures—in order to carry out the purpose which it was authorized to do. The plaintiff had no right to control it, but the matter was left entirely to the sound and honest judgment of the railroad company in the exercise of the franchise conferred upon it by law. Whether it would make a solid embankment in a particular place or not was left to the judgment of the engineers employed by the railroad company. Whether it would make a trestle to construct part of its line was also left to the discretion and judgment of the railroad company, and the plaintiff had no right to interpose his judgment and say that one was better than the other, or worse than the other. The railroad company has to employ skillful engineers, men of experience, men of good judgment, men of skill, in the determination of these matters, and it was not subject to be questioned by anybody else, because the legislature intrusted the discretion involved in this matter entirely to the railroad company itself. All that it was bound to do was, generally, to construct its road in a careful and skillful manner, having regard of course to the rights and interests of the public, as well as of all others who were affected by the exercise of this franchise by the railroad company; and even if an erroneous method was selected by the engineers of the railroad company, and adopted by the railroad company, no negligence whatever is to be imputed to the railroad company on account of this erroneous exercise of its judgment. It is no negligence, but it is the exercise of the right which the law committed to the railroad company, subject to the restrictions which I have stated, that, generally, it shall exercise that franchise conferred upon it in the construction of the road in a careful and reasonably skillful manner. Keeping within that restriction, the

railroad company is not accountable to any one for any error which it might commit in the construction of its road.

Now, the railroad company acquired the right to exercise a franchise conferred upon it by the legislature by resorting to a proceeding which the legislature provided for the benefit of the owners of the land through which the railroad is constructed. In other words, the railroad company has no right to exercise the powers conferred upon it by the charter until it makes compensation, in some form, to the owners of the land which is taken, and over which the railroad is being constructed. The railroad must agree with the owner of the land, or if that cannot be done, then it must apply to the proper tribunal for the appointment of commissioners to assess the damages which are assumed to result from the construction of the railroad over the man's land. In this case such proceedings were instituted in the proper court here in New Jersey. Viewers or commissioners—viewers, they are called in Pennsylvania; commissioners, I believe, in New Jersey—were appointed to estimate the damages supposed to result to the land of the plaintiff by reason of the construction of a railroad. Those proceedings were so conducted that they resulted in a condemnation of the land of the plaintiff, and a computation of the damages which the commissioners so viewing the land estimated would result by reason of that construction. That award has been read to you, and it appears to have been filed, and to have had the effect of a conclusive ascertainment of the damages as between the railroad company and the owner of the land, (unless appealed from by one or the other, which does not appear in this case,) and settled the right of both as to the amount of damages to be paid by the railroad company and to be received by the owner of the land. The amount in this case was not satisfactory to the railroad company, and negotiations, no doubt, were commenced between the railroad company and the owner of the land, the result of which was that a less amount than fixed by the commissioners was agreed to be paid and received. Accordingly, a deed of conveyance was made by the plaintiff, conveying the lands to the railroad company. The deed was executed and delivered, and was for a consideration stated in that deed. That consideration was accepted by the owner of the land, and it had all the effect then of a transfer of the rights of the land-owner and an investiture of the right to construct this road upon the railroad company which the condemnation proceedings would have had, and embraced all the damages which the plaintiff might have recovered by condemnation proceedings. It is not a mere partial release of the damages to which the owner of the land might be entitled which is provided for there, but the construction which the court gives to it is that it relieves the railroad company as effectually from the payment of the damages caused by the construction of the road as the perfected condemnation proceedings would have done. Whatever damages, then, would result necessarily from the construction of that road through the lands of the plaintiff were released to the railroad company, or rather the railroad company was released from all liability for them just as effectually as if the land had been taken by the railroad company under the condemna-

tion proceedings, and they embraced all the damages necessarily resulting from the construction of the road, whether they were in contemplation of the parties or not. If the plaintiff's land was injured by the stoppage of water by that embankment, and that had not been the case before, the company was protected by this arrangement to the extent of its liability from any further damages that it agreed to pay by this deed of conveyance; and, as I remarked before, if damages did result from that cause,—the construction of the railroad,—necessarily resulting and not caused by any fault of the railroad company, the railroad company was not liable. They were covered by this arrangement. It agreed to pay as compensation \$3,000, and the other side agreed to accept that for the injury thus caused. The railroad company is liable only for such loss or injury as was occasioned by the negligent exercise of this right; that is to say, by an inconsiderate exercise of it, or by the omission, on the part of the railroad company, to do what it ought to have done in the observance of a reasonable degree of care in reference to it. As has been stated, and a number of cases have been read in your hearing, nothing more than reasonable skill in the exercise of the power granted by the legislature is incumbent upon the railroad company, and if injury results to anybody from this proper exercise of the power, the person so injured has no ground of legal complaint against the railroad company. It appears here that one ground of complaint is that the injury resulted from the insufficient width of railroad bridges over the Raritan river. The determination of the plans and construction and sufficiency of the bridge to pass the water through it from the Raritan river was a matter entirely for the determination of the engineers of the railroad company, if they exercised reasonable skill and careful judgment in the determination and construction of the plans.

But it is alleged further that after this road had been in operation for some years, and no apparent injury resulted from the construction of the road for that period, a change was made in the construction of some of the bridges upon the road, and after that time the injury complained of here accrued, and that, in part at least, is what is complained of, and for that reason damages are claimed by the plaintiff. It appears that when the embankment was constructed through the plaintiff's land there were three bridges made, of the width of 40 feet each,—40-feet spans,—and that while these bridges were maintained in this condition the injury did not accrue to his lands, but that after this change was made and the water-way under the bridges extended, that great injury resulted to the road and land of the plaintiff, by reason of which a considerable number of acres were rendered useless, still more were damaged, and he was deprived of the crossing of the stream on the south side of the road which he had enjoyed before. It is claimed that that was the result of the water passing from the north to the south side of the bridges, and that it greatly impaired the use of his land south of the railroad. The defendant, in the construction of these bridges, as I have already intimated, was, in the exercise of its unquestionable legal right, to construct them according to the judgment of its engineers, as to what is necessary and

proper for the benefit of the railroad company, of course having proper regard to the interests of the owners of the land, or rather being under an obligation to so construct those bridges as to avoid any injury it might properly avoid, without prejudice to the railroad in the construction of the road. But it is alleged that these bridges were reconstructed with a water-way of 100 feet between the piers, and therefore the injury complained of resulted. Now, gentlemen of the jury, the reconstruction of these bridges and the enlargement of the spans was within the unquestionable right of the railroad company. If they found that the arches or spans were not wide enough to afford a sufficient vent to the water passing between them under the arches, and the reconstruction was necessary for the preservation of the railroad, they had a right to so change the arches, but at the same time subject to the duty which I have already referred to, that no avoidable or unnecessary injury should be done to the property of persons upon whose land this work was done. There is no doubt, I suppose, that by the enlargement of the spans there the current of the water passing down through them must have been accelerated, and the washing effect of the water from points above thereby increased; but if the railroad company, in the exercise of an honest judgment, and in the observation of proper skill, found it necessary to increase the water-way under those bridges, so as to preserve their own embankment, and injury thus resulted to the plaintiff, that was within the scope of his claim for damages, originally, and it must be understood to be included in what the land-owner agreed to receive when he executed the deed to the railroad company. In other words, the mere change in the arches of those bridges, without putting in other bridges, as some others might have thought the railroad company ought to have done, was within the right of the company, and if injury did result to the land owner, why, the railroad company is not liable to an action for damages for negligence simply because this injury has occurred from the exercise of its undoubted legal right, and for which the owner of the land had agreed to receive as compensation what the railroad company paid him. So that you are not to consider the mere change made by the railroad company in the enlargement of this water-way, and the subjection of the plaintiff's land to injury, as of themselves evidence of negligence. There must be something more. It must appear that there was some neglect of duty, or some excess of power exercised by this company, to lead to that result, and to subject the railroad company to damages for such an exercise of power.

I think I have stated now with sufficient fullness the principles of law which are applicable to this case, and by which you are to be governed in making up your verdict, and that you understand generally how those principles are to be applied to the evidence upon which you must pass in this case. You must find, therefore, in the first place, that the railroad company was in the exercise of unquestionable power conferred upon them by the legislature in the construction of this road in a mode such as it had a right to determine, and as must be determined by the exercise of a reasonable and skillful judgment on the part of the engineers

whom it selected. You must understand further—there must be no question about it—that, for any damages resulting from the lawful exercise of the power conferred upon it, the land-owner was compensated, and the plaintiff now succeeding to the ownership cannot recover what he might have claimed in the first place, and for which, by agreement between the owner of the land and the railroad company, he was compensated for. In the second place, if any injury has accrued to the plaintiff, it must appear clearly to you that it resulted from the negligence of the railroad company as I have defined it, or of the excess of exercise of the authority conferred upon it by the legislature, or the omission to do what it ought to have done in the exercise of any power conferred upon it by its charter. If you find that there has been no negligence on the part of the railroad company, the plaintiff must fail in this action. If the railroad company has done simply what the law authorized it to do, and has done it in a careful and skillful manner, and injury has accrued to the plaintiff, the railroad company is not responsible. It may be a matter of regret,—it may be a matter of misfortune,—but still, from the necessary and proper exercise of the power which the legislature has conferred upon the railroad company, if any one is injured, why, certainly, the railroad need not pay for it.

Another question was presented by counsel for the defendant, upon which he asked the court to instruct the jury, and that is, that as this railroad was constructed originally by the Easton & Amboy Railroad Company, and the defendant, the Lehigh Valley Railroad Company, is merely operating this road under a written arrangement or agreement with the Easton & Amboy Company, that the defendant, the Lehigh Valley Company, does not thereby sustain such relation to the plaintiff here as to make it liable for damages resulting from what has been done in this case, and that therefore this action cannot be maintained against the Lehigh Valley. I think, gentlemen, that the character of the agreement is such as puts the defendant substantially in the character of a lessee of the Easton & Amboy Railroad Company, and if anything wrong is done, for which, if done by the Easton & Amboy Company, it would be liable, that the defendant also is liable; so that I decline to instruct you as counsel for the defendant asked me to.

That embraces all that I think is necessary to say to you, and you will, therefore, take the case and decide it conformably to the principles of law which I have laid down, and to the evidence, as the evidence, in your judgment, may justify you.

Mr. McCarter. Will the court permit me to call its attention to one point which I do not think was presented? There is nothing in the plaintiff's declaration complaining of default in the company for widening the openings at the east end to justify a recovery for that cause, if the jury think the damages were due to that. The complaint here is that the Lehigh Valley Railroad Company continued a nuisance created by the Easton & Amboy Railroad Company. That is the whole complaint. It does not deny that the increase of the opening was done by the Lehigh Valley

Railroad Company, and not by the Easton & Amboy Railroad Company. That is not what the defense is sued for.

The Court. That is the description contained in the declaration, and although there may be some plausibility in your suggestion, I think I will decline to instruct the jury that way; that is, that the declaration sets forth as the ground of the injury the defective construction of the bridges over the Raritan river, and does not refer at all to the change made in the width of those bridges along that bank over the brooks. But the case has been tried, and the whole evidence has been directed to that point, as if the injury resulted mainly from the widening of the arches or the water-way of those bridges, and I would like the jury to take that evidence and decide upon it. The case is with you, gentlemen. The jury will understand from that, that at the time of the institution of the suit the plaintiff, as is shown by the declaration, regarded the injury as resulting from the defective construction of the bridge over the Raritan, and made no reference to what is very much more important, as appears by the evidence of the experts, and by argument of counsel; but I will not refer to that any more.

The jury returned a verdict for plaintiffs for \$4,000.

ON RULE TO SET ASIDE VERDICT.

Before McKENNAN and BUTLER, JJ.

PER CURIAM. Is the verdict clearly against the weight of the evidence? This alone, of the several questions embraced in the reasons assigned for setting aside the verdict, need be considered. The principal question on the trial related to the sufficiency of the Raritan bridge to vent the water of the stream, in time of flood. The defendant had an unquestionable right to change the bridges or culverts over the small stream eastward, as the jury was instructed, and the only legitimate reference that could properly be made to what was done there, was in explanation of the fact that the principal damage is of recent date. These changes could not be made a cause of complaint. In considering the sufficiency of the bridge (or rather whether the company had failed in duty by erecting it as it did) the necessities and interests of the railroad, as well as those of the land-owners, must be borne in mind. These considerations involve questions of safety to the public and company, and also of cost. Where the situation is such that the construction of a proper bridge, suited to the circumstances, must necessarily obstruct the stream, to some extent, the land-owners must submit to the obstruction, and the company must make compensation for the damages likely to ensue, as a part of the consequences of building the road. Where a stream, flowing through low lands, spreads out, when flooded, to great width, many times its usual size, a railroad company, crossing it, is not necessarily required to erect a bridge of corresponding length; nor resort to trestles instead of embankments. What should be done under such circumstances must be

settled by engineering skill and judgment. It does not appear that the spans of the bridge in question might not be increased in number and length, if this is necessary to vent the water without obstruction. It is not shown, however, with clearness that the water is obstructed and thus forced out of the channel. On the contrary the weight of the evidence fully justifies a conclusion that it is not. Furthermore, the damages awarded are greatly in excess of the injury shown, arising from this source, even supposing the bridge a proper subject of complaint. The jury has manifestly overlooked or disregarded the fact that the defendant possesses rights on the plaintiff's land, for which he or his predecessors in the ownership were paid when the road was constructed. No error is discovered in the ruling on the trial, nor in the charge, but for the reasons stated the verdict must be set aside. This action is the more imperatively necessary because the verdict, if allowed to stand, would virtually, if not actually, settle the question of enlarging the bridge, as well as the amount due for past injury. The rule to show cause is therefore made absolute, and a new trial is granted.

SWAN LAND & CATTLE Co., Limited, v. FRANK *et al.*

(Circuit Court, N. D. Illinois. July 22, 1889.)

1. CORPORATIONS—STOCKHOLDERS—ACTION AGAINST—PARTIES.

A bill against the stockholders of a certain corporation alleged that complainant, a corporation, had purchased all the assets and properties of defendants' corporation; that the vendor had fraudulently misrepresented the value of the property, and the defendants, as stockholders, had received their proportionate shares of the proceeds of the sale and the other assets of the company which came into their hands as a trust fund for the satisfaction of complainant's claims; and prayed that the defendants be required to account for and pay over so much of such assets as might be necessary to satisfy complainant's demands. *Held*, that as the action was primarily an action against the vendor corporation for damages for fraudulent representations, the corporation was a necessary party.

2. SAME—ABANDONMENT OF FRANCHISE.

Allegations in the bill that complainant purchased all of the property of the vendor corporation, and that since the sale the vendor had divided its assets among its stockholders, and ceased to exercise its franchise, furnishes no excuse for not making the vendor a party, as the corporation was not dissolved by mere non-use of its franchise, or by the want of assets.

3. SAME—NON-ELECTION OF OFFICERS.

Under Rev. St. Wyo (under which the vendor corporation was organized) § 560, failure to elect trustees on the day designated by the laws of the company did not dissolve the company, but the election might be held on a subsequent day, and the trustees held until their successors were elected. By the laws of Wyoming service of process could be made on the corporation by serving the same upon any of the trustees or officers, or by leaving a copy at the company's place of business. *Held*, that the allegations of the bill that the company had no officer or agent on whom service of process could be served, showed no valid reason why it could not be made a party.

4. SAME—EQUITY—JURISDICTION.

As the bill showed that the case was one appropriate for a trial at law, complainant should first establish at law, not only his right to damages against the vendor company, but also the amount of such damages.

5. SAME—PLEADING—AMENDMENT.

As the bill is brought in a jurisdiction other than the district of which the vendor company was a resident, it cannot be amended so as to bring the company in as a defendant, and is fatally defective.

In Equity. On demurrer to bill.

Swift, Campbell & Jones, for complainant.

Kraus, Mayer & Stein and J. W. Woolworth, for defendants.

BLODGETT, J. This bill is now before the court upon a demurrer filed in behalf of all the defendants who have been served with process. The bill seeks relief against the defendants as stockholders in certain corporations organized under the laws of the territory of Wyoming. The bill avers that in November, 1882, there were existing and doing business in the territory of Wyoming three corporations organized under the laws of said territory, engaged in the business of breeding and dealing in cattle, known respectively as "The Swan & Frank Live-Stock Company," "The National Cattle Company," and "The Swan, Frank & Anthony Cattle Company." That on the 27th of November, 1882, said three companies joined in making a written contract with one James Wilson, of Edinburgh, Scotland, by which said companies agreed to sell to a limited company, to be thereafter incorporated under the laws of Great Britain and Ireland, by said Wilson and his associates, as promoters, for the sum of \$2,553,825, all and singular the lands and tenements, possessory rights to lands and tenements, water-rights, improvements upon lands, houses, barns, stables, *corrals*, cattle, horses, and mules belonging to said three Wyoming corporations, or any or either of them; also the live-stock brands, tools, implements, wagons, harnesses, ranch, camp and round-up outfits, and branding irons belonging to said Wyoming corporations, or any or either of them, which said lands and tenements, possessory rights, goods and chattels, and live-stock, were particularly enumerated and described in certain inventories annexed to said written agreement, and made a part thereof. That said contract contained, among other provisions, the following covenant:

"And it is further agreed on the part of the said first parties, as to all live-stock mentioned and described in said inventories, that said first parties shall and do hereby agree and guaranty to and with said second party that the herd-books of said first parties, showing the acquisition, increase, disposition of, and number of cattle now on hand, of the said first parties, respectively, have been truly and correctly kept."

That after making said contract, Wilson proceeded to Scotland, and there succeeded in organizing the complainant company, a limited liability company, as contemplated in said contract, under the laws of Great Britain and Ireland, and secured subscription for and payment into the complainant company of sufficient capital stock to consummate the said contract; and that some time in April, 1883, the full purchase price called for by the Wilson contract, less certain agreed deductions for expenses, etc., was paid to the three vendor companies, and bills of sale and deeds for the property of the vendors were delivered to the com-

plainant, and complainant thereupon took possession of the property so transferred to it by the vendors.

It is also alleged in the bill that the vendor companies represented to the complainant in the bill, and to the promoters of the complainant company, and to the shareholders of the complainant company, that it was impossible to count the cattle which the vendor companies agreed to sell the complainant, and that the complainant would be obliged to take possession of the same wherever they might be ranging, without any count whatever, and without any other or further act on the part of the vendors than the delivery of the bills of sale and deeds; that complainant, relying upon the representations made by the vendors that the inventories attached to and made a part of said agreement of sale, and upon the representations of the vendors that the death losses in their herds were made good by the number of calves which escaped branding at the regular branding season, and their further representation that they undoubtedly had the full number of 89,167 head of cattle in their said herd, and relying upon the joint guaranty of the vendors that their herd-books truly and correctly showed the number of cattle then on hand, and upon the guaranty that the calf brands of the year 1883 would amount to 17,868 calves, and fully believing, as stated by the vendors, that it was impossible to count said cattle, complainant consented to receive delivery of said cattle, and did receive the same without any count, and take the same wherever they were ranging, without any other act on the part of the vendors than the delivery of said papers by the vendors.

The bill further states that one Alexander H. Swan was the active agent of the vendor companies in the negotiation and consummation of said sale to the complainant; that Swan was connected with all the vendor companies as a stockholder, and was an officer in all of them; that he had had large experience in the management of such properties, and that by reason of said Swan's knowledge of said properties and the business of the vendor companies, the complainant made an agreement with him to continue in charge of said herd, as manager for complainant, at a large salary; and that Swan at once, after said purchase was consummated by complainant, took charge of said herds and all the said ranch property, as manager for complainant, and continued to be such manager until a very recent date before the filing of this bill. It is further averred that Swan, as such manager, reported to complainant that 17,932 calves were actually branded at the branding season of the year 1883, and further says that said report was false, and intentionally made so in order to deceive and defraud the complainant.

The bill further says that complainant has now learned "that the representations made by the vendors that they had 89,167 head of cattle to sell to complainant were grossly untrue, and the representations made by said vendors that the number of calves in their herd which escaped branding at the regular branding season was sufficient to offset the death losses in said herd were also grossly untrue," and avers that the fact that said representations were untrue was known to the vendors, and that the

vendors were unwilling to have said cattle counted at the time such purchase was consummated, because they well knew that such count would show that they did not have the number of cattle that they purported to have and agreed to sell. And the bill further avers that there were at least 30,000 head of cattle less in the herds sold to complainant than the vendors represented themselves to have, and that complainant has suffered damage in consequence of such deficiency, and in consequence of the misrepresentation of the vendors, to the amount of at least \$800,000. It is also further charged in the bill that the vendors had no other assets, or substantially none, except the property sold by them to complainant, and that after the sale of their said properties to the complainant, and the receipt by them of the purchase price, the three vendor companies paid whatever liabilities they had outstanding, except their liability to complainant, herein set forth, and distributed the money and stock obtained from complainant as the proceeds of said sale, and all their other assets among the respective shareholders, and the same were received by said shareholders; and since that time said three corporations have not, nor has either of them, made any use whatever of their franchises, but they have abandoned the same; and neither of said corporations has any officer or agent upon whom process can be served. That they have not, nor has either of them, any assets of any kind out of which any judgment at common law against them, or either of them, could be satisfied. That the assets of said corporations were in the hands of the vendor corporations a trust fund to satisfy the claims of the complainant, as set forth in its bill, before the shareholders of said vendor corporation were entitled to receive any portion of the same; and said shareholders, in taking and receiving said assets, took and now hold the same as trustees in place of the corporation, subject to the lien of the complainant's aforesaid claim for damages. That all the defendants in this bill were shareholders in some one or more of the vendor corporations, and received their proper shares of said assets when said assets were distributed, as aforesaid.

The bill states that the complainant has made defendants thereto all the shareholders of the vendor corporation who reside within this district. The prayer of the bill is, that each and every of the defendants shall, by a decree of the court, be required to account for and pay over, as the court may direct, to complainant, in satisfaction of complainant's damages, so much of the assets of said respective corporations as may be necessary to satisfy complainant's demand. Neither of the original vendor corporations are made parties to this bill, nor is it claimed that all the stockholders in said corporations are made parties, but only such stockholders as are within this district.

The bill is demurred to, mainly on two grounds: *First*, that the vendor corporations are necessary and indispensable parties to this suit; *second*, that no judgment at law has been obtained against said vendor corporations for the amount of damage which complainant alleges it has sustained by reason of a breach of the covenants, or the misrepresentations set out in this bill.

It is true that complainant seeks by the averment that said vendor corporations, having abandoned their corporate franchise, have no officer or agent on whom process can be served, to excuse itself for not making the corporations parties defendant, and perhaps it may be said that they intend also to excuse themselves thereby for not having obtained judgment at law against the vendor corporations; but the averment that the vendor corporations have distributed their assets among the stockholders, and ceased to make any use of their franchise, is not equivalent to an averment of the dissolution of the corporation. The law is well settled that a corporation is not dissolved by the non-use of its franchise, or by the want of assets. *Bank v. Bank*, 14 Wall. 383; *Bank v. Insurance Co.*, 104 U. S. 54. The rule was undoubtedly correctly laid down in *Glass Manufactory v. Langdon*, 24 Pick. 49, where it is said:

"The possession of property is not essential to the existence of a corporation. Its insolvency cannot, therefore, extinguish its legal existence. * * * The omission to choose directors clearly does not show the dissolution of the corporation. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even the want of officers, and the want of power to elect them, would not be fatal to its existence. It has a potentiality which might by proper authority be called into action without affecting the identity of the corporate body."

By the laws of Wyoming, under which these vendor corporations were organized, "failure to elect trustees on the day designated by the laws of a company does not dissolve the corporation, but an election may be held on another day, and the acts of trustees are binding until their successors are elected," (Rev. St. Wyo. § 560,) and service of process could be made on such corporations by the laws of Wyoming by serving the same upon any of the trustees or officers, or by leaving a copy at the usual place of business of such corporation, so that there is nothing in the bill showing any valid reason in law why the corporations cannot be made parties to the controversy set out in this bill, if the suit is brought within the proper jurisdiction. That these vendor corporations are not only necessary, but indispensable, parties to this controversy it seems to me can hardly admit of a doubt, upon the statements made by the bill. It will be noticed that all the claims which the complainant seeks to enforce against the defendants as stockholders of these corporations are claims sounding in damages which have accrued by reason of the alleged breach on the part of the vendor corporations of their covenants in regard to the number of cattle upon their respective ranches, and their misrepresentations in regard to the present and prospective value and profits of their property, as set forth at length in the bill, many of which I have not quoted.

As the case stated in the bill is one sounding wholly in damages, it is one peculiarly appropriate to the jurisdiction of a court of law. It is a case for damages primarily against the vendor corporations, and the defendants in this case are only sought to be made secondarily liable by reason of the fact that they are charged with having possession of certain assets of the vendor corporations out of which it is insisted complainant's damages should be satisfied; but it seems to me that the first step is

to establish a claim against these vendor corporations. The complainants are, in effect, by this bill seeking to compel these defendant stockholders to try a case in this court against corporations who are not parties to the suit. The first and fundamental question in the complainant's case is, has there been a breach of the covenants of these vendor corporations, and what amount of damage has the complainant sustained by reason of such breach? It would be anomalous and unjust, it seems to me, to try this question in a suit to which the corporations were not parties, and where they could not be heard.

The case made by the bill is one peculiarly, if not exclusively, appropriate for a trial by a court of law. The extent of the shortage in the cattle sold complainant, and the value of those cattle, is a matter which, it seems to me, these defendants have the right to demand should be inquired of and adjudicated upon by a court of law. Indeed, it may well be doubted whether any court of equity should take jurisdiction of the controversy as stated in the bill. In Story's Equity Jurisprudence, (volume 1, § 72,) it is said:

"If, therefore, the proper relief be by an award of damages, which can alone be ascertained by a jury, there may be strong reasons for declining the exercise of the jurisdiction, since it is the proper function of a court of law to superintend such trials."

And in many other cases where the question arises purely on matters of fact fit to be tried by a jury, and the relief is dependent upon that question, there is equal reason that the jurisdiction for relief should be altogether declined. I am therefore of opinion that the demurrer to this bill is well taken, upon the ground that the complainant should first establish by a suit at law, not only the fact that it has a claim for damages against these defendant corporations, but the amount of such damages, and, even if I am in error upon this point, and if a court of equity can, with the proper parties before it, administer the relief which the complainant seeks in this bill, without the damages first having been ascertained and determined by a suit at law, still, there can be no doubt, I think, in the light of the authorities, that the vendor corporations are necessary and indispensable parties to such bill. *Kendig v. Dean*, 97 U. S. 423; *Wood v. Dummer*, 3 Mason, 308, *Lyman v. Bonney*, 101 Mass. 562; *Patterson v. Lynde*, 112 Ill. 196; *Bank v. Smith*, 6 Fed. Rep. 215. As I have already said, the complainant, by the bill as now framed, seeks to compel the defendants, who are not the vendor corporations, to try, in effect, a suit against the vendor corporations where the claim sounds wholly in damages. These defendants are not supposed to have within their possession or control either the facts upon which the corporations themselves might base a defense or upon which the damages could be measured and determined. The books, papers, vouchers, original contracts, everything which would be material to the settlement of the rights of the complainant against these vendor corporations must be supposed to be in the hands of the vendor corporations, or some of their officers, and not in the hands of either of these defendants by reason of the mere fact of their being stockholders. These vendor corporations, being Wy-

oming corporations, cannot be brought into this court, and hence the bill is not only fatally defective, as it stands, but cannot be amended in that respect. The demurrer is therefore sustained and the bill dismissed.

WEBSTER LOOM CO. v. HIGGINS *et al.*

(Circuit Court, S. D. New York. July 26, 1889.)

1. PATENTS FOR INVENTIONS—CARPET-LOOMS—INFRINGEMENT—DAMAGES.

On bill for infringement of a patented device for weaving carpets, complainant selected another loom, the B., as the standard of comparison by which the increase in production by use of the device infringed should be measured. The master found that still another device, the J., which was in use before complainant's, produced vastly superior results to those produced by the B. *Held*, that the master should have found whether defendants derived any advantage from the use of complainant's device over what they would have had in using the J.

2. SAME—RES JUDICATA.

A former decision in the case as to the proper rule by which to compute defendants' profits from using complainant's device, rendered in denying defendants' motion to direct the master not to require an accounting of the cost of production and selling price of the carpets, is to be followed upon the hearing of exceptions to the master's report.

In Equity. Bill for infringement of patent.

Bill by Webster Loom Company against E. S. & N. D. Higgins. Complainant excepts to the master's report.

Edward N. Dickerson and *Edward Stephens*, for complainant.

Livingston Gifford and *Walter K. Griffin*, for defendants.

SHIPMAN, J. The questions in this case arise upon the complainant's exceptions to the master's report. The bill is founded upon the infringement by the defendants of letters patent No. 130,961, dated August 29, 1872, to William Webster, for an improvement in looms for weaving pile fabrics. In the opinion of the supreme court in this case (*Loom Co. v. Higgins*, 105 U. S. 580) the history of the art and the nature of the improvement are stated, so far as they were developed in the record which was then before the court. For the better understanding of the questions which came before the master, it is desirable to recapitulate that portion of the opinion:

"In weaving pile fabrics,—such, for example, as Brussels carpet,—the pile or loop is formed by inserting a wire alternately with the filling between the threads of the warp, immediately under the woolen or worsted threads, and afterwards withdrawing it from the web of cloth. At first these wires were inserted and withdrawn by hand, by the aid of an assistant, which made the process a very slow one, so that only a few yards could be woven in a day on a single loom. The first great improvement was introduced about 1840–50, by Erastus B. Bigelow, of Massachusetts, who invented a mechanical apparatus, attached to the side of the loom, which automatically inserted the wires in the shed, or opening between the warps, and withdrew them from the web.

* * * This attachment to pile-fabric looms became generally known as the 'wire movement,' and by its aid twenty-five yards a day could be woven on a single loom, without the aid of any assistant. It is seldom that such a complete revolution in one of the useful arts is made at a single jump."

Improvements were made on Bigelow's invention. Among others, William Weild of England, in about 1855, made a decided improvement, which, after being subsequently perfected, enabled 30 or 40 yards a day to be woven on a single loom. But perfect efficiency was not attained by Weild's motion, and its defects made it necessary to work the loom more slowly than the other operations required. Webster's improvement "resulted in giving to the loom the capacity of weaving fifty yards a day." The circuit court, in entering its decree in favor of the complainant in accordance with the instructions of the supreme court, directed the master, among other things, to ascertain and state to the court the number of infringing carpet-loom used by the defendants, the number of yards of carpet which they had caused to be woven thereon since October 20, 1873, and the gains or profits which they had received from infringing the exclusive rights of the complainant. No damages were claimed by the complainant. It was agreed that the defendants had used 61 infringing looms, upon which the master finds that they had woven 8,277,012½ yards of carpet during the eight years they were in use. The complainant insisted that the testimony proved that by means of the infringement the 61 looms produced 4,145,872 yards of carpet over and above what could have been "produced on a like number of looms fitted with any other wire motion, open and free to be used, and that the value of the increased product to the defendants was thirty-six and three-fourth cents per yard, making a total net profit of \$1,523,-607.96. The thirty-six and three-quarter cents per yard was arrived at by subtracting the entire cost of manufacturing from the selling price." The master does not find whether the net profit which the defendants made upon their manufactured goods was 36½ cents per yard, but was of the opinion, as matter of law, that, inasmuch as the wire motion related only to an improvement and increased product in the matter of weaving, which was, although the final process, but one of many processes involved in the art of manufacturing carpets from wool, the entire profit upon the increased production from the use of the wire motion was not the rule of profits, but that the true rule was the profit to the defendants in the matter of weaving, and that the proper inquiry was the difference in the cost of weaving the increased quantity of carpet upon the infringing looms and upon any looms free and open to use. He therefore reported that there had been a failure on the part of the complainant to establish a legal basis for a computation of profits.

The complainant selected the Bigelow loom as the standard of comparison by which the amount of increased production by the use of the Webster motion should be estimated. The defendants insisted that a number of wire motions were at the date of the infringement free and open to use, either of which produced results superior to those produced either by the Bigelow or the Webster motion, and consequently that they

had made no profits for which they were accountable to the complainant. The master found that the Johnson wire motion, which had been continuously used by the Roxbury Carpet Company of Roxbury, Mass., since 1856, until 150 looms furnished with such motions were running at the time when the testimony was taken, "was capable of producing, and actually did produce, results so vastly superior to the Bigelow as to utterly destroy the latter as a basis of ascertaining the gains, profits, and advantages which were realized by the defendant by reason of the infringement." He does not find the exact amount of its superiority in point of productiveness to the Bigelow device, or the relation which the Johnson motion bore in its capacity for assisting production to the Webster motion, because he was of opinion that, the defendants having shown the superiority of the Johnson motion over the Bigelow, "the burden of furnishing the means for making a computation based upon the superiority of the infringed device over all others open and free to the public use, was wholly upon the complainant, and he must do it by trustworthy legal proof. Should any of the factors necessary to ascertain the computation be destroyed by defendants, a new basis must be established by the proofs, or the accounting fails." The master found nothing in regard to the relative superiority or inferiority of any of the other devices in regard to which evidence was offered. Upon both the law and facts he found that the complainant had failed to establish by trustworthy legal proof any basis for the computation of profits. It will thus be seen that, in addition to the number of infringing looms and the number of yards manufactured thereon, the master found upon the questions of fact only the superiority of the Johnson wire motion to the Bigelow motion. The complainant excepts to all the foregoing conclusions both of law and fact, which the master reached.

Two questions were presented for his decision: (1) Did the defendants derive any advantage from using the complainant's invention over what they would have had "in using other means then open to the public, and adequate to obtain an equally beneficial result?" And, (2) if yea, what were the fruits or the profits which resulted from that advantage? The alleged advantage is a vastly increased capacity to produce, and actual increased production of finished goods. As the standard of pre-existing success in weaving pile fabrics the complainant selected the Bigelow motion, and apparently, from the history of the litigation upon this patent in New Jersey, had a right to make such selection. The defendants designated divers motions as superior to the Webster, and furthermore offered proof to show that the alleged capacity of the Bigelow motion was too low. From these devices the master properly gave most attention to the Johnson, because, as he says, "there is no question as to its being open and free, and because the proofs seem more direct and reliable." The Roxbury Company had had no interest in this infringement. The testimony was derived from the books, which were apparently kept in the ordinary course of business, without reference to this question, during the same years in which the infringing looms were used by the defendants, and the master justly thought that the proof seemed

more direct than in regard to the other motions. After having found its superiority to the Bigelow, he stopped his investigations, upon the ground that, as the defendants had destroyed the complainant's standard, there could be no standard until the complainant voluntarily created one. Whether this is or is not a correct application of the doctrine of the burden of proof in other cases I shall not inquire, because it is not, in my opinion, correctly applied to the facts in this case. The question was as to the advantage which the defendants had from the use of the patented invention, and the plaintiff said the advantage is large by reason of its superiority to the acknowledged pre-existing standard. The defendants' testimony was a comparison of the Johnson with the Webster, rather than with the Bigelow. It not merely attacked the correctness of the plaintiff's standard, but by testimony, which purported to be exact, definite, and mathematically accurate, set up a new standard, and endeavored to establish the fact that the Roxbury motion gave larger results than the patented motion. The testimony on both sides has been closed, and, if the Roxbury testimony was credible, and was believed by the master, it was not merely negative; but, in connection with the criticisms which were made upon it by the complainant's counsel, and the analysis which it received from them, it was capable of giving a positive answer to the first question. If the new standard is a true standard, it is not important who introduced it into the case. The master should have found whether any advantage was derived by the defendants from the use of the patented invention over what they would have had in using the Johnson motion.

The next question is one of law, and relates to the rule for the computation of profits in case an advantage is found; or, in other words, what were the fruits of the advantage? The complainant contends that the rule is the net profit which the defendants received per yard upon the increased amount of manufactured carpets. The master thinks that it is the difference, if any, between the cost of weaving the same number of yards upon any loom, with or without a wire motion, which were free to be used, and the cost of weaving upon the infringing looms. This question is both an important and an interesting one; but, for the purposes of this case, I think that it is settled in this circuit, by the decision of Judge WALLACE¹ upon the motion of the defendants to direct the master not to require an account of the cost of production and the selling price of said carpets. In the opinion denying the motion Judge WALLACE said:

"These profits arise because by using the patented loom the defendants have produced more yards of carpet than they could have produced by using such looms and appliances as it was open for them to use. Upon this theory it is to be ascertained to what extent defendants' production has been increased by the use of the patented loom, and then the average profit per yard, or the aggregate profit on the increased production that actually accrued to the defendants. * * *. The complainant has the right to follow the profits through all the stages of production, and all the departments of their busi-

¹Not reported.

ness, because the ultimate profit made by the defendants is the measure of their accountability."

This decision was directly upon the proper rule of profits in this case, after an argument of the question, and its conclusions are not now open for review on my part. If any advantage is found, the amount of profit should be estimated by the master in accordance with the rule stated in the opinion of the circuit judge.

The defendants offered testimony, which was admitted, respecting the comparative advantages in point of weaving capacity of divers English looms with wire motions, which were patented in England at different dates, but were never patented in this country. The complainant and the defendants differ upon questions of law whether those patented devices, or any of them, or which of them, were free and open to be used, and also differ as to the time when a comparison is permitted to be made; the complainant, for example, contending that a device must be free and open at the date of the complainant's patent; and the defendants contending that, if it is free and open at or during the time of the infringement, then from and after the time when it becomes free it is a proper subject of comparison. Inasmuch as the master has found nothing in regard to these devices, and is not herein directed to make a new finding respecting them, a decision of these questions is unnecessary. The report is recommitted to the master, to make a further report in conformity with the views herein expressed.

McDONALD v. WHITNEY *et al.*

(Circuit Court, D. Massachusetts. July 26, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES.

On a reference to a master to report the amount of damages for which the defendant should be charged for infringement of plaintiff's patent, it appeared that plaintiff received \$200 as royalty for each machine manufactured by a licensee, and that plaintiff made a profit of like amount on machines made by himself, and that defendant was a close competitor of plaintiff in the market. *Held*, that a charge of \$200 for each machine manufactured by defendant was not excessive.

2. SAME.

The facts that plaintiff's machines embraced other patents owned by him besides the one infringed by defendant, and that such other patents were also included in the license, furnish no grounds for altering the master's finding, where he also finds that the efficiency and salability of the infringing machine depended upon the plaintiff's patent.

3. EQUITY—BILL OF REVIEW—TIME OF FILING.

A bill of review for errors on the face of the decree must be filed within two years from the date of the final decree sought to be reviewed.

In Equity: On exceptions to master's report, and on bill of review and answer. For hearing on the merits, see 24 Fed. Rep. 600.

T. W. Clarke, for complainant.

J. H. Millett, for defendants.

COLT, J. The only question arising under the exceptions of the defendant Joel Whitney to the master's report upon which I have any doubt relates to the amount of damages with which this defendant has been charged. The master charges him with \$200 for each infringing machine made and sold by him. This finding is based upon the fact that one Clement paid McDonald a royalty of \$200 on each machine which Clement manufactured; and further, that a profit of like amount was made by McDonald himself on the machines sold by him. It also appears that the complainant and this defendant were close competitors in the market. Under these circumstances, I do not think the master's findings excessive. It is urged, however, that the McDonald machine embraced other patents of McDonald besides the one which the defendant infringed, and that such other patents were also included in the license given to Clement. The master finds, however, that the efficiency and salability of the infringing machine depended upon the McDonald patent, which is in controversy in this suit, and which this court held this defendant infringed. While upon the evidence, as reported by the master, I am not entirely clear on this question, yet, on careful consideration, I can see no sufficient reason for changing the master's finding. The exceptions to the master's report are, therefore, overruled. The complainant has filed a bill in the nature of a bill of review against the defendant Arthur E. Whitney, and a hearing was had upon this bill and the answer thereto. The position taken by this defendant is that, the error being apparent on the face of the decree, the bill should have been filed within two years from the date of the final decree sought to be reviewed. The final decree, dismissing the bill as to Arthur E. Whitney, was entered August 4, 1885, and the petition for leave to file a bill of review was dated more than two years thereafter, namely, September 24, 1887. From analogy to the time within which by law an appeal may be taken from the circuit court to the supreme court, the supreme court have established the same limitation respecting bills of review, whenever the ground of the bill is error on the face of the decree. *Thomas v. Harvie's Heirs*, 10 Wheat. 146; *Whiting v. Bank*, 13 Pet. 6; *Ricker v. Powell*, 100 U. S. 104; *Clark v. Killian*, 103 U. S. 766; *Ensminger v. Powers*, 108 U. S. 292, 2 Sup. Ct. Rep. 643. The decree being final as against the defendant Arthur E. Whitney, and the bill of review not having been brought within two years, this bill must be dismissed. Master's report confirmed, and bill of review dismissed.

MORSS v. UNION FORM CO. (No. 316.) HALL v. KNAPP *et al.* (No. 336.) MORSS v. KNAPP. (No. 538.)

(Circuit Court, D. Connecticut. July 26, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES—PROFITS.

Defendants sold the complainant's patented expanding dress-form, to which defendants attached an improved device for operating it. Complainant's patented device gave to the infringing form its value as a marketable article. *Held*, that if any distinct part of the profit derived by defendants from the infringing sales was due to their improvement in the operating device, the burden was on them to show it.

2. SAME—LOSS OF SALES.

The master properly refused to allow complainant, in addition to the profits which he would have made upon the number of forms which he was deprived from selling by defendants' infringing sales, the profits made by defendants upon the number of forms sold by them in excess thereof. The proper rule is to allow only proved damages.

3. SAME—ACCOUNTING—EVIDENCE.

Where it is manifest that during the period covered by the litigation all the testimony of importance was discovered and presented, it is proper for the master to refuse to open the accounting to receive further evidence that an expanding device not included in complainant's patent, but accomplishing the same results, was free to be used, and to receive in evidence a patent issued to one of the defendants before the accounting commenced.

4. SAME—INCREASED DAMAGES.

While complainant is entitled to increased damages, under Rev. St. U. S. §§ 4919, 4921, giving the court discretionary power to increase the damages, for infringing sales made by defendants in willful violation of a decree enjoining them from so doing, he is not entitled to such damages merely on account of defendants' conduct in pushing the infringing articles upon complainant's customers, and endeavoring to deprive him of his former trade.

At Law and in Equity. On exceptions to master's report.

The facts are sufficiently stated in the opinion. Rev. St. U. S. § 4919, provides that damages for infringement of a patent may be recovered by an action on the case, and that on a verdict for plaintiff "the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict," etc. Section 4921 provides that in suits in equity the court may assess the damages caused by the infringement, and that "the court shall have the same power to increase such damages, in its discretion, as is given to increase the damages found by verdicts in actions in the nature of actions of trespass on the case."

Payson E. Tucker and Charles F. Perkins, for complainant.

John K. Beach, for defendants.

SHIPMAN, J. These are exceptions to the committee's and master's report in two actions at law and one suit in equity, which were based upon the infringement of letters patent No. 233,240, dated October 12, 1880, to John Hall, for an adjustable dress-form. A description of the invention and the claim which was infringed are given in *Morss v. Knapp*, 37 Fed. Rep. 351. By agreement of the parties the accounting upon the

bill in equity was referred to Edwin E. Marvin, Esq., as master, who was also appointed committee to ascertain the damages in the actions at law. The time which was covered by the different suits was as follows: By No. 316, from October 12, 1880, to April 27, 1886; by No. 336, from April 27, 1886, to November 16, 1886; and by the accounting in No. 538, from November 16, 1886, to February 25, 1889. The three cases were heard together upon the stipulation that all the proofs should be considered to be taken in each of said causes, so far as the same were competent and relevant. In No. 538 the master found the profits of the defendant to be \$5,421.02, and the proved damages to the complainant to be \$7,206.21. The damages in No. 306 and No. 336 he found to be respectively \$512.43 and \$373.23. A larger sum in damages in each of these cases he also found in the alternative, if the court should be of the opinion that the evidence was sufficient to justify it. This will be considered hereafter. Both parties except to the findings of the committee and master.

Two general classes of forms were made by the defendants, as well as by the complainants, a skirt-form and a complete form. In order to understand the bearing of the several exceptions it is necessary to give the findings of the master in regard to the damages and profits by the sale of each of these forms, and I think it is important to give them in his own language:

"I find both these forms contain the expanding device of the second claim of the plaintiff's patent in this suit. Of the skirt it supplies the chief elements of the structure, and gives to it its value as a marketable article. It does not appear by the evidence that the solid skirts of such form have or ever did have any considerable sale or great market value, but for skirts adjustable in a greater or less degree to the human form it does appear that there is a large and increasing demand, for the purposes of draping and fitting of garments. The adjustable device employed as to these particular skirts belonged to the complainant, and was embodied in them by the defendants for the purpose of giving them sale, and did in fact sell them. The defendants superadded to the complainant's invention in suit a firmer waist, a substantial foot on casters, also a very simple, convenient, and valuable device for operating the expanding mechanism of it, consisting of a slow-threaded screw on the central rod, rotated or operated by a handle or knob at the top of the form, whereby the mechanism of the plaintiff's patent could be conveniently expanded to fit any form, and at all stages of the adjustment be securely and firmly locked and held in position and in proper form. This device was an improvement for the operation of the plaintiff's device which, as organized in plaintiff's skirt, operated by hand, and with considerable inconvenience, and required to be locked and held at all points desired by the use of several set-screws. The plaintiffs' device was more valuable with this improvement added to it than without it; and the defendants' form embodying plaintiff's device so improved in competition with the plaintiff's skirt form, which did not contain the defendants' improvement, sold more freely than plaintiff's, at slightly higher prices than plaintiff's; that is, it brought from \$2.50 to \$3, while plaintiff's iron post form brought from \$2 to \$2.50, and wood post form from \$1.50 to \$2. The defendants' improvement was not such a device as could give any value to a skirt-form having no expanding devices within it upon which it could operate. The plaintiff's expanding device was absolutely necessary to it to give it any sale; nor does it appear

that there is any other expanding device for skirt-forms on which the defendants' device can operate, or with which it can be employed, which is open and free for them to use and employ. For such profits as the defendants secured by this appropriation of the plaintiff's patent, or for the damages thereby coming upon the plaintiff by loss of sales of his own invention, the defendants are to account. If the defendants' device added to these any essential part of them, the defendants should have proved the amount of such added profits in their own interest after having stated their total profits to the master in their statement on file. There was no such proof made, and the added expense of manufacture necessary would rather indicate a lessening of profits. The profits which the defendants admit they made on these skirts are sixty cents each, and \$1,576.80 in the whole."

* * * * *

"As to the 3,364 full-figure forms sold during the same time, *i. e.*, from November 16, 1886, to April 20, 1888, the defendants admit their profits upon the sale of them to have been \$1.08 each, and \$3,633.12 in the whole. I find that the device of the plaintiff's patent in suit was embodied in all these figures in the same way as in defendants' skirt, to which was added the defendants' knob at the top upon a central screw-threaded rod, for expanding and holding at all points the plaintiff's expanding device, and such addition was entirely useless unless so organized with the plaintiff's patent in suit. That the plaintiff's expanding device in suit, both in bust and the skirt, was a valuable element of defendants' forms, and contributed largely to their sales; but that there were in these full forms other important and prominent features which likewise contributed largely to their sales, and added much to the value of the structure in use; and therefore I cannot find from the evidence that all the profits made by the defendants belong or are due to the plaintiff's patent in suit. Neither is there evidence in the case from which I can find the proportion of the amount of stated profits belonging or attributable to the complainant's patented device, and what to the devices patented by the defendants, and unpatented, which are embodied in this dress-form. There is no evidence from which I can separate the one from the other, and, under such circumstances, if the plaintiff should be adjudged profits, only nominal profits could be given. As to the damages resulting to the plaintiff by the loss of sales of his full and complete form in each instance where one of these forms were sold to his previous customers, I cannot find that he was so damaged. While he undoubtedly suffered a great loss of sales by such interference, the evidence will not establish the fact that he lost the whole number of such sales for such cause, nor is there any evidence which determines what number of sales was so lost. The defendants' full-figure form was in many respects a very superior form. The whole figure was firmer, stronger, and fully as graceful as that of the plaintiff, and also employed in its construction a *papier maché* bust, which kept its shape better, and was far more preferable in general appearance and for fitting purposes than one made of wires. The complainant's selling agents admit that there was a large inquiry in the trade for forms containing these *papier maché* busts; and that the matter of incorporating such a bust in the plaintiff's forms in order to meet the demands of the trade was suggested by customers, from all of which it is certain that although the plaintiff's device in suit was a very desirable element in the trade, and still more desirable when improved by expanding mechanism operating at the top as the defendant organized it in all of his forms, still that the *papier maché* bust was nearly, if not quite, as valuable an element; and it seems fair to presume from the evidence that this bust made as many of the defendants' sales as did the plaintiff's device, and it is absolutely certain that defendant did not make all, or nearly all, his sales to the complainant's previous customers because of the expanding devices of the hip portion of the skirt. Nor can I find the same fact that I have found

in regard to the defendant's skirt-form, that the plaintiff's expanding device was absolutely necessary to give it any sale, and that it would have had no great sale or commercial value without it. On the contrary, I find that it would have undoubtedly had a very considerable sale if it had no expanding devices whatever at the hip of the skirt."

The same difference or distinction was made in regard to the damages in the actions at law and in regard to the sales after April 20, 1888. No damages or profits were given upon the 7,636 complete forms which the defendants sold. Ten of the complainant's 13 exceptions relate to this portion of the report and it is contended that the defendants should be required to pay all the profits which they made upon the full figures, or should pay upon the forms at least a sum based upon the amount which they made upon the skirt-forms. This contention is upon the ground that the invention of the second claim constituted the chief part and value of the full forms. While it is manifest from an examination of the careful and conservative report of the master that he had no doubt of the fact of a great loss of sales to the complainant from these competing forms, and a consequent damage by the infringement, yet that he could not find a basis for the ascertainment of a specific amount of damages arising from the use of the patented invention. My examination of the proofs leads me to the conclusion that, while I do not place quite so much value as he did upon the preference which agents exhibited for the *papier mache* bust, and think that without the expanding devices at the hip of the skirt it would not have been so formidable a rival to the complainant's full form as it was, yet I perceive that there is necessarily a haziness about that part of the case, which makes it difficult to reach exact and definite results in figures as to the amount of damages or profits resulting from the use of the invention as described in the second claim.

Two other exceptions make the point that as damages the master should, in addition to the profits which the complainant would have made upon the number of skirt-forms which he was deprived from selling by the defendants' sales, have allowed the profits made by the defendants upon the number of skirt-forms sold by them in excess thereof. The master and committee followed the rules in the computation of damages which are laid down in *Seymour v. McCormick*, 16 How. 480; *Philp v. Nock*, 17 Wall. 460; *Buerk v. Imhaeuser*, 14 Blatchf. 19, and which are commented upon in *Root v. Railway Co.*, 105 U. S. 189, and allowed only proved damages, and I think that he followed the established rule. The remaining ninth exception, in regard to the sufficiency of the means of ascertaining the number of wooden post and iron post forms, respectively, which the complainant would have sold but for the infringement, is immaterial, in view of the alternative finding of the master, which will be hereafter considered.

The 21 exceptions of the defendants cover the entire case which is stated in the report. The important ones may be divided into three classes. The first contention is that the patented form is but an improvement in the art over pre-existing forms, and that, therefore, the entire

amount of profit which the defendants made cannot be the proper rule of profits. They insist that solid skirt-forms existed and had a prominent place, and that the Everett form, although to a certain extent an adjustable form, was yet practically a solid form, and had a large sale. The first exception is to the finding of the master, that it does not appear that solid skirts of the general form of the defendants' have or ever did have any considerable sale or great market value. Solid entire forms or "dummies" for the exhibition of wearing apparel have long existed, but the patented article was the first dress-form which was adjustable to all sizes, without change of shape. The Everett form was a primitive affair, which had a pretense of adjustability. It was enlarged by pulling away a movable half section from a stationary half section, thus broadening the figure from side to side, while keeping it unaltered from front to rear. The shape was radically changed. The solid entire form has still its place in the shops, and is also made to order, in imitation of the figure of the person who is to use it, but it is not justly a subject of comparison with the patented article, which had a new and distinct character of its own, viz., expansion or adjustment, by the described means, of a skeleton frame, radially, in all directions from a common center, and had its own place as an aid in the manufacture of ladies' wearing apparel. In consequence of its appearance in the market, the Everett form disappeared. The Everett sales of 11,500 in 1883 diminished, until during the year ending in August, 1887, 1,000 were sold, and in the next year, when its manufacturer introduced a new form designed to improve upon its defects, the sales were about 100.

The defendants, secondly, in view of the sales of the Everett form, object to the report, because it is found that the complainant's expanding device of the second claim gave to the defendants' skirt-form its value as a marketable article, and sold it, and was necessary to give it any sale. Of the truth of this finding there can be no doubt. The second claim contained the entire new skirt-form, which was the skeleton frame radially adjusted in all directions from a common center by the described means; and the defendants' wire structure contained the whole of the second claim and of the complainant's frame, and little else, except better and more expensive workmanship, and a better and more expensive equivalent device for operating the expanding mechanism. The defendants' device was the complainant's plus better workmanship and a better selection of equivalent devices to operate the braces.

The third class of exceptions is as to the rule by which profits are to be estimated, and to the finding of law that if the defendants' device added to the profits which they made any essential part of them, they should have proved the amount of such added profit. The complainant relies upon the rule in *Elizabeth v. Pavement Co.*, 97 U. S. 126, in the case of an entire profit derived from the construction of the patented device as an entirety, that if any distinct profit was realized from the addition of another improvement, the burden is upon the infringer to show it. The defendants rely upon the rule in *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. Rep. 291, that when the patent is for an improvement,

and not for an entirely new contrivance, the burden is upon the patentee to apportion the profits between the patented feature and the unpatented features. As has been before said, the complainant's skirt-form was new and distinct from either the "dummy" form or the Everett form. Its entire character consisted in its method of radial expansion without change of shape. The defendants' skirt-form has been described. The principle of the *Pavement Co. Case* seems to be the one which is applicable. If not, it is properly found, as required in *Garretson v. Clark*, that the patented device of the second claim gave to the infringing skirt its value as a marketable article.

The defendants also except to the refusal of the master to open the accounting, after it was closed, to receive further evidence that an expanding device not included in the plaintiff's patent was open and free to be used, and accomplished the same results, and also refused to receive in evidence letters patent to one of the defendants, dated October 29, 1887. The litigation had been in existence both in this district and in the district of Massachusetts. The accounting commenced May 9, 1888, and the testimony seems to have been completed November 29, 1888. During this litigation, it is manifest, from the circumstances which surround the case, that all the testimony of importance had been found and presented. All the exceptions are overruled.

The master found, in each action, the number of skirt-forms which the complainant had been prevented from selling by the defendants' sales. The complainant's forms were made either with a wooden post or with an iron post. Upon the former he made a profit of 87 cents, and upon the latter of \$1.14 per form. The defendants made iron post forms only. Their prices were somewhat larger than the complainant's prices for iron post forms, and their profits upon the largest part of their sales were either 60 cents or 60½ cents per form. Five-ninths of the complainant's sales of skirt-forms were iron post forms, and four-ninths were wooden post forms. The master finds in the equity case that it is a "fair inference from the facts that complainant's loss of sales of 8,263 plaintiff's skirt-forms which he has suffered by the sales of defendants' various infringing skirt-forms would have been supplied by the complainant in the same proportion, and that, if the court is of the opinion that the master is entitled to find such fact from such proof, then the master, in that alternative, finds that five-ninths of the sales of said 8,263 dress forms would have been iron post forms, and the complainant's damages by loss of sales of each of said forms would have been \$1.14 in such case upon five-ninths (4,591) of said forms, instead of 87 cents, a difference of 27 cents each." The same facts are found with reference to the damages in the actions at law. I am of opinion that the proof authorizes such fact to be found except in regard to the 620 "baby drapers" which were sold. Upon such computation the damages in No. 316 will be \$600.72, and in No. 336 will be \$435.49. The damages in No. 538 will be \$8,352.36, being an increase of \$1,146.15; and the excess of damages above profits will be \$2,931.34.

The complainant has filed a motion for an increase of damages under

the two sections of the Revised Statutes relating thereto, upon the general grounds that the infringement was willful, and counterfeited the appearance of the complainant's form, and was accompanied with conduct which indicated a willful and malicious determination to injure the complainant.

A decree in the Ufford suit in the district of Massachusetts, in which the Knapps were the real defendants, was entered February 23, 1888. They continued to manufacture in this district until March 30, 1888, when they were enjoined by decree of this court. They then commenced to sell the forms B, C, and baby drapers, which were not in the Massachusetts case, and continued such sale until January, 1889, although the Domestic Sewing-Machine Company, at the suit of the plaintiff, in which suit the Knapps were the real defendants, was enjoined, on August 25, 1888, in Massachusetts, against selling B and C. The accounting in the equity suit was until February 25, 1889. The defendants pertinaciously pushed their goods upon the customers of the complainants, and endeavored to deprive them of their former trade, but I do not consider that the statute in regard to increased damages intended to punish this pushing, forceful method of business, and I do not find that, with the exception of the interval between February 23, 1888, and March 30, 1888, and between August 25, 1888, and January, 1889, the infringement was a willful or wanton violation of the complainants' exclusive rights. During that time they were acting willfully, and the damages should be increased on that account \$250.

LAMB *et al.* v. GRAND RAPIDS SCHOOL FURNITURE CO.

(Circuit Court, W. D. Michigan, S. D. August 20, 1889.)

1. COPYRIGHT—INFRINGEMENT—ILLUSTRATED CATALOGUE.

Complainants published and copyrighted a book of engravings illustrating certain unpatented articles manufactured by them. Defendant manufactured similar articles from designs taken from complainants' illustrations, and published a book of engravings illustrating its manufactures, in which several pictures were very like those in complainants' book. *Held* not an infringement of complainants' copyright.

2. SAME—PRELIMINARY INJUNCTION.

Complainants' book of engravings was published with a price-list of the articles described in it as an advertisement of those articles. *Held*, that it was a matter of so much doubt whether the engravings were intrinsically valuable as works of art that a preliminary injunction should be denied.

In Equity. On motion for preliminary injunction.

Frederick T. Sibley, (James H. Brewster, of counsel,) for complainants.
Taggart, Wolcott & Ganson, for defendant.

SEVERENS, J. The complainants, who are manufacturers of church furniture at New York, prepared and published a book of engravings,

illustrating their goods, and containing also a price-list thereof. This book they procured to be copyrighted. The defendant is a manufacturer of school and church furniture at Grand Rapids, and they also have published a book containing illustrations of their goods, with price-list, and several of those illustrations bear striking resemblance to those of the complainants. In fact, the defendant manufactures goods from designs taken from complainants' illustrations, and they say (what for the present purpose must be admitted) that their illustrations are in truth of their own goods, so that the similitude of the illustrations results from the fact that the goods are alike. The manufactures of the complainants are not patented. The defendants may lawfully manufacture just such goods. Can they not publish correct illustrations of them as adjuncts of their sale? Ought they to be restrained from doing this because the complainants, having done the same thing, have copyrighted illustrations which, while representing their own goods, represent those of the defendant also? It is clear that the books of both parties are published and used solely as means for advertisement. To say that the defendant has not the right to publish correct illustrations of its goods must practically result in creating a monopoly, in goods modeled on those designs, in the complainants, and thus give all the benefits of a patent upon unpatented and unpatentable articles. Sales of merchandise are made largely by samples, and when the articles are bulky, as in case of furniture, illustrations are the only representations that can be made to the eye of the public at large; and it is altogether likely that to withdraw the right to make them from one of the parties would put him out of the field of competition. It does not appear to me that such results can be accomplished in this way. It is true, there is an appearance of profiting at another's expense, and reaping what another has sown, but I can see no legal ground on which this can be prevented. The legislation, with its limitations, which public policy has approved, does not extend so broadly as to give the complainants a monopoly in the harvest in such a case.

But it is urged that it is alleged and claimed by the complainants that their illustrations are intrinsically valuable, as works of art. I am convinced, however, that they were not published as such, but simply for trade purposes in aid of their sales, and I doubt (though I do not decide) whether they can be regarded in any other light. If they could be established to be works of art, having value independent of their use as advertisements, a very different question would be presented. This subject may be deferred until the hearing of the cause. I have too much doubt about the fact to warrant the granting a preliminary injunction, and the motion therefore is denied.

THE ALLIANCA.

THE NELLIE V. ROKES.

GOULD v. UNITED STATES & BRAZIL MAIL S. S. Co.

(District Court, S. L. New York. June 17, 1889.)

COLLISION—STEAM AND SAIL—ERROR IN EXTREMIS.

A collision occurred at night, in the Swash channel, a little below the Romer beacon, between the steamer A., outward bound, and the schooner R., inward bound, sailing wing and wing, the weather being somewhat thick, and the courses of the two vessels crossing by an angle of half a point. As the vessels neared each other, the schooner ported and changed her course from 6 to 7 points. Upon conflicting evidence as to the lights seen, on which bow they bore, and the time of porting by the schooner, *held*, that the schooner at the time of porting was a little on the steamer's starboard bow, having the latter's green light only in view, and at least a quarter of a mile distant: that she ran from 500 to 800 feet, at least, on her change of course, making a direct offing of at least 250 feet towards the line of the steamer's course; that this change brought about the collision, which would not otherwise have happened, the steamer having previously properly starboarded sufficient to clear the R. by a safe margin; that the R.'s change of course was not justified as an error *in extremis*, because made at too great a distance from the steamer, and not brought about by any fault of the latter, and also as unreasonably made in the wrong direction. *Held*, also, that, as the steamer was running one-half speed, about seven knots, and the lights visible one-third or one-half mile distant, she properly starboarded in time to avoid the schooner, and was free from fault; and that seven knots was a "moderate speed" under such circumstances.

In Admiralty. Libel for damages through a collision.

Goodrich, Deady & Goodrich, for libelant.

Charles H. Tweed and Robert D. Benedict, for respondent.

BROWN, J. At a little past 7 o'clock in the evening of January 25, 1888, the schooner Nellie V. Rokes, loaded with a cargo of guano, while sailing up the Swash channel, came in collision with the steam-ship Allianca, outward bound, at a point probably not much over half a mile below the Romer beacon. The wind was moderate from the south-east. The schooner, until shortly before the collision, was sailing N. W. by N., wing and wing, her main-boom being to port, and the fore-boom and spanker to starboard. When the steamer entered the Swash channel from $1\frac{1}{2}$ to 2 miles above, a snow squall prevented seeing any distance in that vicinity, though it was clear below. The bell buoy at the entrance could not be seen. After going under a slow bell, as the weather became a little clearer, the steamer proceeded at half speed, equal to about seven knots, steering S. E. $\frac{1}{4}$ S. The witnesses for the schooner testify that they saw the steamer's red light, either ahead, or a little on their port bow, from two to three miles distant, next both colored lights, and then her green light only, all on their port bow; that when the steamer was somewhat near, variously estimated at from 200 to 400 yards, a lantern was shown and swung over the port side of the schooner; that

this was shortly after repeated; and that then the schooner's wheel was put hard a-port, under which the schooner swung from 5 to 7 points, so as to head from N. N. E. to N. E., when she was struck by the steamer's stern on her port quarter, about 10 feet forward of the taffrail. The steamer's three witnesses on the bridge testify that a white light was first seen for a few seconds, supposed to be that of a tug coming up, and about a point and a half on the steamer's starboard bow, estimated at about half a mile distant; upon which the steamer's helm was put to starboard to give a wider berth; that the steamer swung about a point and a half under her starboard helm; that in the mean time, the white light, which was seen but a short time, disappeared, and the schooner's green light was then first seen, and very soon after both her colored lights, all on the steamer's starboard bow; whereupon the steamer's engines were stopped and backed full speed, and so continued until collision; that the steamer on reversing swung back again to her original heading of S. E. $\frac{1}{2}$ S.; that the steamer was making stern-way at the collision; and that the schooner at no time after the steamer got headed down the Swash channel was on the steamer's port bow until she crossed the steamer's course under a port helm shortly before collision.

. There is some conflict in the evidence as to the lights seen, and in what order, and over which bow of the respective vessels. The discrepancies are not of special importance, except as bearing upon the credibility of the witnesses, and the reliance to be placed upon their recollection and their testimony as it stands. The circumstances are not sufficient to make a case of unavoidable accident, and the steamer, therefore, is to be held answerable for not keeping out of the way of the schooner, provided the latter observed the rules of navigation. The defense of the steamer, in effect, is that the collision was caused solely by the schooner's improperly and unlawfully changing her course by her port helm. The libellant admits the change, but contends that it was made *in extremis*, when collision was apparently unavoidable through the steamer's fault. The case has been carefully prepared and argued, with illustrative charts upon a large scale, which have made comparatively easy a careful examination of the alleged navigation of each vessel, as well, also, as a test of the probable accuracy of the different witnesses.

1. I am satisfied that the immediate cause of the collision was the schooner's porting. She must have changed at least six points to starboard. In the sworn amendments, put in upon exceptions to the libel, requiring further specifications in this respect, a change from about N. W. by N. to about N. E. is stated, which is a change of about seven points. The mate testifies to a change of from six to seven points; the other testimony makes at least six, except that of the master of the schooner, who, on the trial, for the first time reduced the estimate to five. The deliberate statements made under exceptions to the answer cannot be departed from except on very satisfactory evidence to the contrary, which does not exist in this case. The master further testifies that he thinks a change of five points could be made in sailing a length and a half, or about 200 feet under a port wheel, as the schooner was

then, sailing; while three times that distance would be required for an equal change under a starboard wheel. The mate estimated that the schooner would run about 800 feet in changing five points. While there would be some difference, doubtless, in the schooner's changes, under a port wheel and a starboard wheel when sailing wing and wing, with the wind one point on the side of the spanker, as in this case, I cannot credit the master's estimate that she would change five points in going 200 feet, only a quarter of the distance estimated by the mate. Taking into account the mate's testimony, and all the other circumstances, and the absence of any experiments or facts to verify the master's estimate, I do not think it possible that this schooner, 130 feet long, loaded with guano, could change six points to starboard in going less than 500 or 600 feet; and, if made in even 500 feet, that would give her a direct offing to starboard of at least 250 feet. This change by the schooner, moreover, caused the steamer to back, and to stop her own way more to the eastward, which, in passing over the considerable interval that then separated the vessels, would have resulted in a difference of relative position abreast at the time of passing, had the schooner not changed her course, of at least 350 feet. In other words, they would have passed starboard to starboard with more than 200 feet of clear water between them had the schooner kept her course. The steamer's testimony is even less favorable to the schooner. Her testimony and the log show that she was backing altogether about five minutes, of which about two minutes, at least, was before collision. She did not begin to back until the schooner showed both colored lights, after first showing the green light, which indicates that the schooner was then under a port helm; and the schooner, moving at the rate of four knots during these two minutes must have traveled at least 800 feet; and this agrees with the testimony of the mate of the schooner. A change of six points in traveling this distance would have given the schooner an offing to starboard of 425 feet; and upon this estimate, which I think really accords with the weight of evidence, there would have been more than 350 feet of clear water between them in passing had the schooner kept her course. It is not material to the above conclusion just how far to the westward of the Romer light the respective courses of the vessels may have been. All that is material is the fact that their courses crossed only about half a point; and there is nothing to discredit the testimony of either vessel as to her own course, showing that such was the fact. The course of the *Allianca*, in passing through a channel like the Swash, more than two miles long and only about a quarter of a mile in breadth, for vessels of her draft, was necessarily restricted within very narrow limits of variation.

2. If the above conclusion is correct, that the steamer would have passed from 200 to 350 feet to starboard of the schooner, or even considerably less, had the latter kept her course, it is impossible to charge the steamer with the schooner's damages. *The Kanawha*, 28 Fed. Rep. 329. The latter's change of course upon such facts cannot be justified under the plea of a change in *extremis*. In the case of *The Elizabeth Jones*, 112

U. S. 514, 5 Sup. Ct. Rep. 468, a similar excuse was made for the porting of the Jones, but disallowed. In the supreme court, Mr. Justice BLATCHFORD in reference to this point says:

"To be an excusable mistake *in extremis*, a pardonable maneuver, though contributing to or inducing a collision, when the maneuver would have been faulty if not excusable, it must be one produced by fault or mismanagement in the other vessel."

In the present case, the steamer properly starboarded her helm when the schooner's white light was seen upon the steamer's starboard bow. The vessels must have been then at least one-third of a mile apart, if not more. That maneuver of the steamer was sufficient to clear the schooner by an ample margin for safety. The distance of the steamer was such that the schooner had no right to assume that the steamer would not clear her by proper maneuvers, and there is no reason for holding that the schooner's lights were not seen as soon as they were visible, and a sufficient maneuver promptly made. There was no fault or mismanagement, therefore, in the steamer up to that moment which could have induced the schooner's change of course; so that upon the rule laid down in *The Elizabeth Jones*, the schooner's change of course could not be excused.

In another point of view, also, the schooner's porting cannot be justified, namely, that, though their courses were not crossing by more than half a point, the schooner's change was manifestly in the direction to produce collision, instead of away from it. The green light of the steamer was then visible, as all the testimony on the part of the schooner admits; and a projection of the courses of the vessels upon the evidence shows that it was impossible that the collision could have happened in the manner the weight of testimony shows it did happen, had not the schooner at the time she ported been on the steamer's starboard bow, and at least a quarter or a third of a mile distant. I have no doubt that at the time when the schooner ported the steamer's green light only was visible, and that the schooner was at least a couple of hundred feet to the westward of the line of the steamer's course. Mere apprehension of danger is no justification for such a change, where, as here, the facts were not such as to justify the schooner in supposing that the steamer either would not or could not avoid collision by her own maneuvers. *The Free State*, 91 U. S. 204; *The U. S. Grant*, 6 Ben. 467; *The Britannia*, 34 Fed. Rep. 553; *The Scotia*, 5 Blatchf. 227. The change was too great, and made too early to be excused as a change *in extremis*. *The City of New York*, 15 Fed. Rep. 625, 35 Fed. Rep. 610.

3. I cannot find any fault established against the steamer. The steamer was going at half speed only, or about seven knots. The schooner's white light must have been seen from one-third to half a mile distant. Assuming that the weather was such that it could not have been seen sooner, I cannot find that half speed was not "moderate speed," when the light could be seen that distance. There is no proof, and I cannot assume, that the steamer could not have avoided the schooner by reversing as soon as her light was seen, had backing been the proper maneuver. But

backing was not, then, the necessary or proper maneuver. The steamer rightly adopted a different maneuver; namely, starboarding, which would have given the schooner a wide berth had the latter not wrongfully ported and crossed the steamer's course. As it was, the steamer must have been nearly, if not quite, stopped at the time of collision; otherwise the steamer, striking at nearly a right angle, would have cut off the schooner's stern, whereas, according to the mate, she was only "shook a little; not a great deal." Judged by the rule laid down in *The City of New York*, 35 Fed. Rep. 609, namely, that "such speed only is moderate as will permit the steamer seasonably and effectually to avoid the collision by slackening speed or by stopping and reversing, within the distance at which an approaching vessel can be seen," the evidence does not show that the *Allianca's* speed was in excess of that.

Nor can I find the steamer in fault for not sooner seeing the schooner's lights. The steamer's lights were probably seen from the schooner earlier than the schooner's lights were visible, by reason, perhaps, of the greater brilliancy of the steamer's lights, and of the thicker weather about her, that interfered more with her officers' vision. It seems to me improbable that the steamer's white or red light was seen at a distance of two or three miles. The red light, first supposed to be the steamer's, may possibly have been the new red light of the *Romer*. The testimony of Cumming, the mate, as to what he did after the first light was seen, shows that the time from then to the collision was short, and that the steamer's green light was seen not long before he showed the lantern which the steamer saw. The testimony of the schooner's witnesses as to the lights seen, their bearing, and the intervals, is inconsistent, and cannot be adopted.

The position of the vessels, in my judgment, may be approximately stated as follows: When about 700 yards apart, and their courses crossing by an angle of half a point, the steamer was at or near the point of convergence, so that her white light, when first seen from the schooner, would be seen ahead, as the master of the schooner states. The mate was on the port side, which in some degree accounts for his error. Possibly the overlapping of the steamer's ranges of colored lights was such as to permit both colored lights to be then seen for a short time. Soon after that the schooner's white light from the lantern was seen, from half a point to a point on the steamer's starboard bow. The steamer's red light was then shut in, and her green light only was from that time visible, a little on the schooner's starboard bow, but so little that it might be called ahead; or it might have been, possibly, actually ahead, or even a trifle on the schooner's port bow for a moment during any yawing of the schooner to starboard that might have been permitted; but neither of the steamer's colored lights otherwise came on the schooner's port bow, nor was the former's red light again seen until she crossed the steamer's course by her own porting. Libel dismissed, with costs.

BEEBE v. LOUISVILLE, N. O. & T. R. Co. *et al.**(Circuit Court, N. D. Mississippi, W D June 25, 1889.)*

1. PARTITION—EQUITY JURISDICTION—ADVERSE CLAIMANTS.

Code Miss. 1880, § 2576, provides that, "if the title of the complainant seeking partition or sale of land for a division of its proceeds shall be controverted, it shall not be necessary for the court to dismiss the bill, or delay the suit for an action at law to try the title, but the question of title shall be tried and determined in said suit by the chancery court, which shall have power to determine all questions of title, and to remove clouds upon the title of any of the lands whereof partition is sought," etc. *Held*, that this section does not authorize a tenant in common to make defendants to his bill for partition persons claiming adversely to all the tenants in common.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS.

Where the equity jurisdiction of the federal court is derived from a state statute, the construction put upon the statute by the state supreme court is binding upon the federal court.

3. SAME—CITIZENSHIP.

A citizen of New York filed his bill for partition in the federal circuit in Mississippi against citizens of Mississippi as tenants in common, and also joined as defendant a railroad company, a Mississippi corporation, which claimed title to the land adversely to all the tenants in common. *Held*, that as to the controversy between the tenants in common in regard to the partition the court had jurisdiction, but as to the controversy between the tenants in common and the railroad company it had no jurisdiction, as the parties having the same rights and interests were not all citizens of states different from those on the other side.

In Equity. On demurrer to bill.

W. V. Sullivan and *A. O. Whitfield*, for complainant.

W. P. Harris and *W. G. Yerger*, for defendant railroad company.

HILL, J. The questions now for decision arise upon the demurrer of said railroad company to complainant's bill. The bill, in substance, alleges that complainant, Albert Beebe, who is a citizen of the state of New York, and defendants *W. V. Sullivan* and *Mrs. C. E. Archibald*, citizens of the state of Mississippi, and within the jurisdiction of this court, are the owners, as tenants in common, of the lands described in the bill, and are the only lawful owners thereof, and are in the actual occupancy of a large portion of said lands, and that, owing to the situation of the same, they are not susceptible of a division between complainant and *W. V. Sullivan* and *Mrs. C. E. Archibald*; complainant being entitled to the one-fourth in value thereof, said *Sullivan* to the one-fourth, and *Mrs. Archibald* to the one-half thereof. The bill further alleges that the Louisville, New Orleans & Texas Railroad Company, defendant, and the other defendants, as complainant is informed and believes, set up claim to said lands under pretended tax-deeds and claims from other sources, which the bill avers are void and invalid, but which cast clouds upon complainant's title to said lands. The bill prays that by a decree of this court said pretended titles be declared void, and canceled, and said clouds be removed from complainant's title, and that said lands be sold by a decree of this court, and the proceeds be divided

between complainant and his co-tenants, as stated in the bill. To the allegations in the bill and the relief sought the defendant railroad company has interposed its demurrer, stating nine different grounds of demurrer, most of which are not maintainable, but need not be considered, as the seventh and ninth grounds must be decisive of the ruling of the court upon the demurrer. The seventh ground stated is that the bill seeks a partition of the lands described, or a sale of the same for division of the proceeds between the tenants in common stated in the bill, and has joined in the bill holders of adverse titles, and seeks in said suit to litigate with their respective titles, which the demurrant insists he cannot do. The complainant, for the jurisdiction of the court upon the point raised in this ground of demurrer, relies upon the provisions of section 2576 of the Code of 1880, which reads as follows:

"If the title of the complainant seeking partition or sale of land for a division of its proceeds shall be controverted it shall not be necessary for the court to dismiss the bill or delay the suit for an action at law to try the title, but the question of title shall be tried and determined in said suit by the chancery court, which shall have power to determine all questions of title, and to remove clouds upon the title of any of the lands whereof partition is sought, and to apportion incumbrances if partition is made of land incumbered, and it is deemed proper to do so; and said court in such suit may adjust equities, and determine all the claims of the several parties thereto, as to the lands whereof partition or sale is sought."

There can be no doubt of the jurisdiction of the chancery court, under the provisions of this section, to adjust and determine all the rights of the tenants in common, joint tenants, or co-parceners in the land, and of all persons holding liens or incumbrances on the land growing out of and derived from the tenants in common or joint owners, or either of them, and to settle all controversies between them, and enforce their several rights; and if the railroad company was a tenant in common, or had any interest in common with the tenants in common, or held any lien or incumbrance under them or either of them, by mortgage, trust-deed, judgment lien, or otherwise, the court would have full jurisdiction to settle and determine all questions of title and interest of every kind between it and the co-tenants, and by decree to declare any claim set up by it void if the proof so justified, and to remove the same as a cloud upon the title of the tenants in common, the court otherwise having jurisdiction of the cause; but the claim of title of the railroad company is entirely adverse to the title of complainant and the other tenants in common stated in the bill. It is contended on the part of the complainant that the provisions of section 2576 of the Code, above stated, provide for the removal of clouds from the title of those seeking partition or sale for division and the adjustment of all equities between the parties. Several of the states have statutes similar to this section, which have been construed by the supreme courts of such states as conferring the power, in the partition proceedings, to make all persons setting up adverse claims to the lands sought to be partitioned or sold for division parties defendant, and to adjudicate all claims set up by them, and to declare such as may be found invalid clouds upon the title of those seeking partition or

sale, and, by decree of the court, ordering the same canceled and removed as such clouds. Taking the provisions of this section, and the construction put upon similar statutes by the courts of such states, I would be very much inclined to give to this section the same construction. But this jurisdiction being conferred by a statute of the state upon the chancery courts of the state, and being worked out by the federal courts in favor of non-resident owners of the lands, as a special remedy, and not embraced within the general equity jurisdiction of the court, this court, in my opinion, is bound by the construction given to it by the supreme court of the state, and which construction is considered as a part of the statute, and especially so as it relates to real estate within the state. The supreme court of the state, in the case of *Nugent v. Powell*, 63 Miss. 99, has given a construction to this section of the Code, in which the court declares that "it is a mistake to assume that section 2576 of the Code of 1880 authorizes a tenant in common with another to exhibit his bill against his co-tenant, and, as an incident thereto, to join all parties claiming adversely to both." This construction being binding on this court upon this point, it follows that this ground of demurrer is well taken. It is urged upon the part of complainant that in equitable remedies this court cannot be controlled by state legislation or by the decisions of its courts, but will only exercise the jurisdiction and afford the remedies exercised by the court of chancery in England, modified by the acts of congress, and by the rules of the supreme court of the United States. This is true so far as it relates to the general equity jurisdiction, but it is otherwise when the jurisdiction and remedy are derived from a statute of the state, as in this case. The ninth ground of demurrer is as follows: "That the controversy between two co-tenants, collectively, and the defendant company is not a part of nor an incident to the controversy between citizens of different states; that is, W. V. Sullivan and Mrs. C. E. Archibald being citizens of Mississippi, this court has no jurisdiction of such controversy." It is well settled by numerous decisions of the supreme court of the United States that, to give the circuit courts of the United States jurisdiction of causes, all parties necessary to the adjudication of the rights of the parties on the one side or the other, having the same rights and interests, must be citizens of different states from those on the other side, no matter whether they are, on the face of the pleading, stated as plaintiffs, or complainants, or defendants. The court will, in determining the question of jurisdiction, place the parties on the one side or the other, according to their respective interest in the subject-matter of litigation. It is very clear that on the question of partition or sale the co-tenants, the complainant, and Sullivan and Mrs. Archibald are all necessary parties, and that in the controversy with the railroad company their interest is identical, and adverse to the interest of the railroad company, so that, as to the controversy between the co-tenants on the one side and the railroad company on the other, this court is without jurisdiction. But, so far as the bill seeks partition or sale of the lands for division of the proceeds, the jurisdiction is complete, and, if a division of the lands is made, it can be done without the settlement of the contro-

versy between them, or either of them, and the other defendants, which may be proceeded with jointly by them in the state court, or separately after partition is made. The result is that the demurrer upon the part of the railroad company must be sustained, and the bill dismissed as to it, but the bill will be retained for further proceedings between the complainants and other defendants.

HAYDNVILLE MIN. & MANUF'G Co. v. ART INSTITUTE.

(Circuit Court, N. D. Illinois. July 22, 1889.)

1. BUILDING CONTRACTS—CONSTRUCTION—EXTRA WORK.

Plaintiff agreed in writing to do all the fire-proofing work to be done on defendant's building, according to the drawings and specifications made by the architects, "which said drawings and specifications shall be considered a part of and equally binding with the contract." The price stated was \$13,000, the defendant reserving "the right to throw out any part of the work called for on the 'bill of quantities,' and from the above amount to deduct at the rate of charge in said 'bill of quantities,' and extra work shall be charged in accordance with the figures on said 'bill of quantities.'" "For the several dimensions, the arrangement, and construction of said building reference will be had by the contractor to the accompanying design, * * * which design consists of the following drawings, to-wit, all necessary plans and specifications, and the hereto attached bid and bill of quantities." It appeared that plaintiff's bid had been larger, but he reduced it; it being understood that any deductions or extras were to be charged for at the rate mentioned in the bid, and for convenience the figures which accompanied the bid were attached to the contract. *Held*, that the "bill of quantities" was not intended to be a limitation upon or express the amount of work to be done for \$13,000, but merely to furnish a basis for computing deductions or extras.

2. SAME—COMPENSATION FOR DELAY.

The contract also provided: "Should delay be caused by other contractors to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architects, provided it shall have given written notice to said architects at the time of such hindrance or delay." The specifications stated that "the first two and three stories are ready for their floors, and the contractor may enter at once upon said work; arches in these three stories to be completed on or before Sept. 30. The fourth (attic story's roof and partition) shall be completed in 30 days after the contractor has received notice that these stories are in readiness for his material." *Held*, that these stipulations for further time imply that there was to be no pecuniary compensation for delay to plaintiff caused by the other contractors.

At Law. On final hearing.

Willard & Evans, for plaintiff.

Wallace Heckman, for defendant.

BLODGETT, J. This is a suit to recover an alleged balance claimed to be due the plaintiff for doing the fire-proofing work upon the building in the city of Chicago known as the "Art Institute;" the balance in suit being for extras, or extra work, claimed to have been furnished by the plaintiff over and above that called for by the contract; plaintiff's claim

aggregating \$3,263, and defendant admitting that there is a balance of \$648 due the plaintiff.

The main contention in the case is over the construction to be given the contract. The contract under which the plaintiff did the fire-proofing work upon the building in question was in writing, and bears date August 30, 1886, in which the plaintiff agrees to do all the fire-proofing work to be done in the building in question, according to the drawings and specifications made by Burnham & Root, architects, bearing even date with the contract, "which said drawings and specifications shall be considered a part of and equally binding with the contract; the work to be done under the supervision of Burnham & Root, architects, and to be approved and certified by a certificate in writing under the hand of said architects." The contract price to be paid the plaintiff for doing this fire-proofing work upon this building was \$13,000, with a reservation written into the contract in the following words:

"The party of the first part [defendant] reserves the right to throw out any part of the work called for on the 'bill of quantities,' and from the above amount to deduct at the rate of charge in said 'bill of quantities,' and extra work shall be charged in accordance with the figures on said 'bill of quantities.' "

And in the specifications, which are made a part of the contract, is the following clause:

"For the several dimensions, the arrangement and construction of said building, reference will be had by the contractor to the accompanying design for the work, as made by Burnham & Root, architects, which design consists of the following drawings, to-wit, all necessary plans and specifications, and the hereto attached bid and bill of quantities."

It appears from the proof that bids were solicited for doing the work in question, and that the plaintiff submitted a bid, giving its estimated quantity of the work and the price therefor in detail, and proposed to do the entire work for \$13,522.62. After some negotiation the plaintiff deducted from its bid the \$522.62, making the contract price for the entire work the \$13,000 mentioned in the written contract, and as there was an understanding that any extra work which might be ordered under this contract should be done at the same rates mentioned in the bid, and any work which the defendant might afterwards decide to have omitted, which was called for by the specifications, should be deducted at the rates figured in the bid, it was deemed convenient to attach these figures, which accompanied the bid, to the contract, and make them a part of the same, which was done by the clause which I have quoted from the contract and specifications. It is now contended on the part of the plaintiff that the bill of quantities was referred to in the contract and specifications as a limitation to the amount of work to be done under the contract, and that all work not mentioned in this bill of quantities is extra work, and that plaintiff is to be paid therefor in addition to the contract price. In the light of the testimony in the case I do not think the contract should be so construed, as it is very evident to me that this allusion in the contract and specifications to the bill of quantities is only

done for the purpose of furnishing a basis upon which the price for extra work, or work which plaintiff should afterwards decide to omit from the building, should be computed, and that it was not intended that this bill of quantities should be a limitation upon or express the exact amount of work which the plaintiff intended or agreed to do for the \$13,000. The terms of the contract are explicit. The plaintiff agrees to do all the fire-proofing work upon the building as called for by the drawings and specifications. The proof shows that before this contract was signed, and before the plaintiff made its bid for the work, the drawings and specifications were examined by the plaintiff's agent fully, and the plaintiff had full opportunity to estimate the entire quantity of work to be done; plaintiff's agent at the time he signed the contract having signed all the drawings and specifications, thereby making them specifically a part of the contract.

This disposes of all the items involved in the plaintiff's claim except the items for damage to plaintiff occasioned by the delay on the part of the other contractors in the construction of the building, whereby the plaintiff was delayed in his work; and it is claimed it took a longer time because of items for reconstructing floors, arches, and partitions, which fell, and had to be rebuilt. In regard to the claim for rebuilding the arches and partitions which fell, I am satisfied that this necessity arose from the defective construction of this work on the part of the plaintiff, as the theory of the plaintiff's witnesses, that the upheaval of the columns supporting the building was caused by frost, is, I think, wholly overthrown by the proof. With regard to the items for delay occasioned by the want of dispatch on the part of other contractors, the contract contains this clause:

"Should delay be caused by other contractors to the positive hindrance of the contractor hereto, a just and proper amount of extra time shall be allowed by the architects, provided it shall have given written notice to said architects at the time of such hindrance or delay."

The specifications state:

"That the first two and three stories are ready for their floors, and the contractor may enter at once upon said work; arches in these three stories to be completed on or before September 30th. The fourth (attic story's roof and partition) shall be completed in 30 days after the contractor has received notice that these stories are in readiness for his material."

Taking this clause of the contract and the specifications together, I construe them to mean this: that, if the plaintiff was delayed by reason of the tardiness or want of dispatch on the part of the contractors doing the other classes of work upon the building, it should be entitled to such further time for the completion of the work as the architects should allow him; but I do not see that there is any provision that it is entitled to pecuniary damages by reason of said delay. Evidently the parties anticipated that this contractor, doing only a part of the work, and that which was largely dependent upon the completion of other classes of the work by other contractors, must await the movements of these other contractors; and it seems to me that the stipulation for further

time to complete the work in case of delay by other contractors implies that there is to be no pecuniary compensation for such delay.

The defendant admits a balance due the plaintiff of \$648, but claims that there are some deductions to be made from that for a fire-place, and wire-cloth for ceiling of the attic, which were omitted. The proof, however, does not furnish me with any standard for the price of these articles omitted, and, as the defendant has not paid this money into court, there will be a finding in favor of the plaintiff for the sum of \$648, balance admitted to be due, and interest from the commencement of the suit, and each party will pay its own costs.

SEESE v. NORTHERN PAC. R. Co.

(Circuit Court, D. Minnesota. July 16, 1889.)

1. MASTER AND SERVANT—INJURY TO EMPLOYEE—RISKS OF EMPLOYMENT.

Where in a suit by a brakeman to recover damages from a railroad company by which he was employed, for an injury received by an alleged defective draw-head on a car, the law as to the obligations of defendant, and the acceptance of risks and the degree of care required of plaintiff, is clearly set forth in the charge, the verdict of the jury will not be set aside on the ground that no negligence on the part of defendant was shown, where there was evidence that the draw-head was sunk four inches, and that the defect was old and plaintiff did not know of it.

2. EVIDENCE—EXPERT TESTIMONY.

In such case expert testimony of a yard-master that the method of coupling adopted by plaintiff was careless, dangerous, and not the usual or best way of coupling, was properly excluded.

3. MASTER AND SERVANT—NEGLIGENCE OF SERVANT.

The defendant introduced in evidence certain rules adopted by it in relation to the coupling of cars, prohibiting the use of the hands for such purpose, and ordering the use of a stick or pin. The superintendent of defendant testified that such rules were in use when plaintiff was injured, but could not testify that they had been sent to the "heads of the management of the yards" where the accident happened. Plaintiff testified that no such rules were enforced in the yards while he was there, and he knew nothing about them. *Held*, that it was for the jury to decide whether plaintiff was bound by such rules, and that they were known to him and violated by him.

At Law. Motion for new trial.

F. D. Larabee and J. C. Bullit, Jr., for the motion.

E. F. Lane, *contra*.

NELSON, J. The action is to recover damages for a personal injury. The plaintiff was employed as a brakeman in the defendant's yard at Minneapolis, in this district, and while in the act of coupling cars sustained an injury to his hand, caused by the alleged defective condition of the draft timber which holds up the draw-head on one of the cars. There was evidence tending to show that the bolts that go into the dead-wood were sunk down into the timber and let the draw-head down four inches or more lower than it should be. There was also evidence tending to

show the defect was old and not recent, and that the brakeman did not know of it. The plaintiff was ordered by the foreman in charge of the gang of yardmen to which he belonged to couple a car to the defective one. There was sufficient evidence of defendant's negligence to be submitted to the jury. The law given in the charge of the court on the trial defined clearly the obligation of the defendant, and the acceptance of risks and degree of care to be exercised by the plaintiff. The jury found for the plaintiff, and the verdict cannot be disturbed, for the reason urged by counsel that no negligence of the defendant which caused the injury is proved. *King v. Railroad Co.*, 14 Fed. Rep. 281.

It is urged, however, that it was error for the court to exclude expert testimony in regard to the manner in which the evidence showed the plaintiff attempted to make the coupling. A yard-master, who had been in the service of switching and coupling cars for 19 years, was called as an expert, and the defendant's counsel offered "to prove by the witness that the method of making a coupling of freight-cars with link and pin, as were used on this occasion, when the plaintiff was injured, at the time of day or night when this coupling was attempted to be made by him, was extremely dangerous and careless and injudicious, and not the usual or ordinary way or the best way of making a coupling under the circumstances." Also, "to prove that the manner in which he (plaintiff) undertook to make it at the time he received his injury was an improper way, and a very negligent and careless one, and one that a man might very naturally expect to receive an injury from; and that it was not a way in which an expert or careful and judicious person would undertake to make a coupling at that time." An objection was sustained to such evidence. I think there was no error in excluding it. Upon subjects requiring medical knowledge and skill evidence of this character is given, and the United States supreme court hold that it is not limited to that class of cases either, but is competent upon subjects on which a jury are not as well able to judge for themselves as is the witness. See *Transportation Line v. Hope*, 95 U. S. 298. The rule as laid down by the United States supreme court was elaborated in the supreme court of Iowa, in a car-coupling case, and is well stated, as follows:

"It does not appear to us that the opinion called for pertained to a matter of skill, science, trade, or the like, upon which experts are permitted to give opinions. The thing required of plaintiff was care. That it was not exercised, was the very point which defendants attempted to establish. * * * Every employment requires a degree of skill, and there is none in which a degree of proficiency may not be obtained by practice. This fact is no ground for the admission in evidence of the opinions of men engaged in every pursuit in regard to matters pertaining thereto. * * * The pursuit itself must be considered in determining who may be examined as experts, and we do not think that the occupation of brakemen is of such a character as to authorize them to express opinions upon matters pertaining thereto." *Hamilton v. Railway Co.*, 36 Iowa, 36. Also *Muldowney v. Railroad Co.*, Id. 472.

The cases cited by defendant's counsel (*Propst v. Railway Co.*, 3 South. Rep. 764, and *Railway Co. v. Frawley*, 9 N. E. Rep. 594) are not in conflict with the opinion announced in the Iowa cases.

Again: The following rule adopted by the defendant company was offered in evidence, and received:

"Caution as to personal safety. 25. Great care must be exercised by all persons when coupling cars. Inasmuch as the coupling apparatus of cars or engines cannot be uniform in style, size, or strength, and is liable to be broken, and as from various causes it is dangerous to expose between the same the hands, arms, or persons of those engaged in coupling, all employes are *enjoined*, before coupling cars or engines, to *examine* so as to *know* the kind and condition of the draw-heads, draw-bars, links, and coupling apparatus, and are prohibited from placing in the train any car with a defective coupling until they have first reported its defective condition to the yard-master or conductor. Sufficient time is allowed, and may be taken by employes in all cases, to make the examination required. *Coupling by hand is strictly prohibited. Use for guiding the link a stick or pin.* Each person having to make couplings is required to provide a proper implement for the purpose, as above specified. All persons entering into or remaining in the service of the company are warned that the business is hazardous, and that in accepting or retaining employment they must assume the ordinary risks attending it. Each employe is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, especially in the switching of cars, and in all movements of trains. Stepping upon the front and rear of approaching engines, jumping on or off trains and engines moving at a high rate of speed, getting between cars in motion to uncouple them, and all similar imprudencies, are dangerous and in violation of duty, *and are strictly prohibited.* Employes are warned that, if they commit them, it will be at their own peril and risk. Employes of every rank and grade are required to see for themselves, before using them, that the machinery or tools which they are expected to use are in proper condition for the service required, and, if not, to put them in proper condition, or see that they are so put, before using them. *All will be held responsible accordingly.*"

The defendant then introduced as a witness the assistant superintendent, who testified that the rules were in force at the time that plaintiff received his injury, and that they were made for the information of the employes in the operating department, and that they were sent and distributed to the different heads, but could not testify that they were sent to the "heads of the management of the yards at Minneapolis." The plaintiff, in rebuttal, testified that the rule with regard to the coupling of cars in that yard with a stick or pin had never been enforced while he was there, and that he "never knew anything about the rules whatever."

It was properly submitted to the jury whether upon the evidence the plaintiff was bound by the rules, and that they were known to him and violated. Motion for new trial denied.

ELECTRICAL ACCUMULATOR CO. *v.* JULIEN ELECTRIC CO. *et al.*

(Circuit Court, S. D. New York. July 22, 1889.)

1. PATENTS FOR INVENTIONS—PRACTICE—REHEARING.

In an action for the infringement of a patent, an unusually full and explicit notice was given that a disclaimer would in certain contingencies be insisted upon. It was suggested by the proof, and on the hearing complainant even went so far as to suggest the form of the disclaimer. It was never intimated that the record did not sufficiently present the question. *Held*, that a rehearing would not be granted defendants to enable them to take additional testimony and contest the complainant's right to file a disclaimer upon grounds not mentioned at the trial.

2. SAME.

A rehearing was also asked for on the ground that the court erred in holding that the patent, as limited by the disclaimer, disclosed invention, for the reason that the patented device had no advantage over similar devices produced by other means. Several affidavits were presented, none of which stated any new facts except one, and that was controverted by two affidavits produced by complainant. *Held* that, in view of the conflict, and of the facts that the point had been carefully considered on the trial, and that defendants strenuously insisted on the right to use complainant's structures, a rehearing would be denied.

In Equity. On petition for rehearing and demurrer thereto. For former opinion, see 38 Fed. Rep. 117.

Frederic H. Betts, for complainant.

Thomas W. Osborn and Edmund Wetmore, for defendants.

COXE, J. A rehearing is asked upon the following principal grounds: *First.* The court was in error in holding that the patent, as limited by the disclaimer, discloses invention; for the reason that an electrode to which the active material is applied in the form of a paint, paste, or cement has no advantages over electrodes otherwise mechanically coated. This proposition the defendants seek to establish by further experiments, and by the opinions of experts. *Second.* On the ground of newly-discovered evidence. *Third.* Because the complainant should not have been permitted to file a disclaimer. When this enormous record was taken up for examination the court confidently entertained the conviction that it presented a controversy in which nothing relevant to the art in question, which human ingenuity and diligence could supply, had been omitted, and that no proposition of law or fact, actual or contingent, which was germane to the subject, had been neglected or unexplained. Where time and labor have been so lavishly expended, where the presentation of the cause has been so thorough, and where every opportunity has been offered counsel to present their views, the court should be unusually reluctant to reconsider a conclusion deliberately reached. The administration of the law will become vexatious and intolerable if, upon slight pretexts or unsubstantial grounds, parties are permitted, because the decision changes to some extent the *status* of the controversy, to try again and again issues which were, or which might have been, disposed of at the hearing. The notice that a disclaimer

would, in certain contingencies, be insisted upon, was unusually full and explicit. It was suggested by the proof, and at the hearing the defendants were clearly advised, that a disclaimer might be necessary, the complainant even going so far as to suggest its form. The question was orally argued. It was again discussed in the learned and comprehensive brief submitted by the defendants, and the right to file a disclaimer was strenuously controverted. And yet during all this time it was never intimated—as the facts are now recalled—that the record did not sufficiently present the question. That position was taken for the first time after the decision was filed,—nearly five months from the time that actual notice of the proposed disclaimer was first given. The affidavits attached to the petition contain the opinion of several scientific gentlemen to the effect that the first ground for rehearing is well founded. No new facts are presented, except in one instance, and their verity is denied by two affiants for the complainant. Moreover, it appears that upon this proposition the complainant's experts absolutely disagree with the defendants' experts,—a situation not wholly novel in patent causes. If, therefore, the application were granted, it is altogether probable that, after the parties had been put to the trouble and expense of producing another volume of opinions, the court would be constrained to reach the same result as before. The very question now presented was at that time carefully considered. It was thought then, and it is thought now, that Faure's electrodes have certain characteristics so plain that no scientific testimony is necessary to emphasize them, which distinguish them from preceding structures, and that there is room enough in the art for his restricted invention, even after giving Mr. Brush full credit for his experiments. If it be true that Faure's batteries are inferior to or no better than others, the question naturally suggests itself: Why are not the defendants content to use the other batteries? The injunction can do them no harm, and, if they can establish their position before the master, it is not easy to see how they can be seriously injured by an award of damages. The anxiety displayed to use Faure's invention is surely incompatible with the theory that other supports are as good or better than his. Regarding the Pulvermacher patents, it may well be doubted whether a sufficient excuse has been presented for not having before offered them in evidence; but, even were this otherwise, it is entirely clear that they contribute no new fact to the art. It is not pretended that they relate to secondary batteries. What they show as to primary batteries was sufficiently demonstrated before. The subsequent patents granted to Faure may be invalid because of the patent in suit. But, even were they properly in evidence, it is not easy to see why the patent in suit should be invalidated or a disclaimer refused because of them. After an examination of the authorities upon the question of disclaimer, no precedent is found for the practice now suggested by the defendants. The usual course has been followed in this cause. The defendants have had a fair hearing. To open again, in this court, the door of disputation, would be unjust to the complainant. If the defendants deem themselves aggrieved, their remedy is by appeal. A rehearing is denied.

SOUTHERN WHITE LEAD CO. v. COIT *et al.*

(Circuit Court, N. D. Illinois. February 20, 1888.)

TRADE-MARKS—WHAT WILL BE PROTECTED.

A manufacturer of white lead in Chicago will be enjoined from the use of the words "White Lead, St. Louis," except as to preparations of white lead manufactured there, such use tending to deceive and defraud the public and complainant, a manufacturer of lead in St. Louis.

In Equity.

The Southern White Lead Company filed a bill to enjoin W. A. Coit and others from using the words "St. Louis," with the words "warranted strictly pure white lead in pure linseed oil," to designate lead which was not pure, made in Chicago.

Banning & Banning, for complainant.

Fairchild & Blackman, for defendants.

BLODGETT, J., (*orally*.) This case stands upon precisely the same facts as the case of same complainant against Cary, decided by Judge GRESHAM about a year ago, (25 Fed. Rep. 125;) and, in principle, is on all fours with the case of *Association v. Piza*, 24 Fed. Rep. 149. The complainant may therefore prepare a decree in accordance with the prayer of the bill, enjoining the defendants from the use of the words, Southern or "South Western White Lead, St. Louis," or "Southern White Lead Co., St. Louis," or "St. Louis," except as to preparations of white lead manufactured, put up, or sold at St. Louis. The principle involved is that the defendant's white lead purports to be manufactured in St. Louis, when in fact it is manufactured in Chicago, and thereby tends to deceive and defraud the public and the complainant, who is a manufacturer of white lead in St. Louis, inasmuch as the defendant's lead is not pure, and is not made in St. Louis.

MANCHISA v. CARD.

(District Court, D. South Carolina. July 16, 1889.)

1. SHIPPING—DEMURRAGE.

A steam-ship was chartered to carry baled cotton or other lawful freight, the loading to be by a stevedore selected by the charterer, at the vessel's expense, and under the master's direction. She was to carry a full load, at fixed rates. Fifteen days were given for loading, lay days to begin 24 hours after written notice by the master to the charterer that she was in dock, ready for loading. On December 17th the master gave the charterer's clerk and agent proper notice of her readiness, and that the lay days would begin on the next day. The charterer's witnesses stated that either the master or super-

cargo said it would be necessary to get phosphate rock for ballast, but the officers mentioned denied the statement. The charterer provided rock, and caused it to be loaded as ballast. On the day after the notice was given the charterer replied to the written notice that the lay days could not begin until the ballasting was on board. The loading of the rock consumed several days, when, on December 27th, she began loading her cargo, which was finished January 17th. The vessel carried water ballast in her tanks, but did not fill the tank amid-ships, using it for cargo. *Held*, that as the master had no power to extend the time for the beginning of the lay days, and it was not shown that the phosphate rock was necessary to ballast the vessel, the time engaged in loading rock should not be deducted from the lay days, but demurrage should be allowed for the whole time above 15 days.

2. SAME—CARGO.

The charter-party having placed the loading under the master's direction, and provided that the charterer should not be responsible for stowage, the latter is not liable for failure to take a full cargo, resulting from defective stowage.

In Admiralty. Libel for demurrage.

Barker, Gilliland & Fitzsimons, for libellant.

J. N. Nathans, for respondent.

SIMONTON, J. The *Bremena* was chartered by the New York agents of the owners to Henry Card. The charter-party, dated 28th November, 1888, provided that the ship should go to Charleston, S. C., before December 31st, and there load for charterer, a full and complete cargo of cotton in bales, as usually shipped, or other lawful merchandise, not exceeding what she can usually carry. Freight, 13-32 penny sterling for cotton in square compressed bales. Other goods shipped to bear a full and fair proportion thereto. The charter-party is part of the pleadings, and may be referred to when required. The other provisions which need mention are these: Fifteen days (Sundays and holidays excepted) are allowed for loading cargo. Lay days to commence 24 hours after steamer is in dock, declared in all respects ready to receive cargo, her holds being clear, and written notice given by master to charterer. Demurrage, 6 pence per registered ton. Charterer may provide stevedore at vessel's expense. Stevedore to load under master's directions. Charterer not responsible for improper stowage. Such goods only as charterer may direct shall be received on board any part of the steamer. The steamer, if requested, to hoist goods on board with her steam-winch. All liability of the charterer under charter-party to cease when cargo is shipped; the owner, master, or his agents having an absolute lien on it for freight, dead freight, and demurrage. The steamer arrived at quarantine on 15th December. Came to her dock on 16th, (Sunday.) On 17th, Carroll, stevedore, selected by charterer, reported, and he and the master and supercargo walked down to Card's office. There the master and supercargo had some conversation with the son and partner of Card, and with his chief clerk, and a note was written by one of his clerks, signed by the master, notifying respondent that the vessel was in dock ready for cargo, and that the lay days would begin "to-morrow, 18th inst." The witnesses for respondent say that during this interview the master of the supercargo said that it was necessary to get 200 tons of

phosphate rock as ballast. Both the master and supercargo deny this. The rock was furnished by charterer. It was found that there was an excess of some 30 tons. At the request of the master these 30 tons were returned to the miners, the expense of transportation having been borne by the ship. On 18th the charterer replied to the written notice of the master, "that according to the charter-party the lay days cannot commence until ballasting is on board, and the steamer then tendered for cargo." The loading of the phosphate rock was finished about 24th or 26th December, and on 27th the steamer, without any further notice, began to load with cotton. She finished loading a mixed cargo of cotton, resin, and staves on 17th January. If her lay days began on 18th December, they expired on 4th January. If they began on 27th December, they expired on 14th January. Carroll was in charge as stevedore the whole time. He says that by delay of the ship in the matter of steam two days were lost. This was not denied. When the vessel was ready to clear, an account was made up by respondent, allowing but one day's demurrage, deducting from the lay days the days on which steam failed, and all the days consumed in loading rock. The master took these with him, examined them, brought them back, and settled on them. The next day he filed a written protest against their correctness. The ship carries water ballast in her tanks forward, aft, and amid-ships. When she took in the phosphate rock she did not fill the tank amid-ships with water, but used it for cargo. The rock paid freight at ballast rates, 7s. 6d. per ton. The ordinary freight rates of rock are 24s. to 27s. per ton. The charterer and the master disputing as to the accuracy of the accounts between them, the latter, under threat of a libel, settled. He now brings suit for 13 days' demurrage, and for the deficiency in a full and complete cargo, because of the improper stowage of the ship.

Demurrage. The lay days began 24 hours after notice in writing that the ship was in dock ready to receive cargo. This notice was given on 17th December. The charterer on 18th December by his letter denied that the "lay days could commence until the ballasting was on board and the steamer then tendered for cargo." This is not the language of the charter-party, and in fact the cargo was put in without any further tender. There is something connected with this phosphate rock that has not been developed. I have no doubt that the master and supercargo expressed a desire for it, and perhaps as ballast. But that it was to be furnished before the loading began, or that the lay days should not commence until all the rock was on board, could not have been contemplated by them. Such a conclusion is wholly inconsistent with the written tender of the ship made at the same time in Mr. Card's office, in the handwriting of one of his own clerks, and received without demur, qualification, or explanation by his partner and chief clerk, the very men who had conversed with the master and supercargo about the rock. Why was the phosphate rock asked for? Certainly not because it was absolutely necessary as ballast. The ship had already her provision for water ballast. Was it desired as a substitute for water ballast? If so,

why? Because it paid freight? This could not influence the master and supercargo. Every available space for freight in the steamer had already been hired to its charterer, and was his. The ship had no concern but to put cargo on board, and be paid for it at a rate fixed in the charter-party. Was phosphate rock put aboard in order to utilize the water-tank amid-ships for receipt of cargo? Both parties were interested in this,—the charterer, because it enlarged his freight-room; the master and supercargo, because it increased the amount of freight to be paid. Whatever view may be taken of this, there are some facts proved. The whole freight-room of the ship belonged to the charterer. No merchandise could go on board without his consent. He named the stevedore, and thus secured a witness for this. He was practically the owner of the ship for the purpose of loading her during the 15 lay days. He held under a charter-party with the owners, the terms of which the master had no power or authority to change. *Macl. Shipp.* 138. If the phosphate rock, as ballast, was absolutely necessary to make the ship seaworthy, of course the charterer could wait until the ballast was in. *Raymond v. Tyson*, 17 How. 53. If, however, it was not necessary; if it was put in because it paid freight; if it was put in in order to increase freight-room,—he could have forbidden it. His consent was absolutely necessary to it. As he did not forbid it, as in fact he furnished the rock without demur, we must treat him as assenting. More than this, we must treat it as his act, and the consequence resulting from it he must bear. Even if this be stating the case too strongly against him, the burden of proof is on him to show a good reason for postponing loading cotton cargo from 18th to 27th December. The contract between him and the owners of the ship, which, as we have seen, the master could not vary, provided for the commencement of the lay days 24 hours after written notice that the ship was ready. That notice was given; the lay days began. He did not load. The only thing that could excuse him is that the ship was not ready. The only reason for believing that she was not ready is the putting in of phosphate rock. If this was absolutely necessary, he is excused. If it was put in for the convenience of himself or of the ship, or of both, he cannot be excused because the consent of the owners to this variance of the contract is not shown. Was the phosphate rock absolutely necessary as ballast? The burden of proof is on the charterer. It has not been proved.

The rest of the claim is that she carried an insufficient cargo, below her capacity, and this through defective stowage. There was much testimony as to the capacity of the ship, and as to her tonnage, but the charter-party solves this question. The vessel was to be loaded by a stevedore selected by the charterer, but paid by the ship, and under the exclusive direction of the master,—the charterer not to be responsible for stowage. If she failed to carry as much as she ought to have done by reason of bad stowage, the charterer cannot be held. Nothing has been said of the settlement. If it was made under a mistake of fact, it will be opened. If it was the result of a change in the terms of the charter-party made between the master and the charterer without the knowl-

edge of his owners, it is void. Let the clerk estimate the number of days in excess of the lay days, allowing for the days lost by failure of steam in the winches, and the consequent demurrage.

WILMINGTON TRANSP. CO. v. THE OLD KENSINGTON.

(District Court, S. D. California. July 1, 1889.)

1. SALVAGE—COMPENSATION.

The master of claimant's ship, having discovered that there was fire in the hold, requested libelant's services in towing her ashore and extinguishing the fire. In performing these services libelant employed three tugs, aggregating \$40,000 in value, and a number of men. It appeared that, with the exception of a small tug about 10 miles distant, libelant's tugs were the only ones within 100 miles, and that they were maintained at an expense of about \$6,000 per month for towage, salvage, etc. The actual value of the services rendered by libelant and the damage to the property employed was \$1,510.41. The value of the ship was \$48,000, and her cargo \$23,790. *Held*, that \$4,510.41 salvage would be allowed.

2. TOWAGE—CONTRACT.

The master of the ship, desiring to put her aground, agreed to pay libelant \$500 to tow her ashore. When the ship in tow reached a suitable place, her port anchor was let go, and the tug ordered to go astern and draw the stern of the ship to the shore, so that she could be secured in that position, while another of libelant's tugs carried out a kedge anchor. *Held*, that the contract of towage did not end when the port anchor was cast, but when the ship was placed in the proper position to be put aground.

In Admiralty. Libel for salvage.

Milton Andros, for libelant.

Page & Eells, for claimant.

Ross, J. This is a cause of salvage. That salvage services were rendered by libelant is not denied, but the parties are not agreed as to when such services were commenced, nor as to the amount the libelant should be awarded. It appears from the evidence that the ship Old Kensington was, on Sunday, April 7th, lying in the bay of San Pedro with a cargo of 2,641 tons of coal. The night before the attention of her master, Capt. Jones, was called to what then appeared to be steam coming up the ventilator and hatchway, but it became so much denser the next morning that he requested the master of two other ships then in the bay (Capt. Skinner, of the Banduara, and Capt. McRitchie, of the Apaye) to repair on board and with him examine into the cause. That examination disclosed the fact that what at first appeared to be steam was in fact smoke, and that there was fire somewhere in the ship; and it was then deemed best to endeavor to smother the fire, and also to make preparations for the discharge of the coal so as to reach the seat of the fire. Accordingly the captain directed the hatches to be closed, and then went ashore to arrange with the libelant for the discharge of the cargo. This was Sunday afternoon, about 2 or 3 o'clock, and, the day making it inconvenient to get the required men together, and the captain not then

anticipating any immediate danger, he arranged with the libelant for the sending by the latter of lighters and men the next morning to get the coal out. The next morning, Monday, libelant sent lighters and men, and the discharging of the cargo was commenced, the ship's men working in the hold. About 6 o'clock in the morning of that day three of the ship's pumps were put to work pumping water into her wherever they could get it, and this, together with the discharging, was continued as well as possible until midnight, at which time it became impossible for the men to remain in the hold because of the density of the smoke. The hatches were therefore again put down and the ship's pumps continued pumping water into the hold during the night. Meanwhile about 180 tons of coal had been discharged. Early the next morning, Tuesday, Capt. Jones again requested the advice of Cpts. Skinner and McRitchie, who, after making a survey of the ship, recommended that she be put aground, and that water be pumped into her hold until the fire should become extinguished. At this time it was thought, by Capt. Skinner at least, that the fire was both fore and aft, but an examination made after the discharge of the cargo showed the seat of the fire to have been on the starboard side, just abreast of the main mast, where the ceiling of the ship was burned through in several places for a space of about 6 feet in width and 16 feet in length and about 25 tons of coal burned or charred. For the purpose of carrying out the recommendation of Cpts. Skinner and McRitchie, Capt. Jones went on shore about 11 o'clock on Tuesday morning, and endeavored to arrange with the libelant for the towing of the ship ashore, and for such other and further services as the exigencies of the case might demand. The libelant was willing to, and did, agree with the captain to tow the ship ashore for a stipulated sum, \$500, but would not make any agreement as to compensation for any other or further services, for the reason that it was impossible to anticipate what other or further services would be required; but the libelant was ready and willing to perform such other and further services as should be needed, and did so upon the request of the captain of the ship, as will presently be stated.

Pursuant to the contract for towage, the libelant's tug-boat *Warrior* left the Wilmington wharf at about half past 11 o'clock Tuesday morning, reached the ship about 20 minutes to 12, and towed her to the place which had previously, and after an examination of a chart in the office of the libelant, been selected for grounding her by Cpts. Jones, Skinner, and McRitchie. In towing the ship to the place thus selected, the captain of the tug-boat was directed by Capt. Skinner, Capt. Jones remaining on his ship and making the necessary soundings. When she came to three and a half fathoms, the port anchor was let go, and it is contended for the libelant that at this point the towage service ceased. At this time the ship was lying broadside to the beach, and was still floating. The *Warrior* then, by direction of Capt. Skinner, went astern of the ship, and towed her stern onto the beach, the ship meantime paying out chain, and the libelant's tug-boat *Catalina* took out a small kedge anchor, which Capt. Jones directed to be placed in order to keep the ship straight, with

her stern on the beach. It is at this point, and I think rightly, that the claimants contend that the towage service ceased. The purpose had in view by both parties to the contract of towage was the placing of the ship aground, and in no just sense can that service be said to have ended until the anchors were placed to hold the ship in position. That was accomplished about 3 o'clock in the afternoon of Tuesday. The weather was then good, the barometer high, and there was but little swell. There was in the hold of the ship about two and a half feet of water, which had been put there by the ship's pumps and by two others which had been sent on board from the Banduara and the Apaye about 9 o'clock of Tuesday. As soon as the ship was grounded and the anchors placed, the libelant, at the request of Capt. Jones, commenced to pump water into her. The Warrior, except when prevented by the bursting of a hose and the breaking of her connections, which was occasioned by her surging, and which interruptions were in all about two hours in duration, continued to pump until half past 12 Tuesday night, at which time she was ordered off for the reason that it was not deemed safe, either for herself or the ship, for her to remain. The ship was on the ground, and the Warrior was on her starboard side, which was at the time the weather side, and during the afternoon and evening the swell was such that the Warrior parted a number of lines, among them an eight-inch hawser, twice, and two six-inch lines. Her upper and lower guards were also broken, her bits sprung, and her upper and lower fenders broken. During the same time one of the bulwark plates of the ship was cracked, a stern chock broken, and some of her stanchions carried away. The Warrior was therefore ordered off, but kept within hailing distance of the ship. The pumps used by the Warrior were a three-inch syphon, with a rated capacity of 5,000 gallons per hour, under 40 pounds of steam, which in this instance was increased to 85 pounds, and which should have increased the capacity about one-third, and a one and a half inch hose connected with the Warrior's donkey-pump, the capacity of which was about 7,000 gallons at the speed at which it was run, and a small pump which was used during the interruptions referred to. The libelant's tug-boat Falcon went to the aid of the ship at 6 o'clock Tuesday evening, with a six-inch No. 10 Vanduzen suction-pump, with a rated capacity of 14,000 gallons an hour. In this instance the pressure was increased to 85 pounds. She was undergoing repairs in the morning, and it was impossible to get her ready before the hour named. She came up on the port side of the ship, and commenced and, except when interrupted by the breaking of a pipe and the carrying away of the hose from the coupling, caused by the surging of the tug, continued to pump water into the ship during the whole of Tuesday night, and until half past 8 o'clock Wednesday morning, at which time the fire was found to be extinguished, and the pumping ceased. There was then $15\frac{1}{2}$ feet of water in the ship, and while it is impossible to determine with any degree of certainty the relative amount of water put there by the pumps of the ship and those of the libelant's tugs, I think from the evidence that there is no doubt that much the larger quantity was pumped by the latter. The interruptions in the

pumping of the Falcon lasted from an hour to an hour and a quarter, during which time the necessary repairs were made by libelant's engineer by means of fittings and other appliances that he had taken the precaution to provide.

While I think the service rendered by the Catalina in taking out and placing the ship's kedge anchor was a part of the towage service, for which a specific contract was made, the salvage service of the Catalina commenced before that time. When Capt. Jones was on shore Tuesday morning, at his request the libelant placed its superintendent, engineer, blacksmiths, and men, with the requisite tools and appliances, on board the Catalina, and sent her out to aid the ship. The engineer remained in charge of the pumps of the tugs, but the master of the ship decided that he did not need the blacksmiths, and they, with the superintendent, returned to shore, on board the Catalina, about 4 o'clock of Tuesday. As the Catalina was steaming away the captain of the ship requested the libelant's superintendent to send out 35 men to aid in pumping, which was promptly done by means of the Catalina, and those men worked all of Tuesday night, pumping and putting in water by means of buckets. After the fire was extinguished, the captain of the ship was desirous of having the water pumped out of her as speedily as possible. He started the ship's main pump, and portable force pump, and the force pump of the Apaye, and at his request the Falcon went to San Pedro to get a pump for the same purpose. She did so, and reached the ship again, with the pump, about 2 o'clock of Wednesday. Considerable difficulty was experienced in making the tug fast and in finding a suitable place for the pipe, but the pump was gotten to work about 6 o'clock and continued pumping from 10,000 to 11,000 gallons an hour until about half past 3 o'clock the next morning. The Falcon parted several lines while thus engaged, occasioned by surging backwards and forwards, and was in some danger of having her house, smoke-stack, and mast carried away by one of the yards of the ship, which was cock-billed. During the afternoon of Wednesday the libelant, at the request of the captain of the ship, sent a lighter along-side, which would not have been done but for the perilous position of the ship, for the purpose of taking out coal, and a considerable quantity of coal was thus discharged. The lighter was in good condition when this service was commenced, but was damaged by it so that it leaked, but to what extent does not appear. About 3 o'clock Wednesday night the ship floated, and the pumping then ceased. There was then four feet six inches of water in her. As soon as the chain and anchor were hauled in, to accomplish which consumed several hours, the ship was towed to her former anchorage by the Warrior, which she reached about 6 o'clock Thursday morning. During the time the ship was on the ground she was undoubtedly in a dangerous position, not only because of the existing fire, but because the coming on of bad weather might, and almost certainly would, have made a wreck of her. It is true that during the time she was aground the barometer was high and the weather was good, and so continued for some weeks after, but there was sufficient swell to cause the damage al-

ready mentioned, and to cause the ship to thump quite heavily; and during the night of Tuesday the sky was overcast. It also appears from the evidence that during the month of April severe south-easterly winds are very rare at San Pedro, but that westerly and south-westerly winds frequently come up, and sometimes very strong and suddenly; and also that at times off shore winds cause a heavy swell in that bay. In cases of this nature there is no standard by which can be absolutely measured the compensation to which the party rendering the service is entitled. Each case depends in large measure upon its own circumstances. While it is perfectly true that salvage is not a "question *pro opere et labore*, but rises to a higher degree, and takes its source in a deeper policy," there is a broad distinction, as said by Dr. Lushington, "between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer go out at their own risk for the chance of earning reward, and if not successful they are entitled to nothing, the rule being that it is success that gives them a title to salvage remuneration. But if men are engaged to go out to the assistance of a ship in distress they are to be paid according to their effort, even though the labor and service may not prove beneficial to the vessel or cargo." *The Undaunted*, 1 Lush. 90; *The Sabine*, 101 U. S. 390. In the one case the reward should be more liberal than in the other. Here the services of the libellant were rendered at the request of the master of the ship, for which it was entitled to be paid whether such services were beneficial or not; and although the services were rendered with promptness and efficiency, there was not manifested any disposition on the part of the libellant to take any chance of earning reward, but, on the contrary, it appears that the libellant was unwilling to send the Falcon to aid the ship unless her master requested that it be done. Under such circumstances, while the libellant should be awarded a sum in excess of the actual value of the services rendered and the actual damage done to its property engaged in the service, and while such excess should be liberal, it should not, in my judgment, be measured by that high standard that would control the award had the services been rendered voluntarily. The proof shows the actual value of the services rendered by libellant and the actual damage done to its property engaged in the service to be \$1,510.41, which, of course, will be allowed. The value of the ship was \$48,000, and of her cargo and freight \$23,790. The value of the Warrior and Falcon was \$30,000 each, and of the Catalina \$10,000. These tugs are maintained at San Pedro for the purpose of rendering towage, salvage, and other services, at an expense of about \$6,000 per month, and, with the exception of a small tug, the McPherson, at San Diego, which is distant about 100 miles from San Pedro, and a small tug, the Pelican, at Redondo beach, about 10 miles distant, are, as appears from the evidence, the only tugs maintained along the coast between San Diego and San Francisco. Considering all of the facts and circumstances of the case, I think \$3,000 over and above the actual value of the services rendered and the actual damage done, making in all \$4,510.41, is a fair sum to be awarded the libellant, for which amount, with costs, a decree will be signed.

THE MARIE.¹

THE NEWTOWN.

BOYES *et al.* v. THE MARIE.

SAME v. THE NEWTOWN.

(District Court, E. D. New York. July 12, 1889.)

SALVAGE—COMPENSATION—INJURY BY FIRE.

An oil steamer, lying on the north side of an oil-dock, caught fire. Between her dock and the dock below was a space of 100 feet, and on the south side of the lower dock lay the bark Deutschland. Along side the Deutschland, and fast to her, was the bark Marie, without cargo, and fast to the Marie was the barge Newtown, with 800 barrels of petroleum on her deck. The tug Arrow took hold of the Deutschland and towed her out into the stream, and with her came the Marie and the Newtown. Neither of the two latter was injured. If they had been left at the pier, they would have been destroyed. In the then condition of the tide there was a chance that the vessels could have cast off and drifted clear without assistance, and several other tugs besides the Arrow were in the slip ready to assist. The Arrow sustained no injury. She was worth \$15,000. The Marie was worth about \$10,000, the Newtown \$3,000, and her cargo \$4,000. The Marie tendered \$250, and the Newtown \$100. *Held*, that the tenders were sufficient, but that libelants, in addition to the tenders, should recover costs, as there was some ground to contend for a larger allowance of salvage.

In Admiralty.

Action by Charles W. Boyes and others, to recover salvage compensation for services rendered, against the bark Marie and the barge Newtown and her cargo.

Wilcox, Adams & Macklin, for libelants.

Wing, Shoudy & Putnam and *C. C. Burlingham*, for claimants.

BENEDICT, J. These actions are to recover salvage compensation for services rendered by the steam-tug Arrow to the bark Marie and the barge Newtown and cargo, respectively, on the occasion of a fire which broke out in the steamer Hafis, lying at the oil-docks, on the 11th day of October, 1888. The steamer Hafis, where the fire first broke out, lay on the north side of the pier at the foot of Eleventh street. The bark Avoca lay on the south side of that pier. The distance between that pier and the pier below was 100 feet. On the north side of the pier below lay the Leopold Schall. On the south side of the pier lay the bark Deutschland. Along-side the Deutschland, and fast to her, was the bark Marie without cargo, and fast to her was the barge Newtown, with 800 barrels of petroleum oil upon her deck. Upon the request of the Deutschland the steam-tug Arrow took hold of her, and towed her out of the slip to a place of safety. The Marie and the Newtown, being fast to the Deutschland, were towed out with the bark. After being in this way towed out some two ship's lengths and into the stream, the

¹Reported by Edward G. Benedict, Esq., of the New York bar.

Marie cast off from the Deutschland, and, with the barge, anchored. Neither the Marie nor the Newtown sustained any injury from the fire. The wharf at North Tenth street, where these vessels lay, is an open wharf, under which the ebb-tide was running at the time of the fire. Between that wharf and the wharf below at foot of Ninth street was a distance of 276 feet. The wharf at Ninth street was not so long as the wharf at Tenth street by 103 feet. The fire was a dangerous one. The bark Ella Vose, which lay on the north side of the pier at foot of Tenth street, and just ahead of the Deutschland, was burned up, and these vessels would have been burned if they had remained where they were at the pier.

Two features of the case are important in determining the amount of salvage proper to be awarded to the Arrow for her services to the Marie and Newtown. One is that, owing to the distance between the pier foot of Tenth street and the pier below, there was a chance that the Marie and the Newtown would have drifted clear of the pier below, and so have been saved from the fire without assistance from any one. Another important feature of the case is that by the time the Arrow arrived at the Deutschland, as stated, several tugs had arrived, able and willing to take these vessels into the stream. The Garlick was in the same slip, the Vigilant followed the Garlick in, another tug came into the same slip and played water on the Vose. It is evident, therefore, that the peril to the Marie and Newtown was not great. Neither of them was on fire, and the weight of the evidence is that at the time of the services in question the fire had not caught the pier at which they lay. They were fast to a bark that had a tug able to tow all of them out, and, as already stated, several other tugs stood ready to take them out of the slip. The Arrow incurred no substantial risk, and her services required no especial skill, nor any considerable labor. The value of the Arrow is claimed to be \$15,000. The value of the Marie is estimated by some witnesses at \$10,000. The Newtown was worth about \$3,000, and her cargo \$4,000. On behalf of the Marie a tender of \$250 for the services rendered by the Arrow was made and refused. Taking into account the fact that the Arrow has been compensated for her services to the Deutschland, in my opinion the tender was sufficient, and should have been accepted. On behalf of the Newtown a tender of \$100 was made for the services rendered by the Arrow to her. In my opinion this tender was sufficient. Decrees for these amounts may be entered, and I think they may receive their costs, for the reason that there was some ground to contend for a larger allowance than is made.

THE LABRADOR.¹McCaldin *et al.* v. THE LABRADOR.

(District Court, E. D. New York. July 12, 1889.)

SALVAGE—COMPENSATION.

The steam-ship L., worth \$200,000, and having cargo valued at \$750,000 aboard, soon after her arrival from sea, in New York bay, caught fire. The steam-boat R. was employed by the agents of the steam-ship in New York to go to her aid. At the same time the M., a steam-tug, valued at \$25,000, which was towing near the place where the steam-ship was lying, abandoned her tow, went to the L., and began to pump water into her. The steamer was then beached, and in the course of an hour and a half the fire was extinguished. After this the M. went to New York to procure a suction-pump, with which she returned and pumped out the steamer. The latter was not seriously damaged. The fire was in an iron compartment, far removed from the cargo, and would probably have been confined to that compartment without the aid of the M. The owners of the steamer paid the R. \$4,000. *Held*, that the M. should recover \$4,500 as salvage.

In Admiralty.

Action by James McCaldin and others for salvage compensation.

Buller, Stillman & Hubbard, for the owners, and *Sheppard & Osborne*, for the officers and crew, of the William McCaldin.

Coudert Bros., for claimant.

BENEDICT, J. This is an action on the part of the owners and crew of the steam-tug William McCaldin to recover salvage compensation for services rendered to the steam-ship Labrador. The defense set up in the answer is that the services rendered were mere work and labor, and not entitled to salvage compensation. The steam-ship Labrador, a passenger vessel of the value of \$200,000, having on board a cargo of the value of \$750,000, and freight of the value of \$9,500, soon after her arrival at quarantine from sea caught fire. The fire originated in the drying-room. All efforts on the part of those on board the steamer proving insufficient to control the fire, the steam-boat Rescue, a fire-boat belonging to the Merritt Wrecking Company, was employed by telegraph from the agents in New York city to go to the steam-ship. About the same time the fire was discovered by the tug William McCaldin, a new steam-tug, equipped with powerful pumps for throwing water, valued at \$25,000, at the time up in the Kill von Kull engaged in towing a ship to sea. The McCaldin at once abandoned her tow, and proceeded to the port side of the Labrador. Her aid was accepted, and she commenced to throw water into the burning compartment. The Rescue had already arrived on the starboard side. It had been determined by the officers of the steamer to beach the steamer, and when the McCaldin arrived the steamer was proceeding towards Owl's Head for that purpose, with the Rescue along-side throwing water on the fire. On arrival at Owl's Head

¹Reported by Edward G. Benedict, Esq., of the New York bar.

she was at once beached, and in course of an hour and a half the fire was extinguished, water being up to that time thrown upon the fire by the Rescue, the McCaldin, and at the last by the Fletcher, as well as by pumps, some of which were worked by hand and some by the donkey-engine belonging to the steam-ship. The ship's company on board numbered 144 men. When the fire was extinguished the Rescue departed. The McCaldin also stopped pumping, and went back to New York to procure a suction-hose, with which she returned, and pumped out of the steamer the water which had been thrown in her to extinguish the fire. At high water the steamer came off the mud, and proceeded to her berth, and thereafter went to sea on her return voyage without repairs. The fire, which, as already stated, broke out in the drying-room, was confined to the iron compartment in which it originated. In that compartment it did considerable damage, destroying the wood-work, and otherwise injuring the vessel. It is impossible, under this state of facts, to sustain the defense set up in the answer, that the service rendered by the McCaldin was not salvage, but mere work and labor. The position was abandoned at the hearing. The only question discussed was as to the amount of salvage proper to be awarded. The great difference in opinion as to the amount that should be awarded arises from a difference of opinion as to the extent of the peril to which the steam-ship and her valuable cargo were exposed. Upon this point I do not think sufficient importance has been attached by the advocate for the libelants to the undisputed fact that the fire occurred in an iron compartment of an iron steam-ship, far removed from the cargo, to which compartment the fire would in all human probability have been confined without the aid of the McCaldin. The steamer herself was in peril, but there was no serious peril of the total loss of the cargo by fire. It was to the danger by fire that the efforts of the McCaldin were directed. On the other hand, the evidence makes it plain that the opinion now firmly expressed by the officers of the steamer that the fire was thoroughly under control before the McCaldin arrived, and that the steam-ship was in no peril, was not the opinion entertained by them at the time. The protest made a day or two after the fire shows this, where it says:

"The fire continuing to increase, fearing a fatal issue, I accepted the services of two fire-boats having powerful engines, and I resolved to run the vessel aground on a mud-bank which was near us. As soon as we had ascertained the extent of the fire, the boats had been put out, ready to take off the passengers, who had been gathered aft. * * * From 7 o'clock in the morning all danger had completely disappeared, being vigorously attacked by the appliances on board, and with the assistance of the fire-boats was extinguished."

The early hour in the morning at which the fire occurred is not without importance, and renders it highly probable that, if the McCaldin had refused her aid, the Rescue would have been left to cope with the fire alone for two or three hours. The services of the Rescue have been rewarded by the owners of the steamer by the payment of \$4,000. In view of all the circumstances, I am unable to award salvage compensation to the McCaldin upon the theory that by her efforts property

of the value of nearly a million dollars was saved from destruction. Neither am I able to agree with the advocate for the steamer, who, to quote from Lord STOWELL in a salvage case, "has taken matters quite at the freezing point," when he insists that \$500 would be a liberal award to the McCaldin. The payment by the owners of the steamer to the Rescue of the sum of \$4,000 for services no more important than those rendered by the McCaldin, and which perhaps could not be held to be services the compensation for which was dependent on success, is wholly inconsistent with the argument now made in her behalf. I am unable to see any ground upon which to award to the McCaldin a less sum than was paid to the Rescue. As I view the case she is entitled to something more. Taking all the circumstances into consideration, it is my opinion that \$4,500 should be awarded to the McCaldin for her services on the occasion in question, and she must also recover her costs.

THE MARTELLO.

THE FRED A. WILLEY.

WILLEY *v.* THE MARTELLO.

WILSON *et al.* *v.* THE FRED A. WILLEY.¹

(*Circuit Court, S. D. New York. July 31, 1889.*)

1. COLLISION—IMMODERATE SPEED—STEAMER.

For a steamer whose full speed is 12 knots an hour, and which is near the entrance to New York harbor, in a thick fog, a speed of 5½ to 6 knots per hour is not the "moderate speed" required by article 22 of the new international rules.

2. SAME—SAILING VESSEL.

Where a sailing vessel has a speed of 10 knots an hour, loaded, and requires 4 knots an hour for steerage-way sufficient to give her master thorough control of her to tack, wear, and handle her as occasion might require, a speed of 4 knots an hour near the entrance of New York harbor, in a thick fog, is not faulty navigation putting her in fault for a collision with a steamer, the vessels being on crossing courses.

3. SAME—CHANGE OF COURSE.

In the absence of any indication of the steamer's maneuvers, the master of the sailing vessel would not have been justified in violating rule 22 by a change of course.

In Admiralty. Appeal from district court. 34 Fed. Rep. 71.

(1) The Martello is a British steam-ship of 2,439 tons net register, 370 feet in length, 43 feet beam, and 28 feet in depth, owned by the respondents and appellants, Charles Henry Wilson and Arthur Wilson, and is

¹ Reversing 34 Fed. Rep. 71.

one of the Wilson Line of steamers plying between New York and Hull, and other foreign ports.

(2) The Martello left her dock in Jersey City on Saturday afternoon, May 7, 1887, laden with a miscellaneous cargo of merchandise, bound for Hull, England. The weather was so foggy that she could not go down the channel, but anchored for the night in Gravesend bay.

(3) The Martello got under way from Gravesend bay about 6 A. M., Sunday, May 8, 1887, and started for sea in command of Capt. Francis E. Jenkins, the senior captain in the New York service of the line, and in charge of Pilot Joseph Henderson. The weather was thick, but sufficiently clear to enable the buoys marking the channel to be seen. She proceeded down the Swash channel, and thence through Gedney's channel to the sea.

(4) When about half a mile to the westward of the perch and ball buoy, *i. e.*, about north from the black buoy No. 1, her engine was stopped for the purpose of slowing the vessel until the pilot could be discharged. That being done, the engines were at 7:10 A. M. moved ahead slow.

(5) At about 40 minutes after discharging the pilot the horn (one blast) of a sailing vessel was heard on the starboard bow. At that time the captain and third officer were on the bridge, a competent lookout was in the crow's nest, (about 100 feet abaft the stem,) the first officer was on the lookout on the forecastle, and the quartermaster was at the wheel.

(6) At that time the steamer was heading E. S. E., the wind was about E. by N., blowing a five to six knot breeze. The fog had grown denser, and vessels could not be seen over a quarter of a mile away. The whistle of the steamer had been blown regularly at intervals of thirty seconds or less, and her speed was about five and one-half to six knots an hour. Three knots an hour would give her good steerage-way.

(7) About a minute or two after hearing the horn the officers of the Martello saw the barkentine Freda A. Willey looming in sight through the fog.

(8) On April 24, 1887, the barkentine Freda A. Willey left Pensacola bound through Long Island sound for New Haven, with a cargo of yellow pine lumber, and on Sunday, May 8th, about 8 o'clock A. M., she was bound into the harbor of New York.

(9) The Willey, with all her sails set, can make ten knots an hour. With the wind as found in the sixth finding, the Willey, if going at less than four knots an hour, would not have steerage-way sufficient to give her master thorough control of her to tack, wear, or handle her as occasion might require.

(10) About 4 A. M. of May 8th she was sailing with her mainsail, spanker, main stay-sail, upper and lower foretop sails, foretop-gallant sail, and three jibs. At 5 A. M. the wind freshened, and she took in her royal. At 7 A. M., the wind freshening, her foresail was hauled up.

(11) There was on the deck of the Willey before the collision, Cobb, able seaman, on the lookout; Mathlin, able seaman, at the wheel; Ludvigsen, second mate, and Willey, captain, about the deck; the rest of the

crew were below. She was heading north, close-hauled on the starboard tack, sounding her horn at intervals of one to two minutes, and making about four knots an hour.

(12) While thus proceeding, she thrice heard the steam-whistle of a steamer, answering promptly each time with a single blast of her horn. At this last signal the Martello appeared in sight, bearing about four points on the port bow, and a quarter of a mile away.

(13) As soon as the Willey loomed in sight of those on the Martello, as indicated in the seventh finding, the first officer of the Martello called out "Hard a-port," and the lookout reported a vessel on the starboard bow. The captain immediately ordered the helm hard a-port, and the engines reversed full speed.

(14) The speed of the Martello under a hard a-port helm, and with engines reversed at full speed, became gradually reduced, and at the time of the collision was about two knots an hour.

(15) The place of collision was about $1\frac{1}{4}$ miles about N. by E. from Sandy Hook light-ship.

(16) As the vessels neared each other, the first officer of the Martello called out to the barkentine, "Luff! Luff all you can!" but his call was not heard by those on the Willey.

(17) From the time of the hearing of the first whistle down to the time of the collision, the steamer, except as stated in the sixteenth finding, gave no signal or indication showing whether her intention was to go ahead of the barkentine or astern, or even whether she had reversed her engines. In consequence the Willey held her course, as she was bound to do, but the steamer ran into her with great violence, the steamer's stem running into the port bow of the barkentine, cutting its way into her keel, knocking her stem over to starboard, and driving her bow around to the eastward.

(18) Had the steamer been going at three knots an hour, had she stopped her engines as soon as she heard the Willey's horn, and reversed when she sighted the barkentine, she would have stopped short of the Willey's course.

(19) The master of the barkentine was on deck. He had his vessel under control. If when the steamer first sighted the barkentine the master of the latter had been advised that the steamer was starboarding her wheel, he could have ported, and avoided the collision. If at that time the steamer had ported her wheel, the barkentine, keeping her course, would have crossed the steamer's bows in safety. If at that time the master of the barkentine had been advised that the steamer was reversing, he could have ported, and avoided the collision.

CONCLUSIONS OF LAW.

(1) The Freda A. Willey was free from fault.

(2) The Martello was in fault for proceeding at an excessive rate of speed in a fog, and is solely responsible for the collision.

(3) There should be a decree for the Freda A. Willey and against the Martello in each case, with costs of the district and circuit courts.

James Thomson, for the *Martello*, cited:

The Zadok, L. R. 9 Prob. Div. 114; *The State of Alabama*, 17 Fed. Rep. 847, *The Europa*, 14 Jur. 630; *The Vim*, 12 Fed. Rep. 906; *The Maria Martin*, 12 Wall. 31; *The Louisiana*, 2 Pet. Adm. 271; *The Continental*, 14 Wall. 345; *The C. C. Vanderbilt*, Abb. Adm. 361.

Wm. W. Goodrich, for the *Willey*, cited:

The Hammonia, 11 Blatchf. 414; *McCabe v. Steam-Ship Co.*, 31 Fed. Rep. 238; *The Nacoochee*, 28 Fed. Rep. 462; *The Colorado*, 91 U. S. 692; *The Pottsville*, 12 Fed. Rep. 633; *The Pennsylvania*, 19 Wall. 133; *The Luray*, 24 Fed. Rep. 751; *The Rhode Island*, 17 Fed. Rep. 554; *The John Hopkins*, 13 Fed. Rep. 185; *The Leland*, 19 Fed. Rep. 771; *The Elysia*, 4 Asp. 540; *The Victoria*, 3 W. Rob. 49; *The Pepperell*, Swab. 12; *The Westphalia*, 4 Ben. 404; *The Pennland*, 23 Fed. Rep. 551; *The Northern Indiana*, 3 Blatchf. 99.

LACOMBE, J., (*after stating the findings as above.*) This is an appeal from a decree of the district court, apportioning the damages resulting from a collision in a fog between the steamer *Martello* and the barkentine *Freda A. Willey*, on May 8, 1887. The colliding vessels were on crossing courses, and came together nearly at right angles, the steamer's stem striking the barkentine between her stem and the cat-head. Both vessels were damaged, and cross-claims were filed. The location of the collision is fixed by the district judge at one and three-fourth miles N. by E. from Sandy Hook light-ship. Probably it lies somewhat further to the eastward. The soundings recorded in the *Willey's* log seem to indicate that her course was—as her captain testifies—about a mile to the eastward of the light-ship. It is not, however, necessary to determine this location with precision, and the conclusion of the learned district judge on that point may be accepted here. The respective speed of the colliding vessels is the material and controlling fact in the case. Examination of the record has led to the opinion that the conclusion reached by the district judge, viz., that the steamer was moving at the rate of five and one-half to six knots, and the barkentine at the rate of four knots, an hour, is correct. It will not be profitable to enter upon a consideration of the evidence in detail, in view of his careful and exhaustive discussion of the various items of proof which—notably in the case of the steamer—led him to that conclusion in the face of the direct testimony of her officers. Suffice it to say that the *Martello's* witnesses substantially agree in giving her a uniform speed from about the time the pilot left down to the time she reversed upon sighting the *Willey*. That being so, the most persuasive argument as to her rate of speed is found in a comparison of the time which elapsed with the distance traversed between those periods. If the time is taken as given in the *Martello's* log, and the distance as found by the district judge, she must be given a speed of between five and one-half to six knots an hour; and, if the collision occurred further to the eastward, her speed would be even greater. At any rate, it is plain that a reversal of her engines full speed, ordered as soon as the *Willey* came in sight, (7.50 A. M.,) failed to overcome the forward impetus resulting from her prior rate of speed, and this failure was not promoted or assisted by any improper change of the *Wil-*

ley's course. As the Martello would have had good steerage-way at three knots an hour, her speed therefore was not moderate under the decisions, and for the resulting collision she must be held to blame.

The district judge has found the Willey in fault (1) for going at too high a rate of speed, and (2) for failing to check speed after the steamer's whistle was heard. An effort to check speed by executing the maneuver described in the case cited (*The Zadok*, L. R. 9 Prob. Div. 117) would have brought about a change of course, and she was bound to keep her course under the twenty-second rule, at least until the existing situation afforded reasonable assurance that a change would prevent a collision, otherwise imminent, and would not itself tend to produce the very mishap it was intended to avoid. But the existing situation was such that the master of the Willey could not prudently change her course in time to be of any service. The district judge so held, and rightly, upon the proof. The sole question as to the Willey, then, is this: Was her speed of four knots an hour immoderate, under the existing conditions of fog, wind, and situation? None of the cases cited in the opinion or on the argument have gone to that extent. In those where the sailing vessel was going four knots an hour she was not charged with fault; in the cases where she was held in fault her speed was five knots or over. The facts in proof do not show that her speed was too great to admit of the execution of such maneuvers as the situation in which she found herself might require. Her captain was on deck, with his vessel under command. Had the steamer advised him by signal (under nineteenth rule) or otherwise that she was directing her course to starboard, he could have kept his course. Had she advised him she was directing her course to port, or that she was reversing, he could have ported his wheel, and avoided a collision. For any such indication of the steamer's maneuvers the Willey's master was on the watch, ready to promptly respond, and at a speed of four knots an hour a prompt response would have prevented the accident. In the absence of any such indication, however, he would not have been justified in violating the twenty-second rule by a change of course. Nor did the Willey's speed prevent the Martello from avoiding the collision, because, had the latter been going at a lower rate of speed, had she stopped her engines when she heard the Willey's horn, and reversed (as she did) when she sighted the barkentine, she would have stopped short of the Willey's track, whether the barkentine was going fast or slow. Except to the extent that, if going slower, the Willey would at 7.50 A. M. have been further down the coast than the place of collision, her rate of speed cannot be said to have contributed to the collision, and should not be charged against her as faulty navigation. The district court held that the Willey "had by no means brought her speed down to the standard of good steerage-way. On the contrary, she was going at nearly full speed." In support of this proposition there was no direct testimony below, and the uncontradicted proof in this court shows that with all her sails set she is a good, 10-knot vessel, loaded, or 12, light, in a nice set of ballast; and that at less than 4 knots she would not have steerage-way sufficient to give her

master thorough control of her to tack, wear, and handle her as occasion might require. There should be a decree for the Willey and against the Martello in each case.

L'HOMMEDIEN *et al.* v. THE MISCHIEF.¹

(District Court, E. D. New York. July 12, 1889.)

COLLISION—VESSEL AT ANCHOR—LIGHTS.

The steam-tug Q. had taken a tow up Hunter's Point creek, and, having landed it in a proper place on the shore, was lying along-side the tow, stern down the creek, without lights, and with over 100 feet of clear water outside of her. In the early morning the tug M. came up the creek and ran into the Q., doing the damage sued for. The M. claimed that the absence of lights on the Q. was the cause of the collision. *Held*, that under the circumstances the Q. was not required to have a light, and the M. was responsible for the collision.

In Admiralty. Action by Samuel L'Hommedien and others for damages by collision.

Wing, Shoudy & Putnam, for libelants.

Alexander & Ash, for claimants.

BENEDICT, J. This is an action to recover damages for injuries sustained by the steam-tug Quickstep in a collision with the steam-tug Mischief, which occurred in Newtown creek, above the first bridge, on the morning of the 8th of December, 1887. The evidence shows that early in the morning, and before light, the Quickstep had taken a tow up the creek. She landed her tow on the Hunter's Point side of the creek, above the first bridge, at a proper place, and at the time of the collision was lying still along-side of the boats, with her stern down the river. She had no lights. While so lying, the Mischief, having got under way below the bridge, passed up the creek near the Hunter's Point side, and struck the Quickstep in her stern, doing the damage sued for. The collision occurred early in the morning. The testimony leaves it somewhat in doubt as to whether, at the time of the collision, there was not light enough to enable the Mischief to see the Quickstep in time to avoid her. Some evidence is to the effect that it was light enough to see a man on the other side of the creek, which was there some 282 feet wide. The only fault on the part of the Quickstep charged by the answer which deserves consideration is that she had no light. I am not aware of any statute which required her to have a light, under the circumstances,—not being in motion, but moored along-side other vessels attached to the shore of Newtown creek, and with over 100 feet of clear water outside of her. Nor can I find that an absence of light on the Quickstep caused the collision. The pilot of the Mischief himself testifies that he saw the Quickstep, but

¹Reported by Edward G. Benedict, Esq., of the New York bar.

thought she was far enough out in the river for him to go inside of her, and so he changed his course to pass between her and the Hunter's Point side. He immediately discovered his mistake, but it was too late to enable him to swing the other way before reaching the Quickstep. His fault consisted in changing his course, instead of stopping his boat as soon as the Quickstep was discerned, and this fault caused the collision. Let a decree be entered for the libellant, with an order of reference.

NEW YORK, L. E. & W. R. CO. v. THE BREAKWATER.

OLD DOMINION STEAM-SHIP CO. v. THE PAVONIA.

(*District Court, E. D. New York. May 23, 1889.*)

COLLISION—BETWEEN STEAMERS—DELAY IN BACKING.

A steam-vessel, which is bound to keep out of the way of another steam-boat, will be held in fault if collision happen through her delay in backing, where the circumstances of wind and tide and signals exchanged were sufficient to have shown her that such backing could not be delayed without risk of collision.

In Admiralty. Cross-libels for damages by collision.

The steam-ship Breakwater was coming into the North river from sea, and as she approached her dock hauled in somewhat to the New York piers. The tide was ebb, and a strong north-west wind was blowing. When the Breakwater was still several piers below the Pavonia ferry-slip, the ferry-boat Pavonia was seen coming out of her slip on the New York shore. The ferry-boat immediately blew one whistle to the Breakwater, indicating that she would cross the latter's bow, to which signal the Breakwater agreed by one whistle, and stopped, but did not back until the ferry-boat had again signaled once, when the steamer reversed. But the tide and wind carried the ferry-boat somewhat down stream, and the boats came in collision, the stem of the steamer striking the port side of the ferry-boat. Cross-libels were filed for the resulting damages.

Wilcox, Adams & Macklin, for the Pavonia.

Owen & Gray, for the Breakwater.

BENEDICT, J. It is proved that the Breakwater, although she stopped her engine, did not then reverse it. It is also proved that if the engine of the Breakwater had been reversed as soon as possible after it was stopped there would have been no collision. The Breakwater, having the ferry-boat on her starboard side, and upon a crossing course, was bound to do all in her power to avoid striking the ferry-boat as she crossed. It was in her power to reverse the engine sooner than she did, and by so doing to have avoided striking the ferry-boat as she did. The

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

circumstances of wind and tide and the signals exchanged were sufficient to show to those in charge of the Breakwater that reversing the engines of the Breakwater could not be delayed without risk of collision. The delay that occurred in reversing the engines of the Breakwater was therefore a fault, and renders the Breakwater responsible for the collision that occurred. The ferry-boat was guilty of no fault.

SACQUELAND *et al.* v. THE METEOR.

(*Circuit Court, E. D. New York.* June 8, 1889.)

SEAMEN—WAGES—CHARACTER OF SERVICE.

Libelant testified that he was hired by the master of a steam-yacht as mate, at \$50 per month. The master testified that he was only hired as a deck-hand, at \$30. There was no other mate than libelant. During the previous season he had been promoted from a deck-hand, at \$30, to a mate, at \$50, and as such served until the end of the season. During the season in controversy it appeared that until about three weeks before his discharge he wore a mate's uniform when visitors were around, bought for him by the master, who explained it by saying that it was necessary to have some one to act as mate to receive guests. Letters to libelant from the master, authorizing him to employ men, and to keep the work going, were introduced. When libelant left he did not apply for mate's wages. *Held*, that he was only entitled to the wages of a deck-hand.

In Admiralty. On appeal from the district court, 36 Fed. Rep. 566.

In the circuit court new evidence was introduced to show that libelant only wore a mate's uniform when visitors were around, and that when he left he did not apply for extra wages.

Wilcox, Adams & Macklin, for appellant.

Noah Tebbetts, for appellees.

BLATCHFORD, J. I think that, in view of the new proofs taken in this court, and of the whole case, the claim of Sacqueland for a mate's wages must be disallowed, but that the claim of each of the five persons to whom the district court allowed \$6.75 for board money must be allowed. As the claimant has succeeded as to the claim of Sacqueland for a mate's wages, he must recover against Sacqueland the costs of this court; and, although the claim of Sacqueland, which is disallowed for a mate's wages, was coupled with the allowed claims for board money, it seems equitable that costs in the district court should be allowed to those who recover for board money.

FARLEY v. HILL *et al.*

(Circuit Court, D. Minnesota. September 13, 1889.)

CONTRACT—EVIDENCE.

Complainant alleged that he entered into an oral agreement with defendants to purchase certain mortgage railroad bonds, to be used in purchasing the roads on foreclosure, defendants to furnish the requisite funds, and complainant to furnish information and assistance. He and a third person, who did not appear to be interested, testified that the contract was made as alleged, while one defendant denied it, the other defendant having died before his testimony could be had. It appeared that at the time of making the alleged contract, complainant was receiver of the property of one of the roads, and general manager, under the company, of the other road. He was past 60 years of age, of good reputation, and highly respected. A large amount of money would be required to purchase the bonds, none of which, he alleged, was he to furnish; and, as bearing on defendants' reasons for making him an equal partner, claimed that he first originated and suggested the scheme to them, but defendants showed by unsuspected evidence that the scheme had been suggested to them about two years before. Complainant did not show that he had any information on the subject not known to the public. He and his witness testified that defendants said that they were anxious to have him interested because of the great change in the road since he had taken possession thereof, but it appeared that he knew that defendants were negotiating for a purchase of the bonds very soon after he took possession; and his testimony and that of his witness was inconsistent in other respects. Defendants purchased the bonds after two years' correspondence, none of which showed that complainant had any interest, and the persons with whom the negotiations were carried on did not suspect that he was interested, and his only knowledge of the negotiations was derived from the agents of the bondholders. After the purchase of the bonds, and before foreclosure, defendants, wishing complainant's assistance as receiver, in working one of the roads, which he was slow to give, applied to the persons from whom they purchased the bonds to urge him to take action. Meanwhile he wrote letters entirely inconsistent with his claim to be a partner of defendants. It also appeared that shortly after assuming control of the road, and at a time when, as he testified, he proposed to enter into the contract with defendants, he canceled contracts which one of the defendants held with the roads, and which were very advantageous to defendants and prejudicial to the road. *Held*, that the evidence did not show that the contract had ever been made.

In Equity. On bill for accounting.

Beam & Cooke and Hiler H. Horton, for complainant.

Geo. B. Young, H. R. Bigelow, I. V. D. Heard, and M. D. Grover, for defendant Hill.

BREWER, J. The original bill in this case was filed on November 13, 1880. It alleged a contract, and sought an accounting. An amended bill having been filed on December 15, 1880, the defendants, Kittson and Hill, filed a plea thereto, which was sustained in this court on the hearing before Judges TREAT and NELSON. 4 McCrary, 138, 14 Fed. Rep. 114. Complainant appealed to the supreme court, and, the case having been twice argued before that court, the judgment of this court was reversed, and the case remanded, with instructions to overrule the plea, and direct the defendants to answer. 120 U. S. 303, 7 Sup. Ct. Rep. 534. Thereafter an answer was filed, testimony has been taken, and the case argued, and now submitted upon the pleadings and proofs.

The decision of this court on the plea was to the effect that the contract alleged in the bill, if made, was one against public policy, and could not be enforced. The case in the supreme court passed off on a question of pleading, and the decision there, in no manner settling the question whether the contract as alleged was one which could be enforced or not, simply determined that the equities of the bill could not be considered upon a plea, and that a question of fact put in issue by the plea and replication, found for the complainant, compelled the overruling of the plea. So, at the end of nine years, the case now comes before me for decision, with no substantial question of law or fact settled. A brief statement of the questions presented is this: In 1876, complainant was, by appointment of this court, receiver of the property of the St. Paul & Pacific Railway, and also general manager of the lines of the First Division of the St. Paul & Pacific Railway Company, under the company, and subsequently under the trustees in certain mortgages in possession thereof. Several series of mortgage bonds were outstanding, largely owned and held in Holland. Complainant alleges that he and the defendants, Kittson and Hill, entered into an agreement for the purchase of these bonds, or a majority thereof, and the use of the same in the purchase of the road in the foreclosures of the mortgages. These defendants were to procure the funds necessary therefor, and the complainant to furnish facts, information, and assistance. Certain it is that the bonds were purchased by the defendants, Hill and Kittson, with two associates, foreclosures consummated, and the railway properties acquired. The question of fact, then, is whether such an agreement as alleged was entered into, and the question of law, whether, if made, it can now be enforced in a court of equity.

In reference to the question of fact, it may be premised that the complainant, Mr. Farley, and his then assistant in the management of the roads, Mr. Fisher, testify that an agreement was made substantially as alleged in the bill, while defendant Hill as positively denies the same. Defendant Kittson died before his testimony could be taken. Inasmuch as, according to complainant's testimony, only four persons were present at the making of the agreement, namely, Messrs. Farley, Fisher, Hill, and Kittson, the case, so far as respects the direct testimony rests upon three witnesses, two affirming and one denying; one of those affirming and the one denying being pecuniarily interested, and their interests opposed, while the other affirming has, so far as appears, no direct pecuniary interest. This, upon the direct testimony, leaves the preponderance in favor of the complainant; but where there is a square contradiction between witnesses of apparent credibility as to a principal fact like this, the solution is not always reached by a process of mathematics, a mere counting of the number of witnesses, but often requires a careful examination of all surrounding circumstances. In this case inquiry must be directed to the inherent probability, under the circumstances surrounding the parties, of the making of such an agreement; to the conduct of the parties prior and subsequent to that time; to any contradictions and supports which their respective stories may receive from other and un-

disputed facts; and to any statements, oral or written, inconsistent with their direct testimony. The testimony is voluminous, comprising nearly 2,000 printed pages, and with this testimony, in the various ways indicated, counsel for the opposing parties have striven to support their respective claims. It is not pretended that there was any written contract. Messrs. Farley and Fisher testify that at an interview which lasted about two hours the agreement was entered into, and its terms fixed.

Inquiry naturally runs, in the first place, to the situation of the parties and the subject-matter of the agreement at the time it is claimed to have been made, and the probabilities in view of such situation of the parties entering into such an agreement. Two corporations existed,—one, the St. Paul & Pacific Railway Company; the other, the First Division of the St. Paul & Pacific Company. Each owned a land grant. The First Division had two lines completed and in operation,—one, 76 miles in length, known as the “Branch;” and the other 207 miles long, and known as the “Main Line.” The St. Paul Company had one line of about 60 miles graded and partly ironed, and another of about 310 miles on which 139 miles was completed. In addition, some work of grading had been done on this last line. So that there was over 400 miles of completed road, several miles partially completed, and a land grant. These various properties were mortgaged in several mortgages, amounting in the aggregate to \$28,000,000. Some of the bonds secured by these mortgages had been taken up in the payment of lands sold, and possibly all had not been negotiated, but the great bulk of this indebtedness stood against the property. The stock of the First Division of the company was mainly owned by Messrs. Litchfield, and of the St. Paul Company by the Northern Pacific Railway Company. The bonds had been largely negotiated in Holland, and these Dutch owners in 1873 appointed a committee to enforce their rights and protect their interests. This committee appointed J. S. Kennedy & Co., of New York city, as its agents. In 1873 there was a default in the payment of interest. Suit was brought in this court at the instance of Messrs. Kennedy & Co., and in August, 1873, this complainant was appointed receiver of the St. Paul Company’s properties. He continued as such receiver until the final foreclosures and sales in 1879. The First Division Company’s property remained in the possession of the company for some time after the appointment of Mr. Farley as receiver of the St. Paul Company, Mr. Becker being the president and person in charge. In 1875 an arrangement was made between the stockholders and bondholders of the First Division Company, by which the directory was constituted in the interest of the bondholders, and on March 13, 1876, Mr. Farley took possession of these properties as general manager for the company, temporarily, at least, controlled by the bondholders. The arrangement between the bondholders and stockholders did not work out as expected, and in October, 1876, the trustees in the mortgages took possession, continuing Mr. Farley as general manager for them. The agreement was made, according to complainant’s testimony, during the year 1876, and while he was in the possession of the St. Paul Company’s property as receiver,

and of the First Division Company's property as general manager. Mr. Farley was at the time a gentleman past 60 years of age, having spent most of his active life in the state of Iowa, engaged part of the time in mercantile enterprises and part in railroad business. Important trusts had been placed in his hands, and he had so managed these trusts as to win the confidence of those so placing them. He was selected by Messrs. Kennedy & Co., who had had experience in railroad matters in Iowa, to act as receiver of these properties in Minnesota, and their selection was approved by the circuit judge of this court, himself a citizen of Iowa, and doubtless familiar with Mr. Farley's reputation. Now, the agreement was, as claimed, to purchase the outstanding bonds, or a majority of them, and, as complainant expresses it, inherit the property at the foreclosure sales. It was Mr. Farley's duty as receiver not merely to preserve the property in his hands, but to so manage it as to make it as productive as possible, and so realize as much as possible for the bondholders. Is it probable that a man so situated, with his years of experience in railroad foreclosures, and owing such a duty to the bondholders, would enter into a secret arrangement with third parties for the purchase of the bonds,—an arrangement which made it for his interest to reduce the market price of the bonds? Is it probable that such a man would deliberately cloud the record of his life, and burden the discharge of official duty with the adverse and potent and ever-pressing weight of private pecuniary interests? The question we are now considering is not that of his present testimony, but, standing back in the year 1876, would it then have easily been believed that Mr. Farley had entered into such a contract? Supposing the situation changed, and in 1876 an effort had been made to remove him from the receivership on the testimony of two witnesses that he had made such a contract, he positively denying the same, would not the court have been slow to believe him guilty of such a dereliction of duty? Would not the presumption of innocence, strengthened by all the weight of a long life of probity, have borne strongly in his favor? Is the probability any less when it is he that affirms and another that denies? Nor is this a case where some merely technical rule is infringed,—something whose wrong only a legal mind can perceive. The commonest intellect is not too dull to perceive that such a contract produces a constant conflict between duty and private interests. Officially it was his duty to improve the property, and increase the value of the bonds; as a proposed purchaser it was his interest to deteriorate the property, and decrease the value of the bonds. So I affirm that all the probabilities make against the story of the contract.

Again, looking further into the contract, it appears that complainant was to furnish no money and assume no pecuniary risk, all of the money to be furnished or procured by Messrs. Hill and Kittson, his contribution being limited to information, advice, and assistance. Now, the scheme was no trifle, and could not be carried into effect without large sums of money. A majority of twenty-eight millions of bonds cannot be bought for a song, even if they are sold at a large discount. In fact the prices at which they were bought ranged from 13 $\frac{1}{4}$ to 75 per cent. Now, it

is common experience that, when undertakings are entered into in which large sums of money are needed, the men who furnish the money and assume the pecuniary risks take the lion's share of the profits, and the one who furnishes none must be a very potent factor in carrying into success the undertaking before he receives an equal share. And here may well be quoted the exact language used by the parties, as testified to by Mr. Fisher:

"Mr. Farley told Mr. Kittson that he had no money. He said: 'I have no money, Mr. Kittson.' Mr. Kittson said: 'We do not want you to furnish any money.' Mr. Hill says: 'Certainly not.' Then Mr. Hill explained how they would get the money. He went over the thing again,—about Mr. Smith, and his relations, etc., with Mr. Stephen, the president of the Bank of Montreal; and it was through that channel that they were going to get the money. Then Mr. Kittson says: 'We will furnish the money, Mr. Farley. We don't want any money from you. What we want of you is your judgment and advice, and we will attend to the rest of it.' "

And to the same effect, though not so fully in detail, is the testimony of the complainant himself. This leads us to inquire what, according to complainant's account, was the consideration, and what were the inducements which led to this promise of an equal interest? It is claimed that complainant originated the scheme; that he was possessed of information not belonging to defendants in respect to the properties, their incumbrances, the holders of the bonds, and the prices at which they could be obtained, and had means and facilities for aiding in the negotiations, not accessible to the defendants; that he had acquired a large reputation as a railroad manager, which rendered his connection with the project one of value. Both complainant and Mr. Fisher, in their account of the various interviews which led up to the agreement, and the one in which the agreement was consummated, picture themselves as originating the enterprise,—as first suggesting it to defendants,—and the latter as having or pretending to have their attention called for the first time to the matter. So that the complainant would have it that the defendants, realizing that he was the originator of the scheme, felt themselves under a sort of moral obligation to take him in as an equal partner. As against this suggestion of reasons and considerations, the defendants show by testimony independent of themselves, and which is not open to suspicion, that in 1873 and 1874—more than two years before complainant claims to have suggested the scheme—Donald A. Smith, the representative of the Hudson Bay Company's interests in this country, anxious to have a line of railroad extended northward and in the direction of his company's property, had his attention called to this incomplete line from St. Paul northward towards that property; that at his instance Messrs. Hill and Kittson made investigations as to the situation of the railroad, its prospects and incumbrances, and that the acquisition of this property was by the defendants a matter of consultation and consideration in connection with Donald A. Smith for a couple of years before complainant says he suggested the matter. It is not pretended that during these years any definite scheme as to the acquisition

of this property was determined upon between these parties; and for that matter complainant does not pretend that in the interviews between himself and defendants a definite plan of acquisition was determined upon, but simply that the bonds were to be acquired and the purchasers to inherit the property at the foreclosure sale. It is strange that the defendants, who for two years had been considering the matter, and had availed themselves of the opportunities furnished by the records of the courts to ascertain the amount of the incumbrances, the residence of the Dutch committee, and the number of bonds held by it, whose business relations in a transportation way with the railroads enabled them to become fully acquainted with their condition, and whose attention had been directed to them by one who had a manifest interest as the representative of the Hudson Bay Company, should pretend to be, as complainant and Mr. Fisher assert, entirely ignorant, and act as though the suggestion was then first made to them. They certainly were not ignorant of the situation, and it is hard to believe that they pretended to be. Neither is any matter shown by complainant, of which he had knowledge, which was not a matter of public knowledge through the records of the court, and easily ascertainable from those records, and bond transactions and reports at a bank whose cashier was of Hill a special and intimate friend. To think for a moment that the picture drawn by the complainant of the magnificent scheme first unfolded before the astonished eyes of the defendants of the acquisition of the bonds, and through them of the railroad property, is, in view of the overwhelming testimony, most absurd.

As complainant did not first suggest the idea to defendants, as he was not possessed of information unknown to them, the further inquiry arises whether he had acquired such a reputation as a railroad manager as would lead defendants to divide the profits without sharing the risks with him, and here the question of the time at which the agreement was made becomes important. In their first testimony complainant and Mr. Fisher located the interviews, preliminary and final, in the months of August and September, 1876. Between the original and final interview much time elapsed. Complainant says: "From time to time, running through a good many weeks, Mr. Hill and Mr. Kittson continued to talk to me about this matter of purchasing the bonds;" and testifies that the interviews took place in August and September. Mr. Fisher shows that the time between the first and final interview must have been some weeks. He locates the first interview in August, saying that it was hot weather, and the final interview in September, when cold weather had begun, and when they were having a little fire. The complainant also volunteered this testimony, saying that he did not know whether it was important or unimportant, as transpiring at the first interview between himself and defendants:

"Mr. Kittson said: 'Mr. Farley, you are receiver under the court of one of these lines of road, and general manager of the other line under the trustees in possession, and, in order to succeed in this enterprise, it would be best for you not to be known in it, for here are the Litchfields and Mr. Bigelow

and Mr. Becker fighting for the possession of the property,'—as he called it 'fighting.' It was in the law business for the possession of the property. If it was known by these parties that you are interested in the purchase of the bonds, these parties would go into court, and ask for your removal; and in that event I wouldn't give a dollar for the whole thing.' Upon a moment's reflection, I thought Mr. Kittson was right about it, and then and there, with Mr. Hill, Mr. Fisher, and myself, it was sacredly agreed— (Objected to.) *Question.* State what was said by the parties. *Answer.* Mr. Kittson and myself agreed that that was the best plan to pursue; and Mr. Fisher, as a matter of course, had nothing to do with it, and Mr. Hill didn't object to it,—thought maybe it was a good thing. That was a very sacred point with Mr. Kittson clear through the whole transaction. He looked at it as very important."

Mr. Fisher also testified that defendant Kittson used this language:

"My recollection is that Mr. Kittson said that Mr. Farley— I wouldn't be positive about the exact words, whether he said he had made a great change in the property, or whether he said he had improved the property,—but that is the substance of it; that he noticed a change in the management; and my recollection is that Mr. Kittson also said: 'Between you and I, I didn't have much confidence in the former management.' I think Mr. Kittson said something like that also. I wouldn't undertake to give the exact words."

Now, Mr. Farley did not take possession under the trustees until October, 1876. He did take possession under the company in March, 1876, and, assuming that the language of the complainant was used through an inadvertence or a mere mistake of memory, and that the reference was to possession under the company, it shows that the conversation could not have been earlier than March 13th; and according to Mr. Fisher it was long after possession taken in March, and after Mr. Farley had made a great change in the property. Now, after this testimony had all been given with these particularities of date and weather and remarks, it appeared that in the latter part of March and the first part of April, which was immediately after Mr. Farley took possession as manager, Mr. Barnes, one of the firm of Kennedy & Co., and the president of the First Division Company under the arrangement between the stock and bondholders, visited St. Paul, to look after the property. And it further appeared from the complainant's own letter of June 3, 1876, that prior to that time the defendants had had a conversation with Mr. Barnes in reference to the purchase of these bonds, and that the conversation was so long prior thereto that the defendants were beginning to be worried in respect to the matter. This is his language:

"N. W. Kitson *is getting anxious about the Big Operation of* Getting control of 1st Div. Also Extension Lines. He can get the money. What do you think can be done, you have his proposition in your Memory. I would again say to you I think there is a big thing in the Main Line 3 and 6 million Bonds at their present Selling price. Yours &c. J. P. FARLEY."

This shows beyond any reasonable doubt that in March or April, and when Mr. Barnes was in St. Paul, defendants had to the knowledge of the complainant been talking to him as a representative of the Dutch committee in respect to the purchase of these bonds. What shall be said, therefore, as to the suggestion that Mr. Kittson was anxious that Mr. Farley be interested because of the great change he had wrought in

the property since his possession? What of the statement of Mr. Fisher that the first conversation was during excessively warm weather, and the final one weeks afterwards, when it had begun to turn cool, and they had fires?

Again, as appears from the above, it is incontestable that in the early part of 1876 defendants, Hill and Kittson, had some negotiations with the agent of the Dutch committee in reference to the purchase of the bonds. The final agreement for the purchase by the defendants, Hill and Kittson, with George Stephen and Donald A. Smith, was dated the 13th of March, 1878, and signed by the members of the Dutch committee on April 6, 1878. During these two years at least two written propositions or offers passed from Hill and Kittson to the Dutch committee, and negotiations, both by letter and telegram and orally, were carried on between these four parties and Kennedy & Co., the agents of the Dutch committee. During all these negotiations not a scrap of writing appears which shows that Mr. Farley had any interest. Neither the Dutch committee nor their agents knew that he was or claimed to be an associate. Messrs. Smith and Stephen, actively engaged in the negotiations, frequently communicating with Hill and Kittson, (with interests as between themselves understood, and finally settled by contract in writing,) neither knew nor suspected that Mr. Farley was in any way interested; and all the information which he had in reference to the transactions seems to have been acquired from Kennedy & Co., who had selected him as their representative in Minnesota, and from communications which they sent through him to Messrs. Hill and Kittson. Such ignorance on the part of these various gentlemen is, to my mind, strangely inconsistent with the existence of the alleged relation between complainant and defendants.

Again, after the final execution of the contract between the four associates and the Dutch committee in the spring of 1878, more than a year elapsed before the consummation of the transaction and the foreclosure sales in the spring of 1879. During this time, and in execution of the contract, the associates agreed to complete some unfinished portions of the road, and, to do this, orders of the court and the active co-operation of Mr. Farley as receiver were requisite. Mr. Farley seems to have been reluctant and slow, and the associates were frequently seeking through Kennedy & Co. to urge and accelerate his action. How inconsistent this is with the idea that all the while there was a partnership arrangement between him and Hill and Kittson. If he knew that he was a partner, and they knew he was a partner, would not their communications have been directly to him, and would anything more have been needed than a mere suggestion from them to him? Further than this, on February 22, 1879, after the contract had been executed between the associates and the Dutch committee, and the matter was coming on to final consummation, Mr. Farley writes this letter to Messrs. Kennedy & Co.:

"I have your confidential favour 18th for which I am under many Obligations. I would be pleased to have your understanding of the contract as to the Number of Bonds of each Issue Mess. Hill & Kitson and their associates are under obligation to take under the arrangement. You will understand

the Drift of my Inquiries. *It has been more than intimated to me that Mess. H. & K. would be pleased to make me interested in there Shares of what may result from this trade in order to have me help them work the matter through in Minnesota, care for the property, &c. My judgement is, some of these Bonds is cheap at the price named, and others very much higher than I would pay.*

Yours &c.

J. P. FARLEY."

To which Mr. Kennedy, on February 25th, sent this reply:

"We think it will pay you to take an interest with K. & H. and we are glad to hear that they have offered it to you. The purchase has now been concluded; we have so advised the committee at Amsterdam by cable today, and it will be publicly announced there to-morrow morning."

On May 23d of that year complainant writes to John S. Barnes this letter:

"Since the election of Bigelow & Galusha as Directors in the New Company, Men of no Money, railroad experience or Influences, And myself left out in the cold, *I am forced to the conclusion that My time and claims on the St. Paul & Pacific is Short, I did expect better things of Hill and Kittson.* I had a talk with Jim Hill last Knight, He disclaims any intention on his part to ignore my Claims, but he is such a Lyer can't believe him. It is a matter of astonishment to every person in St. Paul to see the way Jim handles Mr. Stephens. He is notoriously known to be the biggest lier in the state. Mr. Kitson has told me time and again that Jim Hill was the worst man he ever saw. Upham, P. H. Kelly, Thompson and in fact every citizen in St. Paul if they would Speak their Sentiments would all tell the same story. *You Must Not blame Me if I should try to get even with Jim Hill before I leave here.*"

And on May 29th, to Mr. Kennedy, this letter:

"Your letter 26th reached me this morning; fortunately we had just made arrangements to send the Car to Chicago with Mr. Smith and Lord Elveston. I hope it will reach there in time for you and your party. Pressing Business compells me to be absent a few days. I have had some sharp talk with Mr. Hill. *If he Persists in his Present course to Ignore all my claims to Share in the honours or profit to some small degree, He may have cause to Regret it, I hope to be back early next Week.*"

It is impossible, in my mind, to reconcile the statements in those letters with the idea that all the while there was a subsisting and recognized agreement for an equal share in the enterprise. No man who was an equal partner would talk in respect to his associates and the transaction in the way Mr. Farley does in these letters. If there were nothing else in this case to invalidate his claim to a contract for an equal share with the defendants, these letters would stand, in my mind, as a convincing answer thereto.

Another matter, earlier than these letters, also deserves notice. At the time Mr. Farley took possession under the company as general manager, Mr. Hill, or the firm of which he was a member, had two contracts with the railroad company which were claimed to be very profitable to the contractors and disadvantageous to the company. Within a few weeks after taking control, Mr. Farley canceled these contracts. The later testimony of Messrs. Farley and Fisher necessarily locates the date of the agreement close to the time of Mr. Farley's taking possession.

It is inconceivable that Mr. Farley, having entered into, or proposing to enter into, an agreement with Messrs. Hill and Kittson for the purchase of these bonds, should cancel contracts supposed to be beneficial to one of his associates. If he thought the contracts were injurious to the company's interests, his interest in the purchase of the bonds at as low a price as possible would have compelled a continuance of the contracts with whomsoever they were made. And his new relations with Mr. Hill as an associate would in like manner tempt to forbear offending him by canceling so beneficial a contract.

The length to which I have already extended this opinion forbids my notice of other matters, such as the discrepancy between the facts as alleged in this bill, and those stated in the petition filed in 1879, in a case in the state court, which the supreme court of the state held insufficient to make a cause of action, (*Farley v. Kittson*, 6 N. W. Rep. 450;) the testimony of plaintiff and Mr. Fisher as to a conversation with Mr. Kittson in respect to a newspaper article in February, 1878, which, when shown to be impossible by the absence of Mr. Kittson in New Orleans, they attempted to connect with a prior newspaper article in the previous fall; and the conversations had in the presence of the judge of this court, in the presence of Mr. Farley, after the execution of the agreement to purchase between Mr. Hill and his associates and the Dutch committee,—each of which makes against the claim of an alleged agreement. There are many of these matters, some of them trifling, it may be, but by their very multitude carrying conviction. The surroundings are potent against the truth of complainant's claim. Very likely many of the things testified to by Messrs. Farley and Fisher were said by Messrs. Hill and Kittson to them. Their business relations were such that they were often brought in contact, and doubtless had frequent conversations; but I doubt not that whatever they have truthfully said were the gathered fragments of many talks,—mere *dissecta membra*. I cannot believe from the testimony that at any time the complainant and the defendants had that full distinct talk which complainant and Mr. Fisher testified to, or that there was ever a definite coming together of the minds of the parties in reference to an agreement for the purchase of these bonds. In other words, I think that Mr. Farley, as a receiver, did not fail in his official duty, and, although such conclusion carries an imputation upon his recollection or veracity as a witness, it sustains his integrity as an officer. The contract as set forth in complainant's bill was never, in my judgment, entered into, and a decree must be entered dismissing the bill.

CRAWFORD v. EDGERTON.

(Circuit Court, D. Indiana. June 14, 1889.)

1. EQUITY—ACCOUNTING—CONDITIONAL SALE.

Plaintiff bought of defendant certain standing timber, to cut into hoops, to be paid for at a certain fixed time. There was a dispute as to the measurement, plaintiff claiming that he had paid for all timber cut. Defendant replevied certain hoops, alleging they had not been paid for, and, on judgment in his favor, plaintiff, having sold the hoops, paid defendant their value, and sued defendant for the amount paid in excess of the balance alleged by plaintiff to be due. *Held*, that the money paid to defendant took the place of the property, and was subject to the same remedies, and plaintiff was entitled to an accounting.

2. ESTOPPEL—BY JUDGMENT.

The judgment in replevin did not estop plaintiff from prosecuting such an action.

In Equity. Bill for an accounting.

On the 29th of August, 1878, the complainant and one Crandall entered into a contract with the defendant, the provisions of which, material to an understanding of the case, are these:

"(1) For the consideration and upon the conditions hereinafter expressed, said E. agrees to sell and license said C. & C. to cut and make into hoops and remove from his land * * * the black ash trees suitable for racked hoops; said timber to be all cut, worked up, and removed from the land as rapidly as reasonably practicable, and within four years from the first day of Sept., 1878. (2) Said C. & C. are to pay said E. for said ash hoop timber one dollar and forty cents per 1,000 feet of timber cut, suitable for hoops, log measure; and all the black ash timber that it is practicable to use shall be taken as it runs, and is to be worked up and accurately measured, and a correct account and statement of all measurement is to be kept and rendered to said E. upon his demand, * * * it being understood and agreed that the entire amount of timber cut on said land for hoops shall be fully paid for on or before Sept. 1st, 1882; and all timber got out and not paid for shall be and remain the property of said E. until paid for. (3) In consideration of the agreement and license aforesaid, said C. & C. agree forthwith to commence and prosecute to completion, and complete by the first day of January, 1880, a good and suitable tram-road; [on said land,] * * * and said C. & C. are to have the free use of said tram-road to execute the purposes of this contract until said Sept. 1st, 1882, and for one year thereafter, in so far as the use of the same may not interfere with the use by said E. of his land and timber, * * * " (6) Default in performance or violation of any of the terms of this contract by said C. & C. shall work a forfeiture thereof by them at the option of said Edgerton, and entitle him to full indemnity in damages. * * *

Additional facts appear in the opinion.

A. A. Chapin and T. E. Ellison, for complainant.

R. C. Bell and S. L. Morris, for defendant.

WOODS, J. The original contract between the parties is not simply a license, but an agreement by Edgerton to sell (as well as license the purchasers to cut, etc.) "the black ash trees suitable for racked hoops," upon the described land, "to be all cut, worked up, and removed from

the land as rapidly as reasonably practicable, and within four years from the 1st day of September, A. D. 1878." And by the force of the clause in respect to the use of the tram-road, the time for removal, it is clear, was extended to September 1, 1883. The sale, however, was not absolute, but upon condition that the title of the timber, though cut and worked up, should remain in Edgerton "until paid for." A further plain effect of the agreement is that it shows a sale of all the timber on the land suitable for racked hoops, and, while Crawford and Crandall perhaps had no right to cut after September 1, 1882, they were bound to cut it all before that date, and remove it within a year thereafter, and for a failure either to cut or remove, or both, Edgerton might have claimed damages, if any resulted. He could probably, by consenting to an extension of time for cutting and removing, have insisted upon payment for all timber left standing, as if it had been cut within the stipulated time. In other words, notwithstanding the expiration of the time, he might have insisted that all the timber embraced in the contract should be paid for at the stipulated price, and, if he suffered damage by the purchaser's delay to cut and remove, might have claimed that also. To say the least, the right to cut continued until September 1, 1882, and all efforts before that date to declare a forfeiture of the contract were unfounded and nugatory.

The merits of the case, in my judgment, after carefully reading all the evidence, including letters and suggestions of counsel, are in a small compass. There was a dispute between the parties in respect to the rule of measurement, Crawford and Crandall claiming Doyle's rule, and Edgerton insisting upon Scribner's. By Doyle's rule, the timber cut and removed had been paid for; but by Scribner's, 150,500 feet had not been paid for. Edgerton replevied a quantity of hoops, valued at \$843; and at the trial, under the instructions of the court, there was a finding for Edgerton upon the theory that Scribner's rule was the true rule, and consequently, the timber in the hoops not having been paid for, the title of the hoops and the right of possession were in Edgerton, and he had a verdict for the return of the property or the payment of its value, assessed at the sum stated. Crawford and Crandall, having sold the hoops, paid into court or to Mr. Edgerton their value, and brought this action, after demand, for the recovery of the excess over the amount due and unpaid to Edgerton for the timber. If, in pursuance of the judgment in replevin, Crawford and Crandall had returned the property, it is, I suppose, beyond dispute that, upon payment of the balance due Mr. Edgerton, they would have been entitled to retake possession; and my judgment is that the money paid upon the judgment took the place of the property, and was subject to the same rights and remedies. The judgment settled nothing to the contrary, and constitutes no estoppel against an inquiry into the facts and to an adjudication according to the equities of the case. Any bailee or trustee, entitled to the possession of property, securities, or money, may recover from the owner, who has taken unlawful possession, the money or property or value thereof if converted, but after such recovery it is clear that the

rights and the title of the bailee or trustee, as against the owner, would be the same as if there had never been occasion for such action and the judgment never rendered. Decree for plaintiff.

GEST v. PACKWOOD *et al.*, (ABELL, Intervenor.)

(Circuit Court, D. Oregon. August 5, 1889.)

1. MORTGAGES—AGREEMENT FOR SECURITY.

A written agreement for security on certain property for the payment of a debt is in equity a mortgage, and will be enforced as such against all parties to the agreement, and those who have notice of it.

2. SAME—LEASE AS MORTGAGE—RIGHTS OF PARTIES.

R. gave his notes to C. & P. in payment on the purchase of a mining ditch and grounds, and agreed in writing with them that, if such notes were not paid when due, he would reconvey the property to them as security for their payment. The notes not being paid, R. gave C. & P. a lease of the property, with a right to apply the net profits and proceeds from year to year on these notes. *Held (a)* that, the agreement to give security being in equity a mortgage, the lease, with a pledge of the rents and profits, was accepted as a fulfillment of the agreement, and the agreement and lease, taken together, created a continuous lien on the property in favor of the payee of the notes or his assigns from the date of the agreement; *(b)* that the assignment of the rents and profits of the property to the lessees for the payment of the notes created a lien on the body of the property, which, in case the rents and profits are insufficient to pay the same, may be enforced in equity; *(c)* during the possession under this lease the lessees were not authorized to charge the property with the expense of operating or improving it, and, if the expenditures in any one year exceeded the receipts, such excess was their personal debt.

3. EQUITY—STATUTE OF LIMITATIONS.

In the consideration of purely equitable rights and titles courts of equity are not governed by the statute of limitations.

4. FEDERAL COURTS—JURISDICTION—CITIZENSHIP—VENDEE OF EQUITABLE INTEREST.

The sale of an equitable interest in land is not the mere assignment of a right of action thereabout, and in a suit in a national court by the vendee, to establish his right therein, it is not material what the citizenship of his vendor is.

5. SAME—PARTIES—JUDGMENT IN STATE COURT.

The plaintiff in a decree in a state court, given in a suit to enforce the lien of a mortgage on real property, is a proper party to a suit in a national court to enforce an alleged prior lien on the same property, and in such suit the validity and effect of such mortgage and decree may be inquired into, and determined as an original question.

(Syllabus by the Court.)

In Equity. For former report, see 34 Fed. Rep. 368.

Zera Snow, for plaintiff and Abell, intervenor.

Charles P. Heald, for defendant Grover.

Sidney Dell, for defendant Packwood.

DEADY, J. This case was heard on the bill and supplemental bill of the plaintiff Gest, the cross-bill of the intervenor, Abell, and the answers thereto of the defendants Packwood, Grover, and Emma B. Carter, and sundry stipulations as to matters of fact. From these it appears that on February 15, 1873, the Eldorado ditch, and certain mining property connected therewith, situated in Baker county, Or., and then owned by the Malheur & Burnt River Consolidated Ditch & Mining Company, and hereafter called herein the "Malheur Company," was sold to T. J. Carter and W. H. Packwood for \$43,000, on two judgments obtained on May 20, 1872, in the circuit court of the state for said county,—the one by C. M. Carter, for \$20,330.77, and before that date assigned to T. J. Carter, and the other by Packwood, for \$17,362.18; in the aggregate, \$37,692.95.

A certificate of sale was given by the sheriff to the purchasers, in which the property is designated as the "Eldorado Ditch," "particularly described as follows: Commencing at or near Malheur City, Shasta mining district, Baker county, Oregon, and extending to the North fork of Burnt river, via Kuntz creek, Deer creek, Rock creek, East Camp creek, West Camp creek, Bull's run, and Coyote creek, together with all the water-rights and franchises thereunto belonging, or in anywise appertaining thereto;" and on May 23, 1873, at Baker City, the purchasers assigned said certificate to Arthur Rice, by the following indorsement, written over their hands and seals: "For value received, and in accordance with an agreement of even date herewith, we hereby assign the within certificate of sale to Arthur Rice." Said ditch was then about 80 miles in length, and had a capacity of about 1,200 miner's inches of water.

On the same day an agreement—the one referred to in the assignment—was made by Carter, Packwood, and Rice, over their hands and seals, in the presence of two witnesses, in which, after reciting the recovery of the judgments aforesaid, the sale of the Malheur Company's property thereon, and the confirmation thereof, it is stated that Carter and Packwood have sold and bargained, and by these presents do hereby sell, bargain, and convey, unto "Rice, the certificate of such sale;" that in consideration thereof Rice "agrees to execute and deliver" to Carter and Packwood certain promissory notes, aggregating in amount \$29,700, indorsed by Clark, Layton & Co., and payable as follows: To Carter, four notes, one for \$8,000, one for \$4,000, and two for \$3,000 each, to become due on the 23d of August, September, October, and November, 1873, respectively; to Packwood, four notes, one for \$2,500, one for \$3,500, one for \$3,000, and one for \$2,700, to become due on the 1st of July, October, and December, 1873, and March, 1874, respectively; that "Clark, Layton & Co. shall also indorse and acknowledge themselves bound by the terms of this agreement;" and that "in case of the non-payment of any of said notes" said Rice "shall reconvey" the property to Carter and Packwood, "by good and sufficient conveyance, to be held as security for the payment of said notes."

On the same day the notes were made, indorsed, and delivered as provided in the agreement, and an indorsement made on the latter and

signed by Clark, Layton & Co. to the effect that they were the indorsers of the notes, and "acknowledge the binding force of the within agreement upon us, as such indorsers."

In all this transaction it appears that Rice was acting for Clark, Layton & Co., as well as himself, and that at the date of the assignment of the certificate and sale of the property to Rice he paid Carter and Packwood on account thereof, in addition to the notes given as aforesaid, \$10,000 in cash.

On July 21, 1873, no redemption having been made from the execution sale to Carter and Packwood, they wrongfully, and without the knowledge or consent of Rice, obtained the sheriff's deed to the property, which fact coming afterwards to the knowledge of Rice, he had the execution of said agreement on December 11, 1873, duly proved by the oath of a subscribing witness thereto, and on the 15th of the same month the agreement was duly recorded in the record of "Leases and Agreements" for said county; and on December 3, 1874, he caused the certificate of sale to be duly recorded in the record of "Sheriff's Certificates" for said county.

On the execution of the agreement of May 23, 1873, Rice went into the possession of the property, and operated it openly and notoriously until May 4, 1874, and improved and enlarged the same at a cost of near \$15,000.

On May 4, 1874, a large portion of the indebtedness evidenced by the promissory notes mentioned in the agreement of May 23, 1873, being unpaid, Rice and Clark, Layton & Co. of the first part, and Carter and Packwood of the second part, for the purpose of further securing the payment of the unpaid portion of said notes and other indebtedness of said Malheur Company, and establishing certain priorities in the payment thereof, made an agreement, in which it was recited, wrongfully, however, that the parties of the second part were then "the owners in fee" of the property in question; and also that on May 23, 1873, they agreed to sell the same to the parties of the first part for the consideration therein mentioned, and "delivered the possession" thereof to them, and that the parties of the second part were to convey the property to the parties of the first part on the payment of said notes; that the latter, "in addition to the possessory title to said ditch property under said agreement" of 1873, have other mines and property in the vicinity, and particularly described in Schedule A, annexed hereto.

It is then stated in the agreement that, in consideration of the premises and the covenants of the parties of the second part, the parties of the first part "hereby demise, let, lease, and surrender possession, and by these presents have demised, let, leased, and surrendered the possession, to the parties of the second part, of all of said property, to have and to hold the same from the date hereof, during the ensuing year, and from year to year thereafter, until the notes and demands, debts and judgments, hereinafter mentioned shall have been paid, the parties of the second part yielding and paying, as rent therefor, the net proceeds and profits of water sales from said ditches, and proceeds and profits of the

workings or sales of said mining grounds, to be accounted for monthly on a gold coin basis during the mining season," to J. W. Virtue, as trustee, who shall apply the same on the debts due to the parties of the second part and others, as set forth in Schedule B, annexed to the agreement; that when said debts are paid by said "rents, proceeds, and profits," or otherwise, by the parties of the first part, the "lease shall determine," and the parties of the second part will surrender the possession of the property, and convey their interest in the same, to the parties of the first part.

Then follow, among others, clauses to the following effect: The party of the second part will construct a ditch from Eldorado ditch to the Middle fork of Burnt river, a distance of about six miles, with a capacity of about 300 inches of water, this extension to be made "as soon as snow goes off, and the cost to be considered a part of the expenses of operating said ditch this season," and, "when finished, to be considered a permanent improvement of Eldorado ditch, to inure to the benefit of the parties that are or may be entitled to said ditch property;" that the parties of the second part "shall use due skill, diligence, and economy" in operating said property, and "may be allowed a superintendent's salary not exceeding \$2,000 per annum, to be considered as a part of the expenses of operating the property during the lease;" that if any of the debts mentioned in Schedule B, as due T. J. Carter, W. H. Packwood, J. W. Virtue, and J. A. Packwood, have passed to other parties, and the parties of the first part are forced to pay them * * * in any other manner than out of the rents and profits and proceeds of the property herein mentioned, * * * the trustee shall apply the said rents and profits coming into his hands to reimburse the parties of the first part for such amount so paid * * * at the time and in the order set forth in said Schedule B; that the parties of the first part do not assume the payment" of said debts "in any other manner than out of said net rents, profits, and proceeds of said property, as fast as the same may accrue in the hands of the trustee."

Carter and Packwood went into possession under this agreement, and operated the ditch until 1880, when Carter died, and the possession and operation of the property was continued by Packwood until the appointment of a receiver on May 9, 1887.

On November 2, 1878, this suit was commenced by the plaintiff, Gest, who is a citizen of Illinois, and by sufficient mesne conveyances was then and now is the successor in interest of Rice & Clark, Layton & Co., against Carter and Packwood, for an accounting, and a conveyance of the legal title of the property wrongfully obtained from them by the sheriff.

Subsequently, on March 31, 1879, the plaintiff, by leave of the court, amended his bill, so as to make L. F. Grover, William S. Ladd, and W. J. Leatherwood, parties defendant, with appropriate allegations and prayers, to the end that a certain mortgage on the property then held by Grover, and two judgments held by Ladd and Leatherwood, respectively, against Carter, might be declared of no effect as against the right and interest of the plaintiff in the property. In due time the bill was taken

for confessed as against these defendants. Carter and Packwood answered, admitting the allegations of the bill generally, but alleging that the sheriff's deed was made to them without solicitation, because "they were the purchasers of the property," and stating an account, from which it appears that the expenditures incurred in the operation of the property and the construction of the extensions to the ditch largely exceeded the receipts; and thereupon the case rested until the appointment of the receiver. On January 31, 1888, Henry C. Abell, who is a citizen of Illinois, intervened, by leave of the court, and filed a cross-bill, setting up that he was the owner of the notes numbered 1 and 2 in Schedule B, for \$3,000 each, made in 1873, and payable to Carter on October 23 and November 23, 1873, respectively; and alleging that as such owner he had the first lien on the *corpus* of the property for their payment, which he asked might be enforced. On January 21, 1888, the suit was revived against Emma B. Carter, the widow and successor in interest of T. J. Carter, who answered, admitting the allegations of the bill, and submitting herself to the judgment of the court.

By the answers of Packwood to the bill and cross-bill it appears that during the period he was in possession the expenditures exceeded the receipts by \$36,586.51, for which sum he claims a first lien on the property. It also appears that some of this expenditure was caused by the construction of new or extension ditches, and that in the year 1874, when the extension to the Middle fork of Burnt river was made, as provided in the agreement of that year, the receipts were \$12,235.48, while the deficit was \$15,036.74. And it also appears that in the years 1876, 1878, and 1879 the receipts exceeded the expenditures by \$828.17, \$5,001.04, and \$2,842.66, respectively, or \$8,671.87 in the aggregate.

Before the making of the agreement of 1874, the note for \$2,500 mentioned in the agreement of 1873, and payable to Packwood on July 1st of that year, was paid by Gest's predecessors in interest, and since the making of the same and before the commencement of this suit they paid on the notes given in 1873, and set out and numbered in Schedule B, as follows:

No. 3, to Packwood, due October 1, 1873,	-	-	-	\$ 3,500 00
No. 4, " " (\$3,000,) " December 1, 1873, -	-	-	-	2,951 34
				<hr/>
				\$ 6,451 34
No. 6, to Virtue, due October 23, 1873, -	-	-	-	2,200 00
No. 15, to Carter, " August 23, 1873, -	-	-	-	8,000 00
No. 16, " " " (\$4,000) September 23, 1873, -	-	-	-	1,500 00
				<hr/>
Total amount paid, -	-	-	-	\$18,151 34

Soon after the delivery of the notes to Carter and Packwood, under the agreement of 1873, and before the making of that of 1874, Carter indorsed the notes now held by Abell, and numbered 1 and 2 in Schedule B, and delivered them to his brother, C. M. Carter, on account of his indebtedness to the latter, who thereupon indorsed the same, and delivered them to the First National Bank of this city as security for advances

then and to be made, where they were held and remained until they were transferred to Abell for a valuable consideration, in November, 1886, indorsed in blank by T. J. and C. M. Carter. On July 6, 1887, C. M. Carter was adjudged a bankrupt in the United States district court for this district, and by the order of said court the interest of said Carter in said notes was released to said bank on account of the indebtedness of the former to the latter, then amounting to \$8,200, with interest. Prior to Carter being adjudged a bankrupt, and after the transfer of the notes to the bank, Carter assigned his interest therein to Grover, subject to the right of the bank, and so notified the latter.

On January 4, 1874, T. J. Carter conveyed his interest in the undivided half of the property to his brother, C. M. Carter, by a deed of quitclaim, as security for an antecedent debt of \$30,000, evidenced by his note of that date, payable in one year thereafter, with interest at 1 per centum per month, which mortgage was duly recorded on April 17, 1874. C. M. Carter took said mortgage with knowledge of the agreement of May 23, 1873, and the possession of the property by Rice thereunder. On April 17, 1876, C. M. Carter assigned this note and mortgage to his brother-in-law, L. F. Grover, in payment of an antecedent debt of \$6,700, who took the same with the like knowledge of Rice's interest in and possession of the property that his assignor had.

On February 8, 1879, Grover brought suit in the state circuit court for Baker county to enforce the payment of said note by the sale of the mortgagor's interest in said property, wherein, on May 19, 1879, he obtained a decree against T. J. Carter for the amount of the note and interest, which decree was therein declared to be a lien, on the premises from the date of the mortgage. The sale of the property on this decree was enjoined by order of this court on July 21, 1879.

On October 21, 1887, the defendant Grover, by leave of the court, filed a plea to the bill, to the effect that he is a *bona fide* purchaser for a valuable consideration without notice, and an answer in support thereof. On argument the plea was held bad, because the consideration between Carter and Carter and the latter and Grover was only an antecedent debt, and the quitclaim to Grover's assignor was notice to him and his assigns that he purchased nothing but what his vendor had. 34 Fed. Rep. 368.

Grover then had leave to answer over, but the answer contains nothing material beyond what was in the plea and answer, except the statute of limitations, which will be noticed hereafter.

Packwood admits the case made in the bill and cross-bill, so far as the execution of the two agreements and the making and delivery of the several notes thereunder are concerned; and the transfer of those numbered 1 and 2 in Schedule B to the plaintiff in the cross-bill of Abell. But he contends that the agreement of 1874 created a trust of which he and Carter were the trustees, and Rice and Clark, Layton & Co. the beneficiaries; that as such trustees they had a right to charge the property with the necessary cost of operating it, and that the excess of expenditures so incurred over receipts are a first lien on the property. On this

theory they seem to have incurred indebtedness right and left, and to have been trusted by the public without stint.

But there is nothing in the nature of the transaction nor in the language of the instrument that gives any countenance to this proposition. The agreement is a lease in which Carter and Packwood are the lessees, and Rice and Clark, Layton & Co. are the lessors. The lessees agree to pay the lessors, as rent for the property, "monthly, during the mining season," the net profits and proceeds of the property. It is styled a "lease" in the body of the writing, and the operative words "hereby demise, let, lease, and surrender possession," are those of a lease. It is not only a "lease," but only a lease "from year to year," to continue, indeed, until certain debts are paid by the rent, at the option of the lessees. Therefore the deficit which the lessees have made in the operation of this property is their personal indebtedness, and they alone are responsible for it. The remedy of the lessees, if they found they could not operate the property with profit or without going in debt, was to surrender it to the lessors, which they were at liberty to do at the end of any year after it came into their possession. But as long as they operated it each year's operations stood by itself. If there was any profit, the lessees were bound to pay it over to Virtue, the trustee for the lessors, "month by month, during the mining season" of each year. The surplus of one year cannot be applied on the deficit of another. The deficit of 1874, even if caused by the construction of the extension of the ditch that year, must be borne by the lessees. True, they were authorized to make this extension by the agreement of 1874, and provision was made therein that the cost of such construction should be considered a part of the expenses of operation for that year. The necessary implication from this limitation, as well as the manifest purpose and intent of the whole contract, is that the lessees were not authorized to make any other extension of the ditch at the expense of the receipts or proceeds of the property, and this only from the receipts of that year.

It follows that the surplus of receipts over expenditures in the years 1876, 1878, and 1879, amounting to \$8,671.87, are net profits, and should have been paid over to the trustee and applied on the notes of the lessors, as provided in the agreement of 1874. And for the purposes of this case equity will consider that done which should have been done. This surplus will then be treated as having been applied on the notes first due, but still in the hands of Packwood or Carter. To apply it on notes previously assigned by them, as notes 1 and 2, would give them the benefit of it twice. Having already appropriated this surplus to their own use they can only be made to account for it by applying it on such of the notes as have not been assigned. These are notes 4 and 5, payable to Packwood, December 1, 1873, and March 1, 1874, respectively. On note 4 the sum of \$2,951.34 was paid by Gest's predecessors in interest, leaving \$38.66 due thereon. Note 5 is for \$2,700, which makes \$2,738.66, plus the interest thereon. The surplus applied in payment of this amount as and when it accrued will

much more than satisfy it. The amount due on these notes, less the payment on 4, must therefore be considered paid at the time this surplus accrued, and should have been paid over to the trustee.

This leaves notes 1 and 2 unpaid in the hands of Abell, for which he claims the first lien on the property. Gest, as the successor in interest of Rice and Clark, Layton & Co., also claims a lien on the property for the sum of \$20,651.34, plus interest at the rate of 10 per centum thereon from the date of the filing of the bill, which is the sum theretofore paid by said Rice and Clark, Layton & Co., on notes 3, 4, 6, 15, and 16, under the clause in the agreement of 1874 providing, in effect, that, if they paid any of these notes otherwise than from the rent of the property, they should be subrogated to the rights of the creditors thus paid, and be reimbursed out of the net profits and proceeds, according to the priority of the debt thus paid.

By the purchase of the property at the sale on execution, Carter and Packwood acquired an estate or interest in the premises which could be sold and passed to others. *Page v. Rogers*, 31 Cal. 305. Unless redeemed within the time prescribed by statute, they were entitled to a conveyance of the legal title to the property, and in the mean time were entitled to the possession thereof. Comp. of 1887, §§ 304, 307.

The agreement of 1873, together with the formal assignment of the certificate of sale, and the possession taken thereunder, was in legal effect a sale of this property, with a complete right in the vendee Rice to demand and have the sheriff's deed thereto in place of the vendors. *Page v. Rogers, supra*. The purchaser at an execution sale may assign or dispose of his right thereunder, and it is the duty of the officer to make and deliver a deed to the property accordingly. *Voorhees v. Bank*, 10 Pet. 479, 1 McLean, 226.

By the wrongful conduct of the vendors they obtained the sheriff's deed, instead of the vendee. But equity will treat them as mere trustees of the legal title thereby acquired, for the benefit of the latter.

It was the evident intention of the parties to the agreement of 1873 that the notes given thereunder for the purchase price of the property should be secured by a lien thereon. To this end it is provided that in case of the non-payment of any of them the property shall be reconveyed to the vendors, "to be held as security for the payment of the same." Nor was it to be "reconveyed" absolutely, but only as "a security for the payment of the notes."

The contemplated contingency actually happened. Only the first note was paid when it became due; and the agreement of 1874, which followed, was the reconveyance or security, which the parties finally concluded to give and take. The provision in the agreement of 1873 was, in effect, a contract for a mortgage,—that the property should in some way be returned to the vendors as a security for the payment of the notes,—and the lease of 1874 was the fulfillment thereof.

As against the vendee the vendors had a lien on this property for the payment of these notes from the time of their delivery to them, which equity will treat as a mortgage. As was said by Mr. Justice STORY, in

Flagg v. Mann, 2 Sum. 533: "If a transaction resolves itself into a security,—whatever may be its form,—it is in equity a mortgage." To the same effect is 1 Jones, Mortg. § 168 *et seq.*; and 3 Pom. Eq. Jur. §§ 1235, 1237. The instances and illustrations given by Pomeroy "show," as he says, (section 1237,) "that the form is immaterial if the intent appears to make any identified property a security for the fulfillment of an obligation."

The agreement of 1874 does not abrogate or destroy that of 1873, or anything that was done under it, nor does it profess to. Notwithstanding the misrecitals in the former, the vendees under the latter still act and are treated as the practical owners of the property, and lease the same to the vendors, as a means of furnishing the security for the payment of the notes contemplated in the agreement of 1873. That security consisted of the possession of the property, with a right to operate it, and through the instrumentality of the trustee, Virtue, to apply the rents coming to the lessors to the payment of the notes in the order set forth in Schedule B. The one agreement is an addition to and fulfillment of the other, and they must be construed and have effect as *in pari materia*.

This security, as bargained for in the agreement of 1873, and furnished by that of 1874, was intended for the payment of the notes into whosever's hands they might come. It was given for the benefit of the notes, and not that of Carter and Packwood, or any other person, only as and while they were the holders of them. *Phelan v. Olney*, 6 Cal. 478; *Pattison v. Hull*, 9 Cow. 747; *Grattan v. Wiggins*, 23 Cal. 30.

On the transfer of any of the notes the security bargained for in the agreement of 1873 followed it as an incident of the debt, and, when the security was formally furnished by the agreement of 1874, it followed the notes in the hands of third persons in the order prescribed in Schedule B, unless indorsed without recourse, even if they were ignorant of its existence. *U. S. v. Hodge*, 6 How. 279.

The security bargained for in the agreement of 1873 was the reconveyance of the property sold, for the purchase price of which the notes were given. The security actually given by the agreement of 1874 was a lease from year to year, with a pledge of the net profits and proceeds of the property until the debts were thereby paid. This was a continuing pledge, so far as the lessees were concerned, as long as any one of the notes was unpaid. And in equity it will be considered, if necessary for the security or payment of the notes, as a pledge of the *corpus* of the property.

"An assignment of the rents and profits of land as security for a debt is another mode of creating an equitable lien on the land in favor of the assignee; and the assignment of a lease by way of security produces the same effect." 3 Pom. Eq. Jur. § 1237. In *Ex parte Wills*, 1 Ves. Jr. 162, Lord THURLOW, in speaking of an assignment of rents and profits as a security, said: "It is an odd way of conveying, but it amounts to an equitable lien." See 2 Story, Eq. Jur. §§ 1064, 1064a; 1 Jones, Mortg. §§ 162, 171; *Insurance Co. v. Stephens*, (Utah,) 15 Pac. Rep. 253.

In the latter case it was held that where a writing provided certain ad-

vances made to a mining company should be repaid out of "the rents, issues, and profits," and the same were not sufficient for that purpose, a suit might be maintained to subject the mining property itself to a lien for the payment of such advances.

This case is strongly in point. It appears that the mining ground on which the profits of this ditch depends is substantially disposed of and worked out; that the ditch itself has been allowed to fall into disuse and decay, and the profits derived therefrom cannot be made to pay the interest on the schedule debts.

It follows that Abell is entitled to enforce this lien against the property so far as may be necessary to secure the payment of notes 1 and 2, now held by him. And Gest, as the successor in interest of Rice and Clark, Layton & Co., has a lien on the property for the reimbursement of the amount paid by them on notes 3, 4, 6, 15, and 16 of the Schedule B.

Except as to note 6, for \$2,200, which was payable to Virtue, October 23, 1873, and was not mentioned in the agreement of 1873, the mortgage to C. M. Carter is subordinate to this lien. It is subsequent in point of time to the agreement of 1873, and must be postponed to the lien and security thereby created. But it is claimed that the agreement of 1873 was superseded by that of 1874, and the security provided by the latter substituted for the former, by which means the mortgage to Carter became the prior lien.

In my judgment there was no gap between the operation of the two agreements so as to give priority to the mortgage over the latter. The security for the payment of the notes was bargained and provided for in the agreement of 1873, which equity will treat as a mortgage. By the agreement of 1874 this bargain was completed by the creation of a specific security on the property, namely, a lease of the same with the right to apply, through a trustee, the rent in payment of the notes. There was no instant of the intervening time in which the lien was not in existence; and the agreement of 1874 did not create it, but only gave it specific form, and provided means for its discharge. The agreement of 1873 was, as now appears, duly proved and admitted to record before the execution of the mortgage; besides which the mortgagee had actual notice of the agreement of 1873, and the possession of the vendors under it; and his assignee, Grover, had the same notice.

But, the mortgage having been both taken and assigned for an antecedent debt, neither the mortgagee nor his assignee is a purchaser for a valuable consideration. Admitting, for the present, that the record of the agreement of 1873 was unauthorized, (*Gest v. Packwood*, 34 Fed. Rep. 371,) this circumstance is sufficient in itself to postpone the mortgage to the equities arising under the agreement of 1873, and recognized and provided for in that of 1874, in favor of the notes mentioned in the former, while in the hands of any one except the mortgagor, (*Bank v. Bates*, 120 U. S. 556, 7 Sup. Ct. Rep. 679;) and, the mortgage having been made by deed of quitclaim, the mortgagee and assignee thereby had notice that they only took what was left in T. J. Carter to convey, (*Baker*

v. *Woodward*, 12 Or. 10, 6 Pac. Rep. 173.) This was nothing but the dry legal title to the undivided half of the property, which in equity he held as trustee for his prior vendees under the agreement of 1873. See *Gest v. Packwood*, 34 Fed. Rep. 368, where this subject is considered at length on the plea of Grover to the bill.

And now it is said that this court has no jurisdiction over the Carter mortgage, because it has become merged in the decree of the state circuit court for the county of Baker, and thereby become a valid lien on this property from the date of its execution. The argument in support of this proposition seems to be based on the fact that section 720 of the Revised Statutes prohibits this court from granting a writ of injunction "to stay proceedings in any court of a state," except in bankruptcy proceedings. The decree in the state court was given by default. None of the parties to this suit, except Carter, were parties to that, and are not bound by the decree therein. This is not a suit to stay proceedings in the state court. The proceedings in that court were commenced after this suit was begun, and have long since terminated, unless the sale of the property by the sheriff is a part of such proceedings, within the meaning of the statute, which is not admitted. The sheriff and the defendant Grover appear to have been enjoined at an early day in the case, without objection, from making any sale of the premises under the decree of the state court. But the owner of the mortgage, and the plaintiff in the decree for its enforcement, or his assignee or vendee, if the decree had been assigned or the property sold thereon, is a proper party to this suit, in which the validity and effect of the mortgage and decree may be inquired into and determined as between the parties hereto, without staying proceedings in the state court.

The decree of the state court, as against the persons who were not parties to the suit therein, is of no more force or effect than the mortgage itself; and, if there had been a sale on it, the vendee thereat would have occupied the same position in this suit, if made a party to it, that Grover does now. The sale would only have passed the interest in the property conveyed by the mortgage,—the dry legal title to the undivided half of the property,—subject to all the equities existing between the mortgagor and his prior vendees.

The statute of limitations is pleaded to the cross-bill of Abell in the answers thereto.

In the consideration of purely equitable rights and titles equity acts in analogy to the statute, but is not bound by it. *Hall v. Russell*, 3 Sawy. 515; *Manning v. Hayden*, 5 Sawy. 379. The right of Abell, as the assignee and holder of notes 1 and 2 of Schedule B, to have the same first satisfied out of the property, is a purely equitable one, resting ultimately on the fact that by the agreement of 1873 an equitable lien or mortgage was created on the property as a security for their payment, which security was recognized and continued by the agreement of 1874, and which, on the failure of profits and proceeds, he is entitled in equity to enforce against the *corpus* of the property.

Abell's right to intervene in this suit, on leave of the court, by cross-

bill, is recognized in the courts of equity. It depends on the fact that, as the holder of the notes 1 and 2, he has a lien on the property which is the subject of the litigation. In this proceeding, and by this means, he may obtain the same relief as if he was an original party plaintiff. *Bronson v. Railway Co.*, 2 Black, 524; *French v. Gapen*, 105 U. S. 509; *Savannah v. Jesup*, 106 U. S. 563, 1 Sup. Ct. Rep. 512; *Williams v. Morgan*, 111 U. S. 685, 4 Sup. Ct. Rep. 638.

The only question in the case in this connection is, has Abell or his assignors been guilty of laches in asserting this claim, whereby it has become stale?

No claim of personal liability is sought to be enforced on these notes against any one. The direct remedy on the notes against the parties thereto is barred long since.

The relief sought is simply the enforcement of the lien on the property, created to secure their payment. This lien, in my judgment, is a *vivum vadium*, or living pledge, and continues as long as the pledge of "net profits and proceeds." This pledge had no defined limit of time, and could only terminate with the payment of the notes, or by the rescission of the agreement creating it, at the option of the lessees, who might refuse to continue in possession as such at the end of any year.

The notes have not been paid, and the lessees have not surrendered the lease; and, while Abell or his assignors might have sooner asserted their right to enforce the payment of the notes out of the *corpus* of the property, on the ground that the "net profits and proceeds" under the management of the lessees had proved altogether inadequate thereto, they were not, in my judgment, bound to do so.

On the final hearing it was claimed, on behalf of the defendant Grover, that the relief now sought by the plaintiff, Gest, in the supplemental bill, is inconsistent with the case made and the relief prayed in the original bill, and therefore cannot be allowed. For this proposition, *Shields v. Barrow*, 17 How. 130, is cited and relied on.

But no objection was made to the filing of the bill at the time the application therefor was made, and it is a question whether the objection does not come too late now.

But, waiving this, there is nothing in the objection. The plaintiff, Gest, finding from the answer of Carter and Packwood that there were no "net profits or proceeds" of the property, and that they claimed there was a large deficit, allowed the suit to rest for some years. Afterwards Abell was allowed to intervene for his interest, and file a cross-bill, and, it appearing that he was entitled to a sale of the property to enforce the payment of his notes, and it further appearing that in the mean time the property had so depreciated in value and productiveness that it could not be made to pay the whole of the indebtedness mentioned in Schedule B, the only relief which Gest could obtain, under the circumstances, was the reimbursement out of the proceeds of the property of the sum advanced by his predecessors in interest in payment of certain of the notes in said schedule, as provided in the agreement of 1874. The supplemental bill was allowed on the theory that it did not make a new case,

but would enable the court to give the plaintiff that measure and kind of relief which, under the circumstances, was proper and possible. *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771, is a late and instructive case on this subject, and very much in point.

There the bill alleged that a bond for a conveyance of land had been obtained from the vendor by fraud, and that the purchase price had not been paid according to the contract, and prayed that the bond might be canceled, for an account of the rents and profits and the amount paid on the purchase, that the title of the plaintiffs be quieted as against the vendee, and "such other relief as equity may require." At the final hearing the plaintiffs were permitted to amend the prayer of the bill, so as to ask in the alternative for a decree for the balance of the purchase money, and a lien on the land to secure the payment of the same.

On appeal, the supreme court affirmed the allowance of the amendment, saying, in effect, that it did not make a new case, but only enabled the court to adapt its relief to that made by the bill and sustained by the proof.

And, finally, it is now objected that the plaintiff is simply the last assignee of a contract or contracts for the title to, or interest in, real property; and, as it does not appear that all the assignors could have maintained this suit on the ground of their citizenship, he cannot do so. It was stated by counsel on the argument, and not denied, that as a matter of fact all such assignors had the citizenship to enable them to maintain this suit.

But it is not so alleged in the bill, which is drawn on the theory that the plaintiff is, and those through whom he claims were, successors in interest of Rice and Clark, Layton & Co., and not assignees of a mere right of suit on a contract to convey. And so the bill alleges that since May 4, 1874, the plaintiff Gest, "by a regular chain of conveyances and assignments," has acquired "all the right, title, and interest" which Rice and Clark, Layton & Co. then had in said property, or the rents, issues, and profits thereof. This being so, he is the owner of the property in equity, subject to the lease made to Carter and Packwood. The legal title was wrongfully obtained by the latter after their sale to Rice, and they hold the same in trust for their vendee. A sale and conveyance of the property to Gest under such circumstances, or of all the right, title, and interest of Rice and Clark, Layton & Co. therein, is the sale and conveyance of the beneficial interest in the property, and not the mere assignment of a right of action thereabout. *Manning v. Hayden*, 5 Sawy. 363; 1 Perry, Trusts, § 227. This author says:

"The right of a party who has been defrauded of the title to his land is not a mere right of action to set the deed aside, but it is an equitable estate in the land itself, which may be sold, assigned, conveyed, and devised."

See, also, *Bean v. Smith*, 2 Mason, 268; *McDonald v. Smalley*, 1 Pet. 620.

A decree will be entered that the property be sold by the master clear of all liens, claims, and incumbrances held, claimed, or owned by the

parties to this suit, or any of them, and that the proceeds of such sale be applied as follows:

(1) To the payment of the taxable costs and disbursements of the plaintiff and the plaintiff in the cross-bill, including any unpaid expenses of the receivership; (2) to the payment of the notes 1 and 2 to the plaintiff in the cross-bill, Henry M. Abell, with interest at the rate of 10 per centum per annum from date; (3) to the payment to the plaintiff, William H. Gest, of the sum of \$18,151.34, with interest at the rate of 10 per cent. per annum from the date of the filing of the bill herein, the same being the amount paid by Gest's predecessors in interest on notes 3, 4, 5, 15, and 16, in Schedule B of the agreement of 1874, and made and delivered in pursuance of the agreement of 1873; and (4) to the payment of the sum due the defendant Grover on the note and mortgage assigned to him by C. M. Carter, and the remainder of the notes in Schedule B, and not otherwise herein provided for, in equal parts; provided that note 6 in said schedule, payable to J. W. Virtue, on October 23, 1873, for \$2,200, be first paid to the plaintiff, Gest, with interest from November 2, 1878, out of said proceeds, equally with said note and mortgage.

The surplus of \$8,671.87 is hereby first applied on notes 4 and 5 in said schedule as of the respective years in which it accrued, and the remainder on the notes in said schedule not herein specially named and otherwise provided for, as therein numbered, and for all the exigencies of this suit, and the distribution of the proceeds of the sale herein, this surplus shall be taken and deemed to have been duly applied as herein directed, when and as it accrued.

BURT v. COLLINS *et us.*

(Circuit Court, N. D. Illinois. July 22, 1889.)

1. QUIETING TITLE—FRAUDULENT JUDGMENT AT LAW.

A bill in equity to establish a title acquired by purchase at an execution sale under a judgment by default in complainant's favor will not be entertained where the proof shows that the debt on which the judgment was obtained had been fully paid before the commencement of the action.

2. SAME—UNCONSCIONABLE SALE UNDER EXECUTION.

It is an additional reason for dismissing such a bill that the execution, which was for but \$1,000, was levied upon two separate parcels of land, worth in the aggregate \$25,000, and both parcels sold together and bid in by complainant for the amount of the judgment.

In Equity. Bill to remove cloud from title. On exceptions to master's report.

E. A. Sherburne, for complainant.

P. McHugh, for defendants.

BLODGETT, J., (*orally*.) In this case the master has filed a report finding that the complainant's bill is not supported by the proof, and that it should be dismissed for want of equity. The complainant has filed exceptions to the master's findings, and these exceptions have been argued at length in a brief filed in behalf of complainant. Without discussing at length the proofs in the case, I will briefly say that an examination of the proof satisfies me with the findings of the master. The master has traveled over an unnecessary area of ground in coming to his conclusions, but he finds that the proof on the part of the complainant, inasmuch as the complainant has the burden of proof, is not sufficient to entitle the complainant to the relief prayed for, and recommends that the bill be dismissed. I am of opinion that other reasons might be urged in support of the master's findings aside from those he has discussed in his report. The bill is for removing what the complainant calls a cloud upon his title to certain real estate in this city,—two separate pieces,—the title of the complainant having been acquired by the issue of a writ of attachment against the defendant Thomas F. Collins, as a non-resident of Illinois, to collect the sum of about \$905, alleged to be due and owing from said Thomas F. Collins to the complainant. The attachment was levied upon these two pieces of real estate, and with no personal service of process, and no appearance in the case on the part of the defendant Collins, jurisdiction was obtained by the publication of notice pursuant to the attachment laws of Illinois, and judgment taken by default, and an order for a special execution for the sale of the property levied upon. At the sale under this execution complainant became the purchaser, and now seeks to obtain a decree that the title to this property, which is in the name of the defendant Mrs. Collins, was held by her solely in trust for her husband at the time of such levy and sale, and that her husband, the defendant Thomas F. Collins, was at the time of such levy, judgment, and sale the real and equitable owner of said property.

The testimony in the case shows some very questionable transactions between Collins and the complainant in regard to dealings in certain gas company bonds; that out of such dealings grew the issue to the complainant of a due-bill for \$905, upon which the attachment suit was brought. The answer denies that there was anything due complainant on this due-bill at the time this attachment suit was brought, and a clear preponderance of the proof, I think, supports this denial; as two witnesses testify to the full payment of this due-bill, and complainant alone testifies that it is unpaid.

I take it that the law is well settled that no one who is not an actual and *bona fide* creditor can have relief in a court of equity in a case like this. There must be an actual, valid indebtedness as the foundation of an attachment proceeding like the one in question to give the plaintiff a standing in a court of equity to ask for a perfection of his title acquired by such attachment. With a note or due-bill in his hands he might impose upon a court of law by the production of his evidence of debt as the foundation of his attachment suit, and obtain a judgment there; but

when he seeks for relief in a court of equity he must come in with clean hands and an honest case, which I think the testimony shows this complainant has not. *Secondly.* He sold in satisfaction of the judgment, which amounted to a little over \$1,000, including interest and costs, two separate pieces of property in different parts of the city, with no relation to each other, one worth \$15,000 and the other \$10,000, as the proof shows; thus acquiring, if Thomas F. Collins was the real owner, \$25,000 worth of property to satisfy an indebtedness of barely \$1,000. The two properties were certainly divisible, and perhaps each one of them was also susceptible of further division, and the attempt of the complainant to obtain title to so large an amount of property for so small a consideration seems to me so unconscionable a proceeding as to merit no aid from a court of equity.

For these reasons the exceptions to the master's report are overruled, the report confirmed, and the bill dismissed for want of equity.

UNITED STATES *v.* HUTCHESON *et al.*

(Circuit Court, S. D. Georgia, E. D. February 4, 1889.)

1. POST-OFFICE—POSTMASTER—ADJUSTMENT OF ACCOUNT.

Where the quarterly returns of a postmaster, in which are reported receipts for sale of stamps, etc., and amount of commission claimed for cancellation of stamps, have been regularly rendered to the department, and have been passed upon by the auditor, and the balances therein found to be due the government have been each quarter carried into a general account, *held*, that such action by the auditor is a complete allowance of the commissions claimed, and adjustment of such quarterly returns.

2. SAME—WITHHOLDING COMMISSION.

Where the credits on the general account kept by the auditor against the postmaster, and made up as above stated, show that the postmaster has fully paid all balances so charged, so that a complete balance could be struck upon such general account, *held*, that in such case there is a complete settlement of the account, and that thereafter the commissions covered by such adjusted accounts were not within the power of allowance by the postmaster general so as to give him the right to "withhold" the same within the meaning of the act of congress of June 17, 1878, (20 St. at Large 140.) There was nothing to "withhold."

3. SAME—BALANCE SHOWN—PRIMA FACIE EVIDENCE.

If the postmaster general, in the exercise of the power conferred upon him by the act of June 17, 1878, before the allowance of credit for commissions is made, directs that it shall not be made, and it is not made, but in lieu thereof credit is given on the account kept with the postmaster for the amount of the allowance deemed reasonable by the postmaster general, the balance shown due the government by such an account would be *prima facie* sufficient, but not conclusive evidence against the postmaster.

4. SAME—CHARGES OF FRAUD.

Where an account of a postmaster, regular on its face, has been adjusted and allowed by the proper accounting officers, and fully paid, such officers cannot, after the term of office of the postmaster has expired, evolve *ex parte* a balance in favor of the government, founded solely upon a general and vague al-

legation of fraud in accounts formerly passed upon, so as to make such balance *prima facie* evidence against the postmaster and his sureties. Such allegations must be specific, and sustained by competent evidence.

(*Syllabus by the Court.*)

At Law.

Du Pont Guerry, U. S. Atty.

Lester & Ravanel, for defendants.

SPEER, J. The district attorney has brought suit in behalf of the government against the defendants on a postmaster's bond. The government has offered in evidence a certified copy of the bond, a certified copy of a demand for \$1,296.26, and what purports to be a transcript of the account kept by the post-office department with the defendant, Mary P. Hutcheson, as postmaster at Marysville, Ga.; and appended thereto are copies of the quarterly returns or accounts current of the said postmaster, rendered to the post-office department during her incumbency of the office. This account and the returns are under one certificate from the department, the language of which is that the writing annexed to the certificate is "a true and correct statement of the account from October 1, 1878, to June 30, 1885, of Mrs. Mary P. Hutcheson, late postmaster at Marysville, in the state of Georgia, and that the papers thereto appended are copies of papers pertaining to his accounts in the office of the sixth auditor." The government has also offered in evidence a certified copy of an order made by the postmaster general, which is in the following words:

"POST-OFFICE DEPARTMENT. OFFICE OF THE POSTMASTER GENERAL.

"Order No. 230.

WASHINGTON, D. C., Oct. 30, 1886.

"Being satisfied that Mary P. Hutcheson late P. M., Marysville, Johnson Co., Ga., has made a false return of business at the post-office at said place during the period from Oct. 1, 1878, to June 30, 1885, in order to increase her compensation beyond the amount she would justly have been entitled to have by law, now, in the exercise of the discretion conferred by the act of congress entitled 'An act making appropriations for the service of the post-office department for the fiscal year ending June 30, 1879, and for other purposes,' approved June 17, 1878, (section 1, c. 259, Supp. Rev. St.,) I hereby withhold commissions on the returns aforesaid, and allow as compensation (in place of such commissions, and in addition to box-rents) deemed by me under the circumstances to be reasonable during the period aforesaid the rate of \$10 per quarter, and the auditor is requested to adjust her accounts accordingly.

"WM. F. VILAS, Postmaster General."

An inspection of the certified copies of the accounts current or quarterly returns of the postmaster shows that they are made upon the forms prescribed by the department, and that there are parallel columns provided for the figures, stating the amount of the different items of the account as rendered by the postmaster, and as found by the auditor upon adjustment. It further appears from the figures entered in red ink, in the column provided for the entries by the auditor, that the finding of the au-

ditor as to the items of the accounts agreed with the statement of the accounts as rendered by the postmaster. It further appears from inspection that the general account kept by the department with the postmaster was made up in the following manner: On the debit side the postmaster is charged quarterly with the balances found due by the auditor on adjustment of the quarterly returns of the postmaster, the aggregate of which up to and including the quarter ending June 30, 1885, is \$771.83. On the credit side the postmaster is given credit for his payments or deposits made to the credit of the government, the aggregate of which amounts to \$771.96. On the debit side of the account, however, there are additional entries which appear under date of December, 1886, long after she had ceased to be postmaster, and long after the last entry on the credit side, showing an amount more than sufficient to off-set the debit items. These are stated to be for "amount of commissions illegally retained" during the quarters stated from 1878, to June 30, 1885. These items aggregate \$1,296.39. A general balance is struck upon the account below these items, leaving the defendant in debt to the government, according to the account, in the sum of \$1,296.26; and for this amount the government now brings suit.

It is contended by the district attorney that the provision in the act of June 17, 1878, (20 St. at Large, 140,) "that in any case where the postmaster general shall be satisfied that a postmaster has made a false return of business, it shall be in his discretion to withhold commissions on such returns, and to allow any compensation that, under the circumstances, he may deem reasonable," gave to that officer the power to make the order which he did make on October 30, 1886, and under it to reopen the entire account from 1878, and charge back upon the postmaster the excess of the commissions which had been retained in excess of the \$10 per quarter deemed reasonable by the postmaster general, and that the balance shown on the account after such recharges were made is to be taken as *prima facie* correct in this proceeding. The court does not so construe the law, nor does it think the statute referred to applicable to the facts of this case. The action of the auditor in passing upon each quarterly return which covered the charges for commissions, and in carrying the balance therein found to be due the government into the general account of the postmaster, was a complete adjustment of such quarterly returns; and, since the government account shows that such adjusted balances were fully paid, and that there was no balance due in February, 1886, we do not think there was anything for the postmaster general to "withhold." The postmaster had already been given credit for the commissions claimed, and had been paid in full. We think the meaning and scope of the statute is simply this: If the postmaster general shall be satisfied that a postmaster has made a false return of business, it shall be in his discretion to withhold from the postmaster credit for the amount of commissions claimed in such returns, but to allow any compensation that under the circumstances he may deem reasonable. If the postmaster general had made the order fixing the compensation deemed reasonable by him before giving the

postmaster credit for the commissions, and had given the postmaster credit on his account for the \$10 per quarter instead, and had withheld the credit of commissions claimed in excess of that amount, the government's account would have shown the balance now sued for, and would have been *prima facie* sufficient; but that is not the case at bar. But even such an account would not be conclusive upon a postmaster. He has the legal right to the commission fixed by the statute for the service, if actually performed, and may plead that right when sued upon his bond, or may assert it in an independent suit against the government, brought in the court of claims, or in a circuit or district court since the act of March 3, 1887, (24 St. at Large, 505.) It is not questioned that, even after adjustment and allowance of an account, the department ought to withhold payment of a balance found due a postmaster or other officer if it be discovered that the account is fraudulent; or even where the account has been fully adjusted and paid, there can be no doubt of the right of the government to recover the money so fraudulently obtained, upon proper proof of fraud. But where an account regular on its face has been adjusted by the proper accounting officers, and fully paid, such officers cannot, after the term of office of the postmaster has expired, evolve *ex parte* a balance in favor of the government, founded solely upon a general and vague allegation of fraud in accounts formerly passed upon, so as to make such balance *prima facie* evidence against the postmaster and his sureties. Such a restatement of the account is proper enough as a guide to the district attorney in making out his case, but the postmaster and his bondsmen have the constitutional right to a trial by jury, and to have the allegations of fraud plainly specified. Moreover, these specifications, if not self-evident, must be proven by competent evidence, before a judgment can be rendered against the citizen which would deprive him of his property.

To condense in a few words the conclusions of the court: The postmaster is presumed to have done his duty until the contrary is made to appear by the proof. The accounts of the postmaster, in the absence of the incriminatory letter of the postmaster general, are fairly and honestly kept, and balance to a cent. That letter charges simply that the postmaster "made a false return of business during the period from Oct. 1, 1878, to June 30, 1885," without other notice to the postmaster, or other specification of fraud. In consequence, the postmaster general arbitrarily assesses and adjudges a balance against the postmaster of \$1,296.26. The district attorney offers no proof to show that the postmaster general was right in his conclusions, and admits that there is nothing he can submit, either upon the face of the accounts or proof *aliunde*, to show the falsity and the fraud charged. He closes his case. To allow a verdict upon such a presentation, in the opinion of the court, would be to substitute assertion for proof in a judicial proceeding; to hold the plaintiff entitled to recover because the suit is brought; to adjudge the defendant guilty of fraud because she is accused; and, in other words, to presume fraud in violation of the settled rule that it is never presumed; and to avoid all the effect of that sovereign and beneficent

principle of the constitution conferring upon the defendants in such cases the right to trial by jury. The jury is directed to return a verdict for the defendants.

NORTON *et al.* v. CARY *et al.*

(Circuit Court, N. D. Illinois. July 22, 1889.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—PAINT-CANS.

Patent No. 131,089, issued September 3, 1872, to Horace Everett for an "improvement in cans for paint," the distinctive feature of which is a ring, soldered to the upper edge of the body of the can, with an upturned flange, the object of the ring being to stiffen the body of the can and to receive the cover, the flange of which is interlocked with the flange of the ring by the application of pressure, is not anticipated by a patent for an "improved paint-can," of which the distinctive feature is a cast-iron ring, tightly inserted in the top of the can, with an outward flange, over which the cover is folded.

2. SAME.

Nor is it anticipated by a patent for a paint-can showing a breast attached to the top of the can with an upturned flange, but without the re-enforcing ring to strengthen the body of the can and allow it to be closed by pressure.

3. SAME.

Patent No. 136,575 issued March 4, 1873, to Job A. Williams for an "improvement in cans for oil and paint," the invention in which is a solid breast consisting of a seamless ring of tin, soldered to the top of the can, with a flange turned inwardly for a short distance, and then turned upwards at the top, and an annular groove below the top of the breast, over which a cover fits closely and may be beaded into the annular groove if desired, is anticipated by a patent for a paint-can showing a breast attached to the top of the can, with an upturned flange, over which the cover fits.

4. SAME—COMMON KNOWLEDGE.

Said patent No. 136,575 is also void from common knowledge, inasmuch as it shows nothing but the top of a can which, by being made seamless, allows the can to be tightly closed with a seamless slip-cover.

5. SAME—ANTICIPATION.

The invention described in patent No. 298,018, issued May 6, 1884, to Edwin Norton for a "paint-can," consists of an interior shoulder formed by turning a flange in at the top of the can, and folding over it a seamless ring, so that the shoulder is composed of three thicknesses of tin and solder. The seamless ring has an upturned flange, which is folded with the flange of the can-head into a double seam, which rests on the shoulder, giving the can greater strength. *He'd* that it was anticipated by the manufacture of a similar can by Walsh in 1882.

In Equity. Bill for injunction.

Bill in equity by Edwin Norton and others against William H. Cary and others, to restrain the infringement of certain patents.

Munday, Evarts & Adcock, for complainants.

Stout & Underwood, for defendants.

BLODGETT, J. This is a bill for an injunction and accounting by reason of the alleged infringement of patent No. 131,089, granted September 3, 1872, to Horace Everett for an "improvement in cans for paint;" patent No. 136,575, granted March 4, 1873, to Job A. Williams for an

"improvement in cans for oil and paint," and patent No. 298,018, granted May 6, 1884, to Edwin Norton for a "paint-can." The invention in the Everett patent is described by the patentee in his specifications as follows:

"The object of my invention is a can so stiffened as to retain its shape in the absence of the cover, and, at the same time, constructed for the ready and secure attachment of the cover, and for the ready withdrawal of the entire contents. A ring, B, is soldered to the upper edge of the body, A, of the can, this ring serving the twofold purpose of stiffening the said body, A, and of receiving the cover, D, the flange *e* of which is interlocked with the flange *f* of the ring, as shown in Fig. 2, by the application of pressure. * * * I rely upon the ring, B, as a means of stiffening the can and retaining it in shape, the ring being so narrow as to leave a large opening for the ready removal of the entire contents. After the paint has been deposited in the can the cover is fitted over the flange of the ring, a suitable instrument is then applied, under pressure, to the top of the cover, at and near the edge of the same, until the flange *f* of the ring is contained within the folded and compressed flange *e* of the cover, the body of the can being so stiffened by the ring as to resist this pressure."

The patent also contains a disclaimer in the following words:

"I am aware that the can for which letters patent were granted January 29, 1867, to me as assignee of D. W. Pepper, has an internal-flanged ring, to which, however, the flanged cover could not be secured without the aid of special rollers; whereas, in my improvement the cover is secured by direct pressure on the top of the same, the stiffening ring being so narrow, and its flange, as well as that of the cover, being so curved or bent, that this simple external pressure tends to compress and interlock the said flanges without anything to resist the pressure except the sides of the can."

The patent contains but one claim, which is:

"A can, having at its upper edge a stiffening ring with a flange formed to be interlocked with the flange of the cover by direct pressure on the top only of the same, as set forth."

The Williams patent is described by the patentee in his specifications as follows:

"My invention consists of a can designed principally for holding paint, though it may be used with advantage for other materials or substances, as oil, fruit, etc. The object of my invention is to make a tight can, one which may be easily and cheaply constructed, and which will not leak at the seam. My improvement consists in providing a solid breast for the can, which is constructed and applied as hereinafter fully described."

The solid breast described in this patent consists of a seamless ring of tin, with an inwardly turned flange at the top, and an annular groove below the top of the breast. This solid or seamless section is firmly attached to the top of the can with solder. A seamless cap or cover for the can is also constructed, which fits closely over the breast or seamless ring, so that if made to fit close enough the can, so far as the top or cover is concerned, will be made air-tight, or tight enough for the purpose for which it is intended. Provision is also made in the patent for an annular groove below the top of the breast, into which, if desired,

the edge of the cover may be beaded or tucked. This patent contains but one claim, which is:

"A solid seamless breast for cans, constructed and applied as shown, and made either with or without an annular groove, as described."

Patent No. 298,018 to Edwin Norton is described in the specifications as follows:

"This invention relates to paint and other cans, the heads or covers of which are double-seamed on after the can is filled. In double-seaming heads on filled cans no internal mandrel or support can of course be used, and therefore the flanges of the head and body forming the seam have heretofore always been folded or turned outwardly, so that the seam, when completed, lies on the outside wall of the can-body. * * * It is the object of the present invention to provide a can, the head of which may be double-seamed on after the can is filled by folding the flanges of the head and body inwardly, so that the seam, when formed, will lie on top of the can, and within the circumferential line of the can-body, and thus not interfere with the application of a slip-cover to the can. This result I accomplish by (and herein my invention consists) providing the can with an interior shoulder, against which the flanges of the seam may be folded, and which thus serves, so to speak, as an interior mandrel or support in forming the seam. This interior shoulder I form by turning a flange in at the top of the can-body and folding over it a seamless ring, so that the shoulder is composed of three thicknesses of tin and the solder uniting the same. The seamless ring has an upturned flange, which is folded with the flange of the can-head into the double seam. As in this invention the seam rests snugly on the shoulder, the seam and shoulder together give the can or its cover great strength and rigidity."

The patent contains two claims, which are as follows:

"(1) The combination, with a can-body provided with an interior shoulder to support the seam while it is being formed, of a can-head, secured thereto by a double seam, folded inwardly, and resting upon said shoulder, substantially as specified. (2) The combination of can-body, A, provided with in-turned flange, *a*, with seamless ring, B, folded over said flange, and can-head, C, having upturned flange, *c*, folded with said seamless ring inwardly into a double seam, substantially as specified."

The defenses set up are want of novelty as to each patent, and non-infringement. As to the Everett patent, No. 131,089, the patent granted to Horace Everett July 30, 1867, and the patent granted to Daniel W. Pepper, January 29, 1867, are cited as anticipating this device. The Everett patent of July, 1867, is for an "improved paint-can," and shows a paint-can made of sheet-iron or tin, with a light cast-iron ring tightly inserted in the top of the can, said ring having a flange extending outwardly, over which a tin cover is bent or folded so as to close the can.

Waiving all question as to whether this patent shows a practical device for constructing a can, on account of the increased expense of the cast-iron ring, I do not see that it meets the function of the ring shown in patent No. 131,089, nor is it there for that purpose. In the Everett patent, now in suit, the tin ring, or reinforcement of a single additional strip of tin at the top of the can, reinforces or strengthens the can so far as to permit the cover to be double-seamed on, thereby effecting a tight closure of the can. This was not done, or is not claimed to have been

done, in the old Everett patent of 1867. The Pepper patent of January, 1867, shows a breast attached to the top of the can, with an upturned flange surrounding the opening, but no reinforcing ring of metal to strengthen the can-body, and allow of a closure by close seaming with a seaming tool. I do not, therefore, see, either by the oral testimony of experts, or by the patents cited, any clear anticipation of this patent as shown by the proofs. The Job A. Williams patent, No. 136,575, seems to me to be completely anticipated by the can described in the Pepper patent of January, 1867. This Pepper patent shows a solid or seamless can-breast attached to the top of the body of the can, with the flange extending inwardly for a short distance, and then an upturned flange with a cover, with a downturned seamless flange arranged to fit over the upturned flange of the can-breast, so as to effect a tight closure of the can. But, aside from this anticipation, I think this patent should be held void from common knowledge, as it shows nothing but the top of a can which, by being made seamless, allows the can to be tightly closed by a seamless slip-cover. It had been for many years before the date of this patent the practice to close tin dinner-pails, or other tin utensils, more or less tightly with a slip-cover. It may have required more nicety of workmanship to have made this dinner-pail cover fit so closely to the body as to have made the pails air, water, or paint tight, but there does not seem to me any patentable difference in making them tight from what there would have been to allow them to fit loosely, or fairly loosely, over the top of the pail. The ordinary box for holding shoe-blackening had been made for years before the date of this patent by turning up a seamless flange from an annular disk of tin for the body of the box, and constructing a cover in the same way with a downturned flange just large enough to fit closely over the outside of the body of the box, thereby closing the box, if need be or desired, to make it air or water tight. I am therefore of opinion that this Williams patent must be held void for want of novelty.

Patent No. 298,018 to Edwin Norton is, as it seems to me, fully anticipated from the proofs in the case by the can manufactured by Walsh in 1882, which shows an interior shoulder against which the flanges of the seam may be folded, and which serves as an interior mandrel or support in forming the seam. The proof abundantly shows that Walsh made cans, as early as the spring of 1882, with an interior shoulder, which so stiffened the can as to form an interior mandrel or support for the body of the can in the seaming process, and which was closed by turning the seam inwardly instead of outwardly, or by pressure, as provided in the Everett can of 1872. I think it may well be doubted whether there is any patentable invention in folding the seams of a can one way rather than another, but, if there is, certainly Walsh did it long before this inventor entered the field.

Upon the question of infringement the defendants' can shows a stiffening ring attached to the upper edge of the body of the can, with a flange formed and intended to be interlocked with the flange of the cover, but only differing from the Everett device in that the interlocking was not

to be obtained by direct pressure on the top of the can; but I am of opinion that the essential feature of the Everett device was the stiffening of the top of the can so as to accomplish the closing of the can by seaming the cover to it, and with this view of the Everett patent I find the defendants infringe the first and only claim of that patent. The bill is therefore dismissed as to the Williams patent of March 4, 1873, and the Norton patent of May 6, 1884, and a decree may be prepared for an injunction and accounting as to the Everett patent of September 3, 1872.

IDE v. BALL ENGINE Co. et al.

(Circuit Court, N. D. Illinois. July 22, 1889.)

PATENTS FOR INVENTIONS—INVENTION—STEAM-ENGINE GOVERNORS.

Letters patent No 301,720, granted July 8, 1884, to Albert L. Ide, for a "steam-engine governor," describe, "in a fly-wheel governor, the combination, with relatively movable parts, of a dash-pot." Governors similar in arrangement of parts with dash-pots were used as early as 1880 and 1881 in Brooklyn, and Thompsonville, Conn., but they were attached to the driving shafts, instead of to the fly-wheel, as described in the patent. *Held* that, as no new function was obtained by combining the governor and the fly-wheel, the change did not involve invention, and that the patent was void.

In Equity. Bill for injunction and accounting.

Offield & Towle, for complainant.

J. K. Halleck and *J. H. Raymond*, for defendants.

BLODGETT, J. This is a bill in equity for an injunction and accounting, by reason of the alleged infringement by defendants of letters patent No. 301,720, granted July 8, 1884, to the complainant for a "steam-engine governor." The nature and scope of the invention covered by this patent and described by the patentee in his specifications as follows:

"This invention relates to that class of steam-engine governors known as 'fly-wheel governors,' and has for its primary object to provide means for holding the eccentric steadily in its proper poised position, in opposition to the tendency of certain extraneous forces which are calculated to disturb the movements of the valve, as sought to be determined by the balanced forces of weights and springs when the engine is in motion. To this end the invention consists in the combination of a dash-pot with the governor and pulley, said dash-pot connected with a fixed and movable part, or with two relatively or unequally movable parts; as, for example, with the extremity of a weight, lever, and the pulley hub. In this class of governors the position of the eccentric is variably determined by the opposing and self-balancing forces exerted by the centripetally acting spring or springs, and the centrifugally acting weight or weights connected with said springs; the intention being to hold the eccentric permanently in a certain poised position for a given speed of the wheel to which the governor is applied, and to vary the position of the eccentric exactly as the speed of said wheel is varied. There are, however, certain temporarily acting causes of disturbance calculated to change the position of the eccentric independently of the speed of the wheel. The princi-

pal of these disturbing causes is the inertia of the reciprocating parts, including the eccentric and the parts actuated thereby; and a secondary cause is the gravity of the eccentric when not counter-balanced by some special device for the purpose. At a regular and very high speed of the governor wheel or pulley, these disturbing forces operate but slightly, owing to the momentum of the weights, which serve to prevent their deflection from a regular course; but at lower speeds than that at which the apparatus is adjusted to run, and particularly in accelerating or retarding the engine, as in starting up or slowing down, these incidental disturbing forces interfere materially with the valve action, and give an objectionable irregularity to the movements of the weights. In the case of an engine used for running a dynamo for electric lighting purposes, and subject to sudden and wide changes in requisition of power and speed, the effects of the disturbance referred to manifest themselves also in the quality or intensity of the lights. A dash-pot constructed and attached to the apparatus in such manner as to prevent sudden movements of the weight levers or of the eccentric is found in practice to wholly overcome the defects indicated, and to give a desirable steadiness and regularity to the movements of the movable parts of the governor, as well as accuracy and reliability to the cut-off action of the valve. * * * The cylinder of the dash-pot is filled with glycerine, or some other non-compressible liquid, preferably one that is also not congealable at a temperature to which the engine is likely to be exposed. By means of the dash-pot applied to the relatively movable and stationary parts or to the unequally moving parts, as described, wide and sudden radial movements of the weights, E, are prevented, and as a consequence the governor will have a steady and efficient action at all speeds of the pulley or wheel to which said governor is applied. * * * By the term 'dash-pot' in the appended claim I mean the device technically known by that name,—usually comprising a close cylinder, a piston having a passage through or around it, and a fluid confined in the cylinder, as shown, or its equivalent."

The patent has but one claim, which is:

"In a fly-wheel governor, the combination, with relatively movable parts, of a dash-pot, substantially as described."

The proof shows, without dispute, that as early as 1880, the Buckeye Manufacturing Company of Salem, Ohio, placed upon the driving shaft of their engines governors with weighted arms arranged to swing centrifugally, as the shaft revolved, so as to act upon the eccentric, and kept from swinging too readily by centripetal springs,—the arrangement and function of the movable and fixed parts of the governor being substantially like the movable and fixed parts of the Ide governor, except that it had no dash-pot; the operative parts being held in place upon the shaft of the engine within a comparatively light shell or case, with radial arms extending from the shaft. One of these Buckeye engines was placed in what was known as the "Pacific Elevator," or Dow's stores, in Brooklyn, in the state of New York, and its governor not securing such steadiness of motion in the engine as was desired, a dash-pot, in December, 1880, was put into the governor in substantially the manner shown by the defendant's Exhibit B, in evidence in this case; the dash-pot in Exhibit B being attached to one of the swinging arms of the governor, and to a fixed part, so that its operation was essentially the same as that of the dash-pot in the complainant's patent. In July, 1881, governors similar in arrangement of parts and with dash-pots were put into the engines of the

Hartford Carpet Company at Thompsonville, Conn., and the engine of the Hartford Manilla Company at Burnside, Conn., and these governors, with dash-pots attached, had continued in use on these engines up to the time the proofs were taken in this case, and all had proved effective in securing steadiness of action in the engines to which they were attached, or, as the witnesses expressed it, preventing sudden and violent fluctuations of the governor. The dash-pots attached to these Buckeye governors were connected with a movable and fixed part of the governor in such a manner as to be accurately described by the specifications of complainant's patent. In other words, the structure of these Buckeye governors, with the dash-pot added, was such as to make them a manifest and palpable infringement of the complainant's patent if they had been made and used after, instead of before, that patent. The only feature in which these Buckeye governors, with the dash-pot added, can be differentiated from the complainant's patent, is that they were not placed in the fly-wheel of the engines to which they were attached. Mr. Ide has taken this Brooklyn and Thompsonville governor out of the shell or disk in which it was placed by the agents of the Buckeye Company on the shaft, and attached it to the hub and radial arms of the fly-wheel of his engine, and the claim of his patent is for putting this governor, with dash-pot, into the fly-wheel of the engine. The most he has done has been to fasten this old Brooklyn and Thompsonville governor to the arms of the fly or balance wheel of his engine, instead of leaving it on the driving shaft, where he found it; and the only question is, has he invented anything in doing this? I do not learn from the proof that any new function is obtained by the combination covered by this claim. The governor still performs the same function, and no other, that it did when fastened to the shaft by the shell and arms, as in the Brooklyn and Thompsonville governors; and the fly-wheel still performs the functions it did before the governor was brought into it. Their joint operation, when combined, is the sum, and only that, of their separate operation in the older machines. The patent, therefore, seems to me to come clearly within the rule in *Reckendorfer v. Faber*, 92 U. S. 354, and *Pickering v. McCullough*, 104 U. S. 310. It is true there may be some convenience in bringing these parts together and making a more compact machine, but that is a mere mechanical change, which does not rise into the realm of invention. As was said by Mr. Justice MATTHEWS in the case last cited:

"In the patentable combinations of old elements, all the constituents must so enter into it as that each qualifies every other. * * * It must form either a new machine of a distinct character and function, or produce a result due to the joint co-operating action of all the elements. It is not a mere adding together of separate contributions."

For these reasons I am of opinion that the patent is not valid, and that the bill should be dismissed for want of equity.

BUSBY v. LADD.

(Circuit Court, N. D. California. July 22, 1889.)

PATENTS FOR INVENTIONS—INVENTION.

Where a welt of a double piece of leather, inserted in a seam in such manner that the edges come on the inside so as to require no trimming on the outside, the welt presenting a rounded appearance, has been for years used in gentlemen's and ladies' saddles, in leather cushions, horse collars, leather bags, satchels, hand bags, ladies' reticules of various kinds, and in the uppers of boots and shoes, it requires no invention to transfer the same kind of welt to gloves. This is but a double use for analogous and similar purposes, and is not patentable.

(*Syllabus by the Court.*)

In Equity.

Suit upon a patent in which the following is the claim: "The improvement in the manufacture of gloves, consisting of inserting a welt of a double piece of the same material and color of the body, the edges of which come on the inside, whereby a uniform color of welt and glove is maintained, and the necessity of trimming avoided, substantially as and for the purposes herein described."

Langhorne & Miller, for plaintiff.

A. P. Van Duzer and John L. Boone, for defendant.

Before SAWYER, Circuit Judge.

SAWYER, J., (*orally.*) After a careful examination of this case, in view of the state of the art disclosed, and the decisions of the supreme court, I am unable to see that the claim covers a patentable object. The double-welted seam has been used for a long time in various articles of general use, as in gentlemen's saddles, ladies' saddles, leather cushions, horse collars, leather bags, satchels, hand bags, and ladies' reticules of various kinds. The file wrapper in the case, in evidence, itself, shows that there was a prior patent for the same thing in the uppers of boots and shoes. It requires no invention to transfer that seam from one of these articles to a glove. They are analogous and similar uses of the same thing, and the patent-office declined to grant a patent, at first, until the patentee inserted in the claim a welted double seam of the "same material and same color." It seems to me to be, only a double use of the seam. It is claimed that this is a patent for a process. Certainly the mere using the same material constitutes no element of a process, and it requires no invention; nor is color a part of a process. The selection of a particular color is merely the exercise of taste. The tendency of the decisions of the supreme court for some years has been to limit the field of patentable objects, and the tendency still continues. Under the view I take of the case the bill must be dismissed, and it is so ordered. I will add, that, under the view taken, I do not find it necessary to determine whether the double-welted seam had been before used in gloves. I am, however, disposed to think that a prior use in gloves has not been satis-

factorily shown. There is, as is usual in these cases, some vague and shadowy testimony of such use at Gloverville, and other places in New York some 25 or 30 years ago, which for some reason was discontinued; but there is, also, much testimony by parties engaged in the business at those places at the time to the contrary. The evidence of such prior use in gloves is not very satisfactory, but it is unnecessary to pass absolutely upon that point.

EASTMAN v. CHICAGO & N. W. RY. CO.

(Circuit Court, N. D. Illinois. July 22, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENTS.

Letters patent No. 314,170, issued March 17, 1885, to John P. Eastman, for a continuous mileage railroad ticket, claims a ticket consisting of "leaves or sheets bound together in book form, each having a number of mileage coupons, the leaves being connected at alternate ends for tearing off in a single piece the required number of single coupons for mileage traveled." The original application did not contain the words "bound together in book form," but it was withdrawn, and another substituted, modified by the insertion of those words, and the patent was granted accordingly. The specifications described the sheets as being disconnected at the sides, but connected at the ends, and as having sufficient margin on the side for binding them into book or other convenient form. Defendant used a continuous ticket, consisting of coupons of one mile each, printed on a continuous strip of paper, one end being fastened to the lids of the cover, and the strip then being laid in alternate folds, like a pocket map. The lids of the cover were joined at the back, and closed by an elastic band, so that the strip might be drawn out and coupons cut off on a metallic edge attached to the end of a lid. *Held*, that the first-named patent was limited to a ticket bound in book form, and was not infringed by merely attaching one end of the strip to the cover.

West & Bond, for complainant.

Geo. Payson, for defendant.

BLODGETT, J. This is a bill for an injunction and accounting by reason of the alleged infringement of patent No. 314,170, granted March 17, 1885, to complainant for a "continuous mileage ticket." The invention covered by the patent is quite clearly and sufficiently described in the following extracts from the specifications:

"This invention relates to railway-tickets commonly known or termed 'thousand-mile tickets,' and consisting of a number of small coupons or tickets, each representing mileage, usually bound in the form of a book. As such tickets are now issued a number of coupons for one mile each are impressed or printed on a small sheet, the separate coupons being partially separated one from the other by means of a perforated mark or line, to facilitate tearing off, and a number of sheets containing such coupons—usually enough to represent a thousand miles of travel—are bound together as a book, to be carried by the person holding the ticket, and so that the number required to represent the distance traveled can be readily torn off by the conductor. It often happens that with the present style of putting up these tickets the tearing off of a certain number leaves a single coupon, or two and three coupons, on a

page, to be torn off the next time the book is used; or a few coupons may be torn off from the next succeeding page, and these coupons, being small, are liable to be lost by the conductor or other party handling them, causing considerable trouble and inconvenience in keeping a correct account of the separate coupons belonging to the ticket; and, where a number of such tickets are taken by the same conductor from different books, the sheets, being separate one from the other, and being usually placed all together, become mixed, requiring considerable labor on the part of the conductor to get the separate sheets and pieces of the same ticket together in order to turn them in; and, again, with the present style of these tickets, considerable trouble is experienced in keeping a correct statement of the last number torn off to connect with the first number next torn off, and so on. The object of this invention is to overcome the objections to this class of tickets, and have such tickets as [are] capable of being used as an ordinary single ticket; and its nature consists in providing such tickets on sheets connected together, to have any required number torn off without becoming disconnected, and leaving those remaining in the book also connected, all as hereinafter more specifically described and pointed out in the claims. * * * These sheets are disconnected at the side, but are alternately connected at the ends;—that is, the first sheet is connected to the second at the bottom, the second to the third at the top, the third to the fourth at the bottom, the fourth to the fifth at the top, and so on, to the full number of sheets. * * * The length and width of the sheets are to be sufficient for the size and number of coupons desired for each sheet, with a sufficient margin on the side for binding the sheets for the required number of miles into the form of a book, or other form convenient to be handled by the purchaser of the ticket and the conductor. * * * The sheets being in effect single sheets, and at the same time a continuous sheet, it will be seen that the conductor, in tearing off a given number of coupons to represent the number of miles for which the ticket has been used, although he may tear through one, two, three, or more sheets, will remove the entire number torn off in a single piece, and the remaining coupons will commence with the next consecutive number, and be all united one to the other."

The patent has but a single claim, which is:

"A railroad ticket consisting of a series of leaves or sheets, bound together in book form, each having a number of mileage coupons, the leaves being connected at alternate ends for tearing off in a single piece the required number of single coupons for mileage traveled, substantially as described."

The defenses set up are (1) that the patent is void for want of novelty; (2) that defendant does not infringe.

The principal feature in all the continuous mileage tickets in use seems, from the proof, to be an arrangement of coupons or strips, representing a series of units of distance which the holder of the ticket is entitled to travel upon it, so that these coupons can be detached and retained by the conductor, and the ticket returned to the passenger as long as any coupons remain unused. The patent to William B. Shaddock, granted in April, 1881, shows such a ticket, made up of a series of leaves or pages of coupons bound together in book form, the coupons being easily detached by means of lines of perforations. It also appears from the proof in this case, and I think we may be said to know the same from common knowledge, that coupon tickets for a continuous journey, over several different transportation lines, were in general use long before the complainant's patent. For instance, a person could buy a ticket

entitling him to a passage from Chicago, Ill., to Bangor, Me., which would have, first, a coupon entitling him to passage from Chicago to Detroit over the Michigan Central Railroad; the next coupon would take him from Detroit to Niagara Falls over the Great Western route, through Canada; the next, from Suspension Bridge to Albany; the next, from Albany to Boston; and perhaps the next, from Boston to his place of destination; or there might be still more coupons between Boston and the place of destination; and, as he passed over the successive links in his route, the conductors would detach the coupons representing said link. These coupons were not bound together in book form, but were printed in consecutive order, from the starting to the termination of the journey, upon a ribbon or strip of paper, and the coupons could be readily folded each way, so as to be easily detached at the foldings. So that we may assume that it was old at the time Mr. Eastman entered the field to issue coupon tickets in a ribbon of continuous coupons, each coupon representing a portion of the route over which the holder was entitled to pass, and each coupon to be detached by the conductor, as the holder passed over the route represented by said coupon. The defendant uses a continuous mileage ticket, consisting of coupons which represent one mile each, printed upon a continuous strip or ribbon of paper, one end of which is fastened to one of the lids of the cover, and the strip then folded in alternate folds upon such cover lid, substantially after the manner in which long pocket maps are folded into a cover, so that they may be unfolded and drawn out at full length. The two lids of the cover, within which the strip is held, are joined at the back, and held close by an elastic band, near what would be the open end, so that the end of the strip can be drawn out from between the lids, and the requisite number of coupons torn off across a metallic straight edge, which is attached to the end of one of the covers, the conditions of the ticket being printed upon the inner side of one of the covers.

The proof also shows that the original claim made by the complainant in his application for his patent was for "a railroad ticket consisting of a series of leaves or sheets, each having a number of mileage coupons, and connected at alternate ends, for tearing off in a single piece the required number of single coupons for mileage traveled, substantially as described." This claim was for some reason withdrawn by the complainant, and the words "bound together in book form," as they now appear in the claim, inserted, and the claim allowed with this modification. This amendment of his claim by the patentee clearly limited his patent to that construction of his ticket in which each leaf of his book is to be bound or fastened into the covers by one of its edges or sides in the manner in which the leaves of a book are bound into a cover. The mere fastening of one end of a map upon the inner face of one lid of the cover, and then folding the map into alternate folds, does not make a binding of a series of leaves in book form, as such expression is usually understood, but each leaf of the series must be bound or fastened into the back of the book so that, if cut apart at the folds, they will still be held in the binding; in other words, a long strip of paper, one end of which is

fastened upon one lid of the cover, intended to embrace the whole strip when folded in a series of leaves, is not binding in book form, but is an old form of cover adopted, not only for holding maps, but, as the proof also shows, for pictures of views, where it is desirable to display a series of pictures or views in a panoramic book form, like defendant's Exhibit "Souvenir of St. Louis." It is true each fold incloses what might be called two leaves, in the defendant's folded strip, but these leaves are not bound in book form by their edges or sides, so that, if cut apart at the folds, they would still be held in the binding, as would be true of the complainant's ticket. To my mind, the defendant's ticket much more nearly resembles the ticket shown in the patent granted to Barnum G. Arnold, in February, 1865, than it does the complainant's ticket. The Arnold patent shows a ticket-holder consisting of a metallic or cylindrical case or shell, about three-eighths of an inch in diameter, and two inches long, with a strip or series of coupons wound upon a spindle to be inserted in the shell, and the end of the ticket drawn through a slot or opening in the shell, until the requisite number of coupons were brought outside the slot, when they were to be torn off across the metallic straight edge of the slot. This old device was public property before the complainant's patent was applied for, and, as it seems to me, the defendant has more nearly appropriated the principle, form of construction, and mode of operation shown in that patent than the principle and form of construction to which complainant has limited himself in his patent. It seems to me that if the Arnold patent was now in force the defendant's ticket would be a palpable infringement of it, as the defendant's cover, held together by an elastic band, would only be a substitute for Arnold's metallic shell or case, while the unfolding of defendant's ticket, as the free end is drawn from between the cover under the elastic band, would be equivalent to the unwinding of the roll from Arnold's spindle. Arnold also shows a flat or box-shaped case, where the coupon strip was evidently to be folded in and drawn out through a slot in the cover, substantially as defendant's ticket is to be drawn. Therefore, without assuming to pass upon the question of the validity of the claim of complainant's patent in the light of the state of the art at the time it was issued, I am fully convinced that the defendant does not infringe upon the device covered by that claim. The bill is therefore dismissed for want of equity.

McKAY v. SMITH *et al.*

(Circuit Court, D. Massachusetts. August 2, 1889.)

PATENTS FOR INVENTIONS—LICENSE.

It is no defense to a suit against a licensee of a patented machine that the licensor has sold or leased similar machines to other persons for a less price, when there was no stipulation in the license that he would not do so.

In Equity.

Bill by Gordon McKay, trustee, to recover license fees for use of a patented machine from Frank W. Smith and others.

J. J. Myers, for complainant.

P. E. Tucker and *C. A. Taber*, for defendants.

COLT, J. The complainant in this suit seeks to recover of the defendants certain license fees for the use of a machine known as the "McKay Sewing-Machine." The machine is for uniting the soles of boots and shoes to their vamps or uppers, and embodies in its construction several patents. The lease bears date January 23, 1878, and it terminated September 6, 1887, or at the expiration of the youngest patent used in the machine. *McKay v. Mace*, 23 Fed. Rep. 76. The plaintiff association issued many licenses of the same kind as that taken by the defendants. Upon the taking out of a license a certain sum of money was paid, either by way of expenses for putting up the machine, or on account of its cost. By the terms of the license the licensee was to pay the sum of 10 cents for each and every pair of shoes made by aid of the machine, or, instead thereof, he might purchase and affix a certain stamp to each pair of shoes. The present machine was originally licensed by the plaintiff to Prichard, Smith & Co. In January, 1878, a new firm was formed, comprising the present defendants, and subsequently the original lease was surrendered to the plaintiff, and a new one issued to the new firm. For this license, and some other machinery, the defendants paid \$425 to the old firm.

Several defenses were set up in the answer, but at the present hearing the main ground relied upon is the eviction of the defendants by the acts of the plaintiff. The principal act complained of as constituting an eviction is as follows: In the spring of 1881, for certain reasons which it is unnecessary to enter into, the McKay association, represented by the plaintiff, determined after August 14th of that year, to exact no more royalties for their machines, but to sell them to their licensees, or to strangers, for a gross sum of \$350 for a new and \$250 for an old machine, which were about the same amounts the original lessees paid for the expenses incidental to setting up their machines. This was called a commutation of royalties. This course of action was determined upon after consultation between the plaintiff association and many of the leading manufacturers who had licenses, and the proposition has been accepted by most of the licensees. It is contended by the defendants that

this action on the part of the McKay association put strangers on a more advantageous footing than themselves with respect to the patents covered by their license, because strangers could buy a machine upon the payment of the same sum which they originally paid, and use it without the payment of any royalty. The broad ground is taken that a licensor, independent of any express covenants in the license, has no right to do any act which will impair the licensee's enjoyment of the monopoly granted by the license; that the licensee has a vested interest in the monopoly which the licensor is bound to respect, and, it may be, to defend, and that if the licensor does any act whereby the monopoly is injuriously affected, such as granting other licenses for a less royalty, the licensee is relieved from the further payment of license fees under his license.

I do not understand that the doctrine of eviction, as between licensor and licensee, has ever been pressed so far as this, and I find no case which supports the position of the defendants. It has been held that where a patent has been repealed, or where a licensee is enjoined from acting under a license at the suit of the owner of a senior patent, there is an eviction. *Walk. Pat. § 307; Marston v. Swett*, 66 N. Y. 206, 82 N. Y. 526; *Iron Works v. Newhall*, 34 Conn. 67. It was admitted by counsel for the plaintiff in *Lawes v. Purser*, 6 El. & Bl. 930, 932, that, if every one had publicly used the patented invention, that might amount to an eviction, and Walker, in the section cited, says that an eviction will probably be held to occur wherever the patentee is defied by unlicensed persons so extensively and so successfully as to deprive the licensees of the benefit of his share in the exclusive right which it was supposed to secure. Whether the general public use of a patented invention, in the absence of any covenant in the lease that the licensor will prosecute infringers, amounts to an eviction, has not been, so far as I have been able to examine the cases, judicially determined; and, upon the facts before me in this case, it is not necessary to decide this question. The rule, however, is now well established that the mere invalidity of the patent is not a sufficient defense to the payment of royalties under a license, because the licensee may still continue to enjoy all the benefits of a valid patent. *Birdsall v. Perego*, 5 Blatchf. 251; *Marsh v. Dodge*, 4 Hun, 278; *Bartlett v. Holbrook*, 1 Gray, 114; *Marston v. Swett*, 66 N. Y. 206, 82 N. Y. 526. In *White v. Lee*, 14 Fed. Rep. 789, the defendant sought to resist an action for license fees on the ground that the patent was void. In his opinion in that case Judge LOWELL carefully reviews the authorities. His conclusion is that the mere invalidity of the patent is not a sufficient defense, but "that something corresponding to eviction must be proved if a licensee would defend against an action for royalties." In other words, it is not enough for a licensee to prove that the patent is void, but he must also show that he has been deprived of the benefits secured to him under his license. It would seem, therefore, from the cases, that eviction may be shown, where the patent has been repealed, or where the licensee has been enjoined from acting under the license at the suit of the owner of a senior patent, or

where he can show that he has been deprived of the benefits of his license under a patent which is void. In these instances it may be said that the subject-matter of the contract has been in substance destroyed, and therefore the payment of royalties should cease. A license is the grant of a right to manufacture, use, or sell the thing patented, but, outside of the terms of the contract, I do not see that there is any implied covenant that the licensor will protect the licensee in the full enjoyment of the monopoly. If a licensee, as in this case, enters into an agreement to pay royalties for the use of a patented machine, and attaches no such conditions to the contract as that the licensor will not license to others for a less royalty, or that the licensor will prosecute infringers, it is difficult to discover upon what principle the licensor is bound by any such conditions. There is no implied covenant in a license that the licensor will protect the licensee against competition. In the present case more than 1,000 licenses have been issued to use the McKay machine. By so doing the licensor creates competition. But it is not contended that this relieves the licensee from the payment of royalties; and with equal reason I think that a licensor may license others to use a patented machine at a less price, in the absence of any express agreement in the license, the same as a landlord may lease one store in a block for a less rental than another. It is a question of contract. Admitting that there is an analogy between the case of landlord and tenant and that of licensor and licensee under a patent, I do not see how that helps the defendants upon the facts before me in this suit. What was granted to the defendants was not the protection of the monopoly covered by the license, but the right to use a machine which embodies certain patents. If they were deprived of the use of the machine by the act of the licensor, they might set up eviction, but they cannot continue to use the machine and refuse to pay the royalty due under their contract. When we begin to import implied covenants into a license the problem meets us of where we are to begin and where to end. Upon the theory of the defendants in this case, it would seem that any act or omission on the part of a licensor which impairs the benefit to be derived from the use of the patents contained in the license amounts to an eviction, and relieves the licensee from further payment of royalties, and at the same time allows him to go on and use the patents. Such a doctrine as this, it seems to me, is manifestly unsound, and would lead to much confusion in this important branch of the patent law. The rule of *caveat emptor* should be invoked here as elsewhere; and, if the licensee expects protection, the terms and the degree of such protection should form part of his contract. It is quite common in licenses to provide that the licensor shall not grant future licenses for a less royalty without allowing prior licensees the benefit of any such reduction. In the present case, there being no express stipulation in the license that the complainant should not lease or sell the machine to others for a less price, I think the defendants should account to the complainant for the amount of unpaid royalties due under their license upon the shoes manufactured by them on the McKay machine. Decree for complainant.

THE AUGUSTINE KOBBE.

REVERE COPPER CO. *et al.* v. THE AUGUSTINE KOBBE.

(Circuit Court, S. D. Alabama. June 24, 1889.)

1. MARITIME LIENS—PRIORITIES.

After return from a foreign voyage, a coasting trip for repairs and to earn freight on the way to the port of loading for abroad again is to be considered a voyage, when the contemplated foreign voyage is broken up by seizure of the vessel; and creditors on this domestic trip will be paid in full, although no funds will remain to satisfy those of the late foreign voyage.

2. EVIDENCE—PAROL TO VARY WRITING.

In a suit in admiralty by prior creditors to enforce their claims against a vessel, evidence is admissible of an agreement between master and charterer, not incorporated in the charter-party, to pay off prior liens.

3. MARITIME LIENS—PRIORITIES.

Under the circumstances of this case, one chartering a vessel with knowledge of existing liens must, when the voyage is broken up, have his damage by breach of charter subordinated to the earlier claims; but he will be allowed moneys advanced for the necessities of the vessel, and will be paid *pari passu* with these liens.

4. SAME—PAYMENTS FOR SUPPLIES.

Payment at the request of the master, just before her seizure, of a ship's draft for necessary supplies, furnished on an earlier foreign voyage, imports a maritime lien that will be satisfied out of the proceeds of her sale.

5. SAME.

Supplies delivered in New York to an agent of the ship in a ship-yard at Jersey City give a general maritime lien.

6. SAME—REPAIRS.

When a ship purports to hail from a foreign port, and the carpenter is not informed to the contrary, repairs, exclusively on her credit, import a general maritime lien, and the owner is estopped from setting up that she is a domestic vessel.

In Admiralty. On appeal from district court. 37 Fed. Rep. 696, 702.

The Kobbe, after a voyage from Portland, Me., to South America, and return to Providence, R. I., was repaired at Jersey City for another South American voyage, and started for Pensacola to receive her outward cargo, calling at Mobile to deliver a Mobile cargo taken on at New York. While there, the master abandoned his proposed voyage to South America for one on more advantageous terms to Great Britain, for the firm of Martin, Taylor & Co., of Mobile, whereupon sundry creditors seized the vessel, had her sold under order of the district court, and established their claims by suit in that court. The opinion of TOULMIN, district judge, in the court below, as well as a full statement of the facts, will be found reported in the two cases of *The Kobbe*, 37 Fed. Rep. 696, 702. The only new facts elicited in the circuit court were that the copper purchased for the vessel from the Revere Company was delivered to the ship's agent in New York, and was there punched for her use before being sent over to Jersey City to be put on her; and that the New Jersey carpenters, Gokey & Son, knew nothing of the ownership of the vessel except that a maritime register gave her as owned in New Eng-

land; that the name painted on the stern marked her as of Searsport, Me.; and that Alfred Conover, the master, who contracted for the repairs, and whose wife now claims to own the vessel, and to reside in New Jersey, had at one time lived in Philadelphia. The appeal was argued for two days before Mr. Circuit Justice LAMAR and Mr. Circuit Judge PARDEE. The opinion here reported was filed by the court rather as an explanation of the decree rendered than as an exhaustive opinion. Under the facts, the court did not find it necessary to pass on the relative rank of statutory and maritime liens. Part of the money allowed Edwards and Martin, Taylor & Co. was, in fact, advanced by them to pay off stevedores, who are given a lien by the Alabama statute, and the decree ranks these claims as equal to maritime claims, although the opinion is silent on the point. The decree rendered was in these words:

"This cause came on to be heard on the appeal of the Revere Copper Company, William Gokey & Son, John S. Adamson, and J. R. Edwards, libelants and petitioners in the case, and was argued, whereupon, and it appearing that in the district court the said bark Augustine Kobbe was sold by the order of court, and the proceeds thereof, \$6,350, paid into court, of which sum has been paid and distributed in the court below the costs of the sale, and the costs of the district court, the seamen's wages, and bills for pilotage and towage, amounting to some \$1,746.40, which leaves in the registry of this court, to be distributed, under the decree to be herein rendered, among the several libelants having liens, the sum of \$4,603.60, it is ordered, adjudged, and decreed that the following named claims and liens, incurred in the port of Mobile, and on the last voyage of the said Augustine Kobbe, to-wit, from the port of Providence, R. I., via New York, to the port of Mobile, be paid *pro rata* out of said fund, after all the costs of this court shall be taxed by the clerk, and paid, to-wit: to Martin, Taylor & Co., the sum of \$993; to Joseph R. Edwards, the sum of \$560.74; to Charles A. Leanman, the sum of \$61.90; to L. P. Waganer, the sum of \$34.70; to John Boyce, the sum of \$15.30; to Baker, Carver & Co., the sum of \$505.25; to William Gokey & Son, the sum of \$1,818.28; to Revere Copper Co., the sum of \$998.80. The remaining claims and liens, together with the claim of Richard Doughty, mortgagee, it is not necessary to rank and order paid, because they are postponed to the aforesaid claims, and there are no funds in court arising out of the sale of the said bark Augustine Kobbe to pay any part of them.

"June 21, 1889.

[Signed] "L. Q. C. LAMAR, Circuit Justice.

[Signed] "DON A. PARDEE, Circuit Judge."

G. L. & H. T. Smith, for Revere Copper Company and Baker & Carver.

Hamiltons & Gaillard, for Steelman *et al.*, sailors, and for sundry petitioners.

D. C. & W. S. Anderson and Hamiltons & Gaillard, for Gokey & Son.

Pillans, Torrey & Hanaw, for Martin, Taylor & Co.

J. L. & T. H. Smith, for Edwards and Doughty.

R. Inge Smith, for Adamson and Gladding & Braley.

PER CURIAM. For the information of proctors and parties we give the following explanation of the decree handed down in this case: The funds in court are not sufficient to pay the conceded maritime liens in the case. For the purposes of determining priority, we have considered

that the last voyage was from the port of Providence, R. I., via New York, to the port of Mobile. Whether the trip from Portland, Me., to South America, and thence back to Providence, R. I., should be considered one or two voyages is immaterial. We think that the liens upon this last voyage are entitled to be paid in preference to those incurred on prior voyages. Martin, Taylor & Co., in Mobile, had knowledge of the liens which existed to a large amount against the Kobbe. There is evidence, which we think admissible, to show that Martin, Taylor & Co. agreed to advance the necessary sums to pay off or postpone those liens, so that the ship could make the voyage as contracted with Martin, Taylor & Co. Whether this contract was made or not we deem immaterial, because, with the knowledge Martin, Taylor & Co. had, they had no right to make a charter which, if the vessel should be seized, would further incumber her with large damages, growing out of the failure to comply with the charter-party. We think that Martin, Taylor & Co. should be allowed only the amounts advanced by them to the Kobbe for the necessities of the ship, and that any claim they may have for damages growing out of the breaking up of the voyage and the failure to comply with the charter-party should be postponed until valid liens are paid. As to the claim of Joseph R. Edwards, we allow him the amounts advanced by him for the necessities of the ship in the port of Mobile. The debt to L. P. Wright & Co., which was paid by the said Edwards at the request of the master, imported a lien upon the ship, for which a seizure could have been made, and was threatened. We think that for such advance Mr. Edwards is entitled to the regular maritime lien for necessary supplies furnished a ship in foreign ports. The copper furnished by the Revere Copper Company for the Kobbe was furnished in the port of New York, and to a vessel registered in Searsport, Me., and holding out Searsport, Me., as her home port, although then lying in the waters of New Jersey, and belonging to a party then living in New Jersey. We consider the copper as furnished in the port of New York on the credit of the ship. The bill of William Gokey & Son is for supplies and repairs furnished in Jersey City to a vessel registered in Searsport, Me., having painted on her stern, as required by the act of congress, "Augustine Kobbe, Searsport, Maine." She was thus held out by her owner as of Searsport, Me. Gokey & Son were not apprised, as the evidence clearly shows, of the fact that the residence of the owner was in New Jersey. The owner, therefore, is estopped from claiming other than Searsport, Me., as the home port, and we think, and so decide, that Searsport, Me., was, in the particular circumstances of this case as to him and the other parties interested, the home port of the vessel; that the credit for these supplies and repairs was given exclusively to the ship, and without any reference to the credit of the owner, and, therefore, that the claim imports a maritime lien upon the ship.

STEVENS v. NAVIGAZIONE GENERALE ITALIANA.

(District Court, E. D. New York. August 10, 1889.)

1. SHIPPING—DAMAGE TO FREIGHT.

A bill of lading exempting the vessel owners from liability for "damage done by vermin" does not exonerate them from responsibility for injuries by rats, resulting from their negligence in omitting to fumigate the ship before loading, and the burden of proving that the injuries were not the result of such negligence is on the owners.

2. SAME.

Nor will a further clause, exempting the owners from liability for any fault of the officers or crew in the management of the ship, relieve them, as only mismanagement while the goods are on board is intended to be covered thereby, and not negligence occurring before the freight is placed in the custody of the master and mariners.

3. SAME—RESHIPMENT.

It is immaterial that the bill of lading was executed before the neglect to fumigate the ship occurred, or that it was executed upon the delivery of the goods to a vessel other than the one in which the damage occurred; it being contemplated by the bill of lading that the goods should be transhipped in a different vessel from that in which the voyage began.

In Admiralty. Libel for damages.

Julian B. Shope, (*Chas. Stewart Davison*, of counsel,) for libellant.

Ullo, Ruebsamen & Hubbe, (*Lorenzo Ullo*, of counsel,) for respondent.

BENEDICT, J. This is an action brought against the owners of the Italian steam-ship *Independente* to recover for damage caused by rats to certain goods shipped in Shanghai, on board the steamer *Gilsland*, for transportation to New York. According to provisions in the bill of lading, the goods were transported in the *Gilsland* from Shanghai to Hong Kong. From Hong Kong they were transported to Palermo, in the kingdom of Italy; as is understood in some other steamer belonging to the respondents. At Palermo the goods were reshipped on the steamer *Independente*, owned by the respondents, and in her transported to New York. Upon delivery in New York, or shortly thereafter, the goods were found to be damaged by rats, and also by sea-water. It is the damage by rats alone which is involved in this case, the other damage having been paid by the underwriters.

There is no direct proof in the case to show when the damage by rats occurred, but, inasmuch as the bill of lading given in Shanghai described the goods as "shipped in good order," the presumption is that the damage occurred on the *Independente* during the voyage from Palermo to New York. The question in the case is whether, under the bill of lading sued on, the owners of the *Independente* are liable for damage by rats occurring on her voyage from Palermo to New York. Several stipulations in the bill of lading are relied upon by the respondents as exempting them from liability. One of these stipulations is "damage by vermin excepted." This exemption covers damage by rats. But such an exception, as was decided by Mr. Justice BLATCHFORD in the case of *The*

Isabella, 8 Ben. 139, does not avail to relieve the ship-owner in a case where, as is the fact here, "no evidence is given to show any care or precaution taken to guard against damage by rats." According to the decision referred to, and which should be followed here, the fact of damage by rats is to be regarded as *prima facie* evidence of negligence, in the absence of any explanation or proof of care. The liability of the respondents for the damage in question is undoubted, therefore, unless they are relieved therefrom by another stipulation in the bill of lading, which is as follows: "Damage or loss * * * from any act, neglect, or default of the pilot, master, or mariners in the navigation or management of the ship * * * excepted." This is an express stipulation confined by its terms to liability for negligent acts or omissions on the part of the pilot, or of the master, or of the mariners of the ship, occurring in the navigation or management of the ship; and, as it seems to me, by necessary implication confined to acts or omissions occurring while the goods are on board the ship, where they are, in a certain sense, in the custody or under the control of the master, pilot, and mariners of the ship. It cannot, in my opinion, be held to exempt the ship-owners from negligent acts or omissions which, although they may affect goods thereafter shipped, occur before the goods are by shipment placed in the custody of the master, pilot, or mariners of the ship. If this be the proper understanding of the exception in question, it has no effect to relieve the ship-owners from liability for the neglect which caused the damage in question, namely, the neglect to fumigate the ship; for fumigation must always be performed prior to the shipment of cargo.

In the case of *Steel v. Steam-Ship Co.*, L. R. 3 App. Cas. 72, a clause similar in many respects to the one under consideration was held by the English courts ineffective to exempt the ship for neglect occurring prior to the execution of the bill of lading, and the principle of the decision seems applicable to the present case, although this bill of lading was signed in Shanghai, and the neglect to fumigate the *Independente* occurred subsequently in Palermo; for the bill of lading contemplated a reshipment of the goods at Palermo into a different ship from that in which they were shipped in Shanghai, and for a distinct voyage. The contract provided for several distinct voyages in different ships, and, although a single bill of lading was issued, the legal effect, so far as the exceptive clauses are concerned, is the same as if a separate bill of lading had been issued upon each shipment of the goods upon a different ship for a different voyage. My conclusion, therefore, is that, notwithstanding the exceptions in the bill of lading, the respondent is liable for the damage by rats discovered upon the landing of the goods from the *Independente* in New York. In arriving at this conclusion I have not considered the effect of the Italian law. The bill of lading states that all "general averages arising on the voyage are to be settled at Genoa." This clause has not been insisted upon in the brief, doubtless for the reason that the goods never went to Genoa; that so far as appears none of the parties reside in Genoa; that Genoa was not touched at in any of the voyages; that the clause is limited in terms to "general averages;" and that

there is no proof given to show that the Italian law differs from our law. The law governing this contract I have supposed to be the law of England, as the contract was made in Shanghai, a port conceded in this case to be a port subject for the purposes of commerce and navigation to English law; and the law of England applicable to the case is deemed similar to the law of the United States, with the single exception proved, namely, that the law of the British Empire permits carriers to exempt themselves by express contract from responsibility for losses occasioned by the negligence of their servants,—an exception not important under the construction here given to the contract.

The further point was made at the trial, but not in the brief, that the damage in question might have been caused in a warehouse in Hong Kong, where, according to the bill of lading, the ship had liberty to land and store the goods at shippers' risk, to await the arrival there of the first available connecting steamer. As to this it is sufficient to say that, for all that appears, the goods may have been transhipped directly to a connecting steamer at Hong Kong, without going into warehouse. If the goods were put in store at Hong Kong, it was incumbent on the claimant to prove it. I observe in the brief the point made that the damage in question was not discovered until some days after the goods had been landed from the ship in New York, and that, inasmuch as rats may have eaten the bales after they were discharged, proof that the goods were damaged by rats when landed is necessary before the libelant can recover. This point did not attract my attention at the trial, and, as the respondent is of course not liable for rat damage done after delivery, leave is given to either party to take proofs upon the reference as to the existence of rat damage when the goods were delivered, and the damage reported will be limited to damage by rats appearing to have occurred prior to the delivery of the goods in New York.

The conclusion I have arrived at renders it unnecessary to consider the interesting proposition argued in behalf of the libelants, that an exception such as this bill of lading contains, being held by the courts of the United States to be contrary to public policy, should never be enforced by the courts of the United States upon grounds of comity, because comity yields when the law of the foreign state conflicts with a rule of the forum based upon public policy. Let a decree be entered in favor of the libelant, with an order of reference to ascertain the amount of damage by rats to the libelant's goods.

BLACK v. SOUTHERN PAC. R. CO.

(Circuit Court, N. D. California. July 29, 1889.)

1. SHIPPING—LIABILITY OF VESSEL FOR TORT—LIMITING LIABILITY—PROCEEDING EXCLUSIVE.

Proceedings of the United States district court, under admiralty rule 54, United States supreme court, and sections 4283-4285, Rev. St., the act of congress of June 26, 1884, and section 4289, Rev. St., as amended by act of June 19, 1886, to limit the liability of ship-owners for loss or damages to persons or goods, supersede all other actions and suits for the same damages in the state or national courts, upon the matters being properly presented therein.

2. SAME.

In the nature of the case, where the jurisdiction of the district court has attached, it is exclusive.

3. SAME—TIME OF FILING PETITION—RULE 54.

The petition or libel may be filed in the district court before, as well as after, suit commenced to recover damages.

(Syllabus by the Court.)

At Law. Motion to stay proceedings and strike the case from the calendar.

The steamer Julia was a duly enrolled and licensed vessel, under the laws of the United States, for the coasting trade, and was employed, in connection with the railroad of the Southern Pacific Company, as a part of its continuous line of overland transportation between the state of California and other states, in the business of commerce and navigation, and in navigating between Vallejo Junction, in the county of Contra Costa, across the straits of Carquinez, to South Vallejo, in Solano county, in the state of California, upon tide waters, and within the admiralty jurisdiction of the United States. On February 27, 1888, as she was leaving her dock at South Vallejo for Vallejo Junction, with a considerable number of passengers, but without cargo, her boilers exploded, in consequence of which about 30 passengers lost their lives, and 8 others were injured; and the steamer was so largely damaged that she was beached at South Vallejo. The Central Pacific Railroad Company as owner, and the Southern Pacific Company as lessee, in pursuance of admiralty rule 54, thereupon filed a petition in the United States district court for the Northern district of California, stating the foregoing and other necessary facts; that suits were about to be commenced against them by the heirs and representatives of the parties killed, and by parties injured, for sums largely in excess of the value of the interest of the petitioners in the vessel and freight; and prayed that they might be declared entitled to the benefit of the act of congress as expressed in sections 4283, 4284, and 4285 of the Revised Statutes of the United States, and of an act passed June 26, 1884, and particularly section 18 of said act; also the benefit of section 4289, Rev. St., as amended by an act passed June 19, 1886. They also asked that they might be permitted to convey all their interest in said steamer and freight to a trustee to be named by the court, for the benefit of the parties injured, and the heirs and representatives of those

killed, and that they might be discharged from further liability in the premises. The court rendered a decree appointing a trustee, and authorizing a conveyance for the benefit of the heirs of those killed and the parties injured, and the conveyance was made in pursuance of the order. After the filing of the said petition the plaintiff commenced this suit to recover \$50,000 for injuries alleged to have been sustained by the explosion on said steamer Julia; whereupon the defendant presented to this court a certified copy of the petition, and said decree of the district court, entered thereon, and on affidavits stating the facts, moved that the proceedings in this case be suspended, and the case stricken from the calendar.

Benj. Morgan, for plaintiff.

T. J. Bergin, for defendants.

Before SAWYER, Circuit Judge.

SAWYER, J., (*orally*.) This is an action to recover damages for injuries sustained by the explosion of the boilers on the steamer Julia. After the explosion, and a few days before the commencement of this suit, the Southern Pacific Company, and the Central Pacific Railroad Company, filed a petition in the United States district court stating the facts about the explosion, and the number of persons that were injured and killed, and offered to surrender the vessel, and all their interest in it, and asking to be allowed the advantages provided under the statutes of the United States in such cases. The district court rendered a decree after monition, accepting the property, and appointing a trustee, to whom they conveyed it in pursuance of the offer in the petition, and decree entered thereon. A few days after that, the plaintiff, Black, commenced this suit for \$50,000, damages for injuries sustained by the explosion. This is a motion to stay proceedings, and strike the case from the calendar. More properly it should have been in terms to dismiss the case, the district court having jurisdiction of the entire subject-matter of this suit as well as of the surrender of the vessel, to distribute the proceeds under the statute, and determine whether the company should be exempted from any further payment after the surrender of the vessel thus made or not. In the case of *Steamship Co. v. Manufacturing Co.*, 109 U. S. 578, 3 Sup. Ct. Rep. 379, 617; the United States supreme court held that the district court having acquired jurisdiction, its jurisdiction so acquired is, in the nature of the case, exclusive, and it is the duty of all other courts to whose attention the matter is properly brought to suspend proceedings, dismiss the suit, and refer the whole matter to the district court. That was affirmed in the case of *Butler v. Steamship Co.*, 9 Sup. Ct. Rep. 612.

The plaintiff opposes this motion on the ground that under rule 54 of the United States supreme court in admiralty relating to these matters, inferentially, the company are only authorized to file their petition in the district court after a suit has been commenced. The form of the rule is a little ambiguous it is true. It is that a petition or a libel may be filed in the district court after the suit has been commenced, but it does not say anything about filing it before suit commenced. In the case of *Ex*

parte Slayton, 105 U. S. 451, the supreme court held that under this rule a petition may be filed before, as well as after, the commencement of the suit, so that the supreme court has construed its own rule, adversely to the position taken by the plaintiff. The defendant has filed a copy of the petition in the district court, and of the decree upon it, and there is no dispute as to its correctness except that the decree has been modified by striking out the injunction. The remainder of the decree remains as it was. When brought to the attention of this court, its duty, is, according to the decisions of the supreme court, to suspend all proceedings in the case. The supreme court of the United States says that the suit should be dismissed. The motion here, in form, is, to suspend all further proceedings in the case, and to strike the case from the calendar. I do not know exactly what is meant by striking the case from the calendar, otherwise than dismissing it. We are not in the habit of striking cases from the calendar until they are disposed of, because inconvenience may result therefrom many years afterwards. The proceedings will be suspended, and I think, the suit may as well be dismissed. If counsel, however, think that is not proper, I will leave them to move to amend in that particular. Let the proceedings be suspended, and the suit dismissed.

THE AVOCA.¹

BOYES *et al.* v. THE AVOCA. WELLS *et al.* v. SAME. ELLIS *et al.* v. SAME. BRIGGS *et al.* v. SAME.

(*District Court, E. D. New York. July 12, 1889.*)

1. SALVAGE—COMPENSATION.

A fire broke out on a steamer lying on the north side of an oil-dock in the East river, which spread to the pier, and immediately afterwards to the bark A., which was lying on the south side of the pier, with nearly 10,000 barrels of oil aboard. Almost as soon as the fire broke out it was discovered by the tug A. E. C., which, with all the speed possible, made for the fire. Arriving at the burning pier, the tug took hold of the bark, hauled her into the stream, where she was anchored, and then the crew of the tug boarded the bark, and aided the latter's crew in extinguishing the fire. The time occupied in towing out the bark was about 20 minutes. The fire was wholly extinguished in an hour and three-quarters. The A. E. C. was the only tug able at the time to assist the bark. The latter and her cargo were worth some \$70,000. *Held*, that the tug should recover \$5,000 salvage.

2. SAME—UNNECESSARY AID.

After the bark had been towed into the stream and anchored, and while the crews of the bark and the tug were engaged in extinguishing the fire, two other tugs came along-side to assist. *Held*, that the fire would have been extinguished without their assistance; that what little aid they rendered was not needed; and that they were not entitled to salvage compensation.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty.

Actions by James Ellis and others, Jonathan H. Wells and others, as owners and crew of the steam-tug Alice E. Crew, and Alison Briggs and others, and Charles W. Boyes and others, as owners of the steam-tugs Arrow and Excelsior against the bark Avoca, to recover salvage compensation for services rendered in extinguishing and protecting from fire.

George W. Dease, for libelants Ellis *et al.*

Wing, Shoudy & Putnam, for libelants Wells *et al.*

Alexander & Ash, for libelants Briggs *et al.*

Wilcox, Adams & Macklin, for libelants Boyes *et al.*

William A. Walker, for claimants.

BENEDICT, J. These actions are to recover salvage compensation for services rendered to the bark Avoca on the occasion of a fire at the oil-docks on the 11th day of October, 1888. They were tried together, and may be disposed of together.

At a little after 5 o'clock in the morning of the 11th day of October, 1888, a fire broke out on the steamer Hafis, lying on the upper side of the pier at the foot of North Eleventh street, on which pier was a shed used for storing petroleum oil, in which at the time there were 30 barrels of refined oil, and upon which was a pipe-line, used for the purpose of carrying petroleum in bulk into tanks upon ships lying at the pier. On the south side of the pier lay the bark Avoca, her foremast being about abreast of the shed upon the pier. The Avoca had taken on board some 9,600 barrels of refined petroleum oil, and at the time the fire broke out lay fast to the pier, having 4 barrels of oil upon the deck, and her hold nearly full of refined oil in barrels. A few moments after the fire was discovered the bark caught fire from the blazing shed. The fire was from the beginning rapid and dangerous, and there was no possibility of aid from the shore. Almost at the time the fire broke out it was discovered by the pilot of the Alice E. Crew, a steam-tug, then on the other side of the river, about a mile and a half distant. He at once made for the fire, signaling his engineer to give the tug all the speed possible. Arriving at the burning pier, the tug at once proceeded to give a line to those on board the bark, and to haul her into the stream, the sails of the bark and her bulwarks being at the time ablaze. The slip was about 100 feet wide, and in towing out the bark came in contact with a vessel on the other side of the slip, from which she was speedily extricated, and then taken to an anchorage near a reef in the river at that point. As soon as the bark was anchored the crew of the tug boarded her, and assisted the master and crew in extinguishing the fire. This was accomplished without difficulty by the use of buckets and the tug's hose. The damage done to the bark by the fire was the loss of some sails, the jib-boom, some feet of her bulwarks, and some of her deck plank. Her repairs cost \$1,280. The time occupied in towing the bark out to the place of anchorage did not exceed 20 minutes. The fire on board the bark was wholly extinguished in the course of an hour and three-quarters.

When the bark was anchored she was in danger of striking the reef when the tide changed. She was therefore held away from that by the tug, so that she did not strike. After the fire was out, the tug took the mate of the bark—the master being absent—down to his owners in New York, leaving him there about 10 o'clock in the morning. The value of the bark was \$35,000, less \$1,280, the cost of repairs. The value of the cargo was \$36,760. While the bark was at anchor, and the crew of the bark engaged with the crew of the Alice E. Crew in extinguishing the fire upon the bark, the steam-tug Arrow and also the steam-tug Excelsior came along-side the bark, and now claim to have rendered services in extinguishing the fire on the bark, for which they also demand salvage compensation. It is not to be doubted that the services rendered by the Alice E. Crew on this occasion were salvage services of an important character. Had it not been for the timely presence of the Alice E. Crew, the proofs render it certain that the bark and her cargo would have been wholly destroyed, as were other vessels, by the same fire. The services so rendered were promptly rendered, to a vessel in great distress. They were voluntary, and they resulted in saving the vessel and her cargo from destruction. An effort has been made on the part of the claimants to maintain that in the absence of the Alice E. Crew, the bark would have drifted in the ebb-tide away from the pier, and might have escaped destruction. I cannot believe that such would have been the fact. My opinion is that, in the absence of aid from some tug, the bark would have burned up. It has also been contended that the bark might have been saved by the tug Emperor, a tug that arrived at the pier at about the same time as the Alice E. Crew. But the proof is clear that the Emperor devoted herself to the steam-ship Hafis, and in the taking off her men from the end of the pier, and would not have been able to assist the bark at the same time. The fact is that, owing to the intensity of the fire, and the exposed position of the bark, no tug except the Alice E. Crew was present in time to afford any valuable assistance to the bark. The services, however, were of short duration, and involved no special skill or hazard to the salvors. The case is that of some \$70,000 worth of property saved from total loss by the timely aid of the only tug able to render any assistance. Such a case calls for a liberal award. In my opinion the tug should recover for her services on this occasion the sum of \$5,000. In regard to the services rendered by the Arrow and the Excelsior, in my opinion neither of those vessels are entitled to salvage compensation. Their services were not needed. The Alice E. Crew was along-side the bark, and her crew and the crew of the bark were engaged in putting out the fire, and it would have been extinguished without any aid from the Arrow or the Excelsior. The little aid that they did render was not required, and I am unable to award to them any compensation therefor. The libel in the case of Briggs must therefore be dismissed, but without costs, and the libel of Boyes must also be dismissed, but without costs. In the other two cases, which are one for the owners and the other for the crew of the Alice E. Crew, a decree against the bark and her cargo will be rendered for the

sum of \$5,000, and the taxable costs. The award will be apportioned hereafter among the salvors by the court, unless they agree among themselves as to its division.¹

THE VANLOO.²

SULLIVAN *et al.* v. THE VANLOO.

(District Court, E. D. New York. July 12, 1889.)

SALVAGE—COMPENSATION—COSTS.

Fire broke out on a wooden ship, which had previously carried petroleum, and which was lying in a crowded dock. A water-boat near by came up, on a call for assistance, and poured water into the ship for some 20 minutes, when the city fire department appeared, and extinguished the fire. The ship was valued at \$40,000. *Held*, that \$500 should be awarded as salvage, but without costs, as no proper effort was made by the salvors to make known the amount demanded before suit, and the ship was seized without notice of intention to proceed against her.

In Admiralty.

Action by Jeremiah Sullivan and others against the British ship Vanloo, to recover salvage compensation for services rendered in extinguishing a fire therein by the water-boat Nelly.

Edward D. McCarthy, for libelants.

Wing, Shoudy & Putnam and C. C. Burlingham, for claimants.

BENEDICT, J. This is an action on behalf of the water-boat Nelly, to recover salvage compensation for services rendered to the ship Vanloo on the 23d day of October, 1888, on which day, at about 11 o'clock in the forenoon,—that ship being in the Atlantic dock, with little or no cargo on board,—fire broke out in the lazaret, which burst forth through the hatch in flames estimated from five to ten feet high. At the time the fire broke out the master of the ship was not on board, but the mate and several of her crew were. On the bursting forth of the fire, the mate caused an alarm to be at once given by the ringing of a bell on board the ship and cries of "Fire!" On hearing the alarm, the water-boat Nelly, then lying near by in the same dock, having on board some 8,000 gallons of water, at once proceeded along-side the burning ship, and commenced to throw water upon the fire with her pumps. After some 15 or 20 minutes the fire department of the city came to the ship, and by their powerful pumps the fire was extinguished.

There is no doubt that the services rendered by the Nelly were salvage services. The only question raised in the case is as to the amount. The

¹The parties being unable to agree as to the division, the court subsequently distributed the \$5,000 among the salvors, awarding \$3,750 to the owners of the tug, and \$1,250 to the master and crew.—[*REP.*]

²Reported by Edward G. Benedict, Esq., of the New York bar.

ship Vanloo was a wooden vessel. She had been engaged in carrying petroleum on a prior voyage. Her value was \$40,000. Notwithstanding the strong assertions of some of the witnesses called by the libelants, the circumstances proved satisfy me that the ship would have been saved from destruction by the exertions of the fire department without the aid rendered by the Nelly. It is impossible, therefore, to award to the Nelly salvage compensation as for saving a ship worth \$40,000 from total loss. From what amount of loss the ship was saved by the exertions of the Nelly cannot be determined with accuracy, but the extent of the damage actually done to the ship by the fire, and the intensity of the fire as it appeared to those who saw it, afford some ground upon which to base a conclusion as to the probable extent of the damage that would have been done by the fire before the arrival of the fire department if no assistance had been rendered by the Nelly. The estimate of the libelants' advocate puts the loss from which the ship was probably saved by the Nelly at half her value. It is made plain by the evidence that without the Nelly's aid the fire would have burned for 20 minutes without serious opposition; and it must be conceded that a delay of 20 minutes in attacking such a fire in the lazaret of such a ship could not occur without giving the fire a headway that must have caused serious injury to the ship; but I do not think that she could in that time have been injured to the extent of half her value. Still I cannot doubt that in the absence of the Nelly the ship would have sustained damage many times exceeding the amount I shall award the Nelly for her services.

In determining the proper award to be made to the Nelly, it is to be considered that it is a case of fire in a crowded dock. It was a fire in a wooden ship of the value of \$40,000, which had lately carried a cargo of petroleum. Danger, not only to the ship on fire, but to many others in the dock, was present. Prompt aid was necessary, and prompt aid was furnished by the Nelly, able as she was to throw water upon the fire without any delay whatever. The aid was furnished on a call for assistance from the ship, and was voluntary. It was, however, rendered without risk, and was of short duration. In my opinion, \$500 will be a proper award for the services rendered by the Nelly, but it must be without costs, because it appears that no proper effort was made on the part of the Nelly to make known before suit the amount demanded, and the ship was seized without notice of the intention to proceed against her.

SMITH v. THE MORGAN CITY.

(District Court, D. South Carolina. July 12, 1889.)

1. SALVAGE—FEES OF MARSHAL.

A vessel was libeled for salvage, but the warrant of arrest remained in the clerk's office, and was never given to the marshal. The parties stipulated that the vessel should remain in her owners' possession. The bond was neither taken in the marshal's name, nor delivered to him. After a decree for salvage was rendered, the claim was paid without sale, no money passing through the marshal's hands. Rev. St. U. S. § 829, provides for a commission to the marshal for sales in admiralty proceedings, which shall be reduced when the claim is settled without a sale. *Held*, that the marshal should receive the reduced commission which is given him as compensation for the loss of his opportunity to earn fees by a sale of the property, and not as a compensation for services.

2. SAME—CLERK'S FEES.

But the clerk, under section 828, giving him a commission for "receiving, keeping, and paying out money" in pursuance of any order of court, of a given per cent. of the amount; "received, kept, and paid," is not entitled to any compensation.

In Admiralty. Libel for salvage.

Libel for salvage by Smith, master of the steam-ship Apex, against the steam-ship Morgan City. A decree was rendered for salvage, and, the sum awarded having been paid, the marshal's and clerk's commissions were taxed as part of the costs. To this taxation the claimants object.

J. P. K. Bryan, for libellant.

Barker, Gilliland & Fitzsimons, for claimants.

SIMONTON, J. The case comes up on a question of the marshal's and clerk's commissions. When the libel for salvage was filed, the warrant of arrest was left in the hands of the clerk. Libellant's proctor instructed the clerk not to hand it to the marshal. No arrest having been made, the respondents put in a stipulation for the Morgan City, both proctors assenting, and she remained in the possession of her owners. A decree for salvage having been rendered, the case was settled by the parties without a sale. No money was paid into the registry of the court, or into the hands of the marshal. In the taxation of costs the clerk charges his commissions on the award, \$12,000. The marshal also charges commissions at the rate of 1 per cent. on the first \$500, and one-half of 1 per cent. on the rest. The claimants dispute these charges. Section 829, Rev. St., gives to the marshal, for sale of vessels or other property under process in admiralty, or under the order of a court of admiralty, and for receiving and paying over the money, 2½ per cent. on any sum under \$500, and 1½ per cent. on the excess over \$500. But when the debt or claim in admiralty is settled by the parties without a sale of the property, the marshal shall be entitled to a commission of 1 per cent. on the first \$500 of the claim or decree, and one-half of 1 per cent. on the excess, if any. Judge BENEDICT, discussing this section in *The City of Washington*, 13 Blatchf. 410, says: "The provision

of the statute which gives to the marshal a commission is applicable to all cases where the debt is settled by the parties without a sale. There are no terms of limitation." Although he states this distinctly, yet he adds: "Nevertheless, I cannot think it was intended to apply, where no service is performed or responsibility assumed." After a careful reading of this section, I cannot find the intent which Judge BENEDICT saw. The learned judge, however, recognized the policy of the courts in this matter. He therefore in that case seized upon the fact that the bond for the release of the ship was given in the name of the marshal. But it was never lodged with or delivered to him. That case was in very many respects like the present case. The warrant of arrest was issued, but never executed. The vessel was never in custody, and was bonded by the parties. The case was heard and settled without any action of the marshal. The point of difference is that in the city of Washington the bond was taken in the name of the marshal. In this case the marshal's name does not appear. In neither case was the marshal ever in possession of the bond. This section provides for the compensation of the marshal by fees. Judge BENEDICT evidently felt the necessity for the most liberal construction of the law in order to secure him his fees. In my opinion, it was unnecessary to strain the interpretation of the act. This compensation in question is not based on any service whatsoever. The commission on moneys paid between the parties without a sale of the property is given to the marshal by way of compensation for the loss of the opportunity to earn the fees by sale and by custody of the money. The cause being in the hands of the court, and the court having rendered a decree, the regular mode of enforcing the decree is by execution. The enforcement of the execution was as well the right, as the duty, of the marshal. The parties, however, prefer to settle the matter without further intervention of the court. If they take this course, they cannot deprive the marshal of all that he might have earned. They pay him a reduced commission. One per cent. instead of $2\frac{1}{2}$, and $\frac{1}{2}$ per cent. instead of $1\frac{1}{4}$. The same practice, from time immemorial, has existed in this state. When parties settle a case in judgment outside of the sheriff's office, he gets a reduced commission. Gen. St. S. C. § 2437. The marshal is entitled to the commission charged.

With regard to the clerk. The language of the section (828, Rev. St.) is, "for receiving, keeping, and paying out money in pursuance of any statute or order of court," the clerk is entitled to "one per cent. on the amount so received, kept, and paid." In this case there is no statute requiring payment of the salvage award into the registry. No decretal order has been entered. Upon knowledge of the views of the court, the parties settled without further action on its part. Thus no order was passed requiring payment of the money into court. As the compensation to the clerk is for the trouble and responsibility of actually receiving, keeping, and paying out money, (*In re Goodrich*, 4 Dill. 230,) this claim is disallowed.

THE ADMIRAL.¹GROVE *et al.* v. THE ADMIRAL.

(District Court, E. D. New York. July 23, 1889.)

1. COLLISION—CROSSING COURSE.

The lighter A. was going up the East river along the Brooklyn piers, and the water-boat C. was crossing the river from New York to Brooklyn, and had the A. on her starboard hand. The C. blew two whistles twice without receiving a reply. To her third signal of two blasts the A. replied with two. The C. thereupon starboarded hard and opened her engine in an endeavor to cross the A.'s bows, and the latter ported. The vessels came together and the C. was sunk. *Held*, that the C., being bound to avoid the A., took upon herself the risk of an attempt to cross the latter's bows, and could not recover.

2. SAME—SIGNALS.

When a boat, bound by rule to avoid another, signals that she is going to cross the latter's bows, an assenting signal by the boat having the right of way is merely an announcement to the other that her intention is known. It gives her no immunity from the responsibility cast upon her by law, and constitutes no fault in the event of subsequent collision.

In Admiralty.

Action by Francis H. Grove and others for damages caused by collision.

Hobbs & Gifford and *R. D. Benedict*, for libelants.

Wing, Shoudy & Putnam, *H. Putnam*, and *C. C. Burlingham*, for claimants.

BENEDICT, J. This is an action brought by the owners of the water-boat Croton to recover for the sinking of that boat in a collision with the lighter Admiral that occurred in the East river on the 13th day of February, 1888. The Admiral was proceeding up the East river along the piers. The Croton was crossing the river from the New York shore, bound to the slip at Prentice's Stores, on the Brooklyn side. An examination of the evidence shows the collision to have been occasioned by the fault of the Croton, and not by the fault of the Admiral. The Croton was on a course crossing the course of the Admiral, and having the Admiral on her starboard side. Although she, as she says, blew two whistles to the Admiral twice without receiving a reply, she kept on without change of course or speed, giving to the Admiral a third signal, to which the Admiral then replied by two. It is argued on behalf of the Croton that the failure of the Admiral to reply to her signal shows now that the Croton was not seen by the Admiral. If so, it showed the same thing then. The Croton, therefore, attempted to cross the bows of a vessel near at hand, and known by her to be ignorant of her presence, and of course she assumed the risk of crossing in safety, without any action on the part of the Admiral. Again, when after the Admiral's delay to reply

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

to two of her signals, upon receiving a reply to her third signal, she starboarded hard and opened her engine in an endeavor to cross the Admiral's bows, she took the risk upon herself, and failing is responsible for the result. The reply of the Admiral to her signal gave the Croton no immunity from the responsibility cast upon her by the law. A mistaken idea seems to be entertained in behalf of the Croton that it was a fault on the part of the Admiral to blow two whistles in reply to the two whistles of the Croton, unless it was the judgment of the Admiral that there was room and time for the Croton to pass ahead in safety. It was not for the Admiral, but for the Croton, to determine whether there was room and time for her to pass the Admiral's bows in safety. Her signal to the Admiral announced her determination of that question, and the reply of the Admiral simply informed her that her determination was known to the Admiral, and constituted no fault. It is further claimed, on behalf of the Croton, that the Admiral was in fault, because, after blowing her two whistles in reply to the Croton's signal, she ported her helm, when, by starboarding, she would have assisted the Croton in her attempt to cross the Admiral's bows. The answer here is that it was no part of the duty of the Admiral to assist the Croton. The limit of the obligation upon the Admiral was, when danger of collision appeared to her, to adopt such measures as she had at command to avoid collision. Upon the evidence I doubt whether it was a mistake on the part of the Admiral to port when the Croton starboarded to cross her bows, but if it was a mistake it is not to be laid at the door of the Admiral as a fault. If it was a mistake, and if in the absence of that mistake the Croton would have passed in safety, the mistake is not to be attributed to the Admiral, but to the Croton, whose unwise action alone required the Admiral to determine a question that otherwise would not have been presented. The libel must be dismissed, with costs.

THE GUYANDOTTE.¹

CHAPPELL *v.* THE GUYANDOTTE.

(District Court, E. D. New York. July 26, 1889.)

COLLISION—VESSEL AT ANCHOR—ANCHOR LIGHTS.

The schooner barge M. was run down at night while at anchor near the middle of the Elizabeth river, a little below Lambert's Point pier, by the steamer G. *Held*, on conflicting testimony as to whether the barge exhibited an anchor light, that she did exhibit such light, and, the night being good for seeing lights, that a vigilant lookout on the steamer would have discovered, in time to have avoided, the barge, but the latter not having an anchor watch when lying in an exposed place, she was in fault also, and the damages should be divided.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty.

Action by Frank H. Chappell to recover damages caused by collision.

Carpenter & Mosher, for libellant.

Biddle & Ward, for claimants.

BENEDICT, J. This is an action to recover for the sinking of the schooner barge Marion by the steam-ship Guyandotte, on the night of the 17th of December, 1887. The Marion, laden with a cargo of coal, consisting of about 1,595 tons, was anchored in or near the middle of the Elizabeth river a little below Lambert's Point pier. While so lying she was run down and sunk by the steam-ship Guyandotte, at the time bound down the Elizabeth river from Norfolk, Va. The amount of the claim is upwards of \$24,000. Upon the greatly disputed question in this case, whether the barge was displaying an anchor light, I incline to the opinion that the strong array of witnesses which the barge has been able to produce upon that point must be held to outweigh the testimony produced in behalf of the steam-ship. The case of the claimants is somewhat weakened by the fact shown by the circumstance in proof, that at the time of the inspectors' examination, held shortly after the accident, they were desirous that the lookout on the boat should not be examined by the inspectors, and by the further fact that, although the master of the boat is now positive that the barge had no light, in his letter to the agents, written the day after the collision, he said that she had a dim light. Upon all the testimony I am unable to hold the barge in fault for not displaying an anchor light. But she must be held in fault for not maintaining an anchor watch. Anchored where she was in such a night, she was bound to take every precaution to warn approaching vessels of her presence. A vigilant watch on her deck might by shouting and swinging a lantern have attracted the attention of those on the steam-boat to her presence in the locality where she lay at anchor in time to have enabled the steam-boat to avoid her. The probability that a watch on deck would have prevented the disaster seems to me greater in this case than in the case of *The Clara*, 102 U. S. 200, where the decision of the circuit justice that neglect to have an anchor watch was fatal to a recovery was affirmed by the supreme court. If, as the weight of the evidence is, the barge had a light displayed, the steamer was also in fault for not seeing it in time. The night was good for seeing lights, and I cannot doubt that a vigilant lookout on board the steam-boat would have discovered the barge in time to enable the steam-boat to avoid her. Both vessels being found in fault, the damages will be apportioned.

TEHAN v. FIRST NAT. BANK *et al.*

(Circuit Court, N. D. New York. August 16, 1889.)

REMOVAL OF CAUSES—FEDERAL QUESTION.

An action between a receiver of an insolvent national bank and a depositor, involving only the right of set-off of deposits against notes due by the depositor, does not present a federal question, under Rev. St. U. S. § 5242, avoiding preferences to creditors of such an insolvent bank.

Motion to Remand.

Action by William H. Tehan against the First National Bank of Auburn and Frank M. Hayes, receiver of said bank, to have certain indebtedness due plaintiff as administrator, by said bank, applied to the payment of notes held by the bank against him. It was removed from the supreme court of New York by defendants on the ground that a federal question was involved, it being contended that Rev. St. U. S. §§ 5234, 5236, 5242, were drawn in question. These sections refer to the appointment by the comptroller of the treasury of a receiver to take possession and administer the assets of an insolvent national bank, and the distribution of the funds among the creditors. They also avoid all transfers and assignments, etc., made by the bank with a view of preferring creditors.

Frederic E. Storke and Sereno E. Payne, for plaintiff.

Bacon, Briggs & Beckley and John N. Beckley, for defendant Hayes.

COXE, J. This action was commenced in the supreme court of the state of New York. It was removed to this court upon the theory that a federal question is involved. The plaintiff, as administrator of the estate of Eliza Tehan, had at various times deposited in the First National Bank of Auburn the sum of \$2,279, for which he held certificates of deposit, payable to him in his official capacity, at the time the bank closed its doors. The bank was also indebted to him individually, as a depositor, in the sum of \$40. At the time of its failure the bank held the plaintiff's notes for \$5,500, upon all of which paper he was individually liable, and upon \$2,000 of which his name also appeared as administrator. The plaintiff contends that the amount of the deposits due him should be applied *pro tanto* upon the notes. The receiver, on the contrary, insists that the plaintiff should pay the amount of the notes in full, and receive the ordinary dividends upon the certificates. The nature of the controversy is thus concisely stated in the brief submitted by the defendants:

"The controlling question upon the trial must be whether this plaintiff as an individual is entitled to an off-set on account of trust moneys deposited with the bank."

It is expressly conceded by the defendants that, unless the determination of this controversy involves a federal question, the suit must be remanded. No other ground of jurisdiction is asserted. As thus stated,

it would seem clear that the action is not one "arising under the constitution or laws of the United States," but one involving a simple question of set-off, to be determined according to the general principles of law. *Platt v. Bentley*, 11 Amer. Law Reg. 171; *Colt v. Brown*, 12 Gray, 233; *Tartter's Case*, 54 How. Pr. 385. The correct decision of this question does not, it would seem, depend upon the construction of any law of the United States. *Gold Washing Co. v. Keyes*, 96 U. S. 199; *Railroad Co. v. Railroad Co.*, 26 Fed. Rep. 477. The sections of the national bank act referred to in the petition of removal (sections 5234, 5236, 5242, Rev. St.) are not involved in this controversy in the sense intended by the statute authorizing removals. It is contended that the plaintiff's proceeding is in contravention of section 5242, which prohibits preferences to creditors. There can be no dispute as to the scope and meaning of this section, but the plaintiff maintains that he is not a creditor at all, but a debtor to the bank for the balance between the certificates and the notes. Should this question be determined against him he will, of course, receive his dividends precisely as other creditors. It is not easy to see how there is any infraction of the section referred to, or how its terms are in any manner drawn in question by a proceeding, the object of which is to ascertain, upon a given state of facts, whether the plaintiff's debt to the bank should be reduced by deducting therefrom the amount of the bank's debt to him as administrator. It is not the case of a creditor who obtains a preference subsequent to the failure of the bank or in contemplation of insolvency. No fraud, actual or constructive, is charged in the answer. The object of the suit is to have a balance struck, and the legal *status* of the account declared as of the date when the bank suspended payment. The fact that the bank in question was a national bank does not at all affect the jurisdiction. Act March 3, 1887, § 4. The nature of the action is the same as if the defendant Hayes were the receiver of a state bank, or of an individual. The action involves a simple question of set-off, and is not one arising under the laws of the United States. The motion to remand is granted.

CARSON & RAND LUMBER Co. v. HOLTZCLAW.

(Circuit Court, E. D. Missouri, N. D. June 4, 1889.)

1. REMOVAL OF CAUSES—JURISDICTIONAL AMOUNT—COUNTER-CLAIM.

Under "the local prejudice clause" of act Cong. March 3, 1887, (24 U. S. St. 553,) restricting the right of removal to causes in which the amount in controversy exceeds a specified sum, a petition for removal, showing that plaintiff's claim was less than the required sum, but averring a counter-claim by defendant in excess thereof, which was denied by plaintiff, shows a sufficient amount involved to confer jurisdiction on the federal court.

2. SAME.

A non-resident plaintiff, suing in the state court, against whom a counter-claim is brought, is a "defendant" within the provision of said act, which

limits the right of removal to the "defendant being * * * a citizen of another state" than that in which the suit is brought.

3. SAME—NOTICE OF PETITION.

Three days' notice is not a reasonable time to allow defendant an opportunity to contest the allegation of local prejudice before an order of removal is made.

On Motion to Strike a Petition for Removal from the Files.

Berry & Thompson, Anderson & Schafeld, and B. R. Dysart, for plaintiff.

Sears & Guthrie and James C. Davis, for defendant.

THAYER, J. The only questions that can properly be considered on a motion of this character are (1) whether the petition for removal shows on its face that the amount involved in the controversy is insufficient to give this court jurisdiction; and (2) whether the applicant for removal can remove the case, in view of the fact that he originally brought the suit in the state court to recover a sum of less than \$2,000, and that his right to now remove the suit under "the local prejudice clause" of the act of March 3, 1887, is predicated solely on the fact that the original defendant has filed a large counter-claim in such suit.

There is no doubt, I think, that the right to remove a suit under the local prejudice clause of the act of March 3, 1887, is limited to cases involving over \$2,000. That was the view taken in *Malone v. Railroad Co.*, 35 Fed. Rep. 625, by Mr. Justice HARLAN, and it seems to me to be the only view that can reasonably be taken of the act in question. It is also clear that the counter-claim filed in the cause now under consideration is for a sum in excess of \$2,000. The petitioner for removal brought a suit in the state court to recover the sum of \$1,822.99, money alleged to be due for lumber sold and delivered. By way of counter-claim the original defendant interposed two demands,—one in the sum of \$725.21, for services rendered, and money and materials laid out and expended, for petitioner's benefit, and the other in the sum of \$3,000 for unliquidated damages arising out of a breach of contract committed by the petitioner. The total sum that the original defendant seeks to recover on his counter-claim is \$3,725.21, and, as his right to recover any portion of that sum is denied by the petitioner's reply, that is *prima facie* the sum involved in the cross-action or counter-claim.

The second question is more difficult, and I am not advised that it has ever been decided under the act of March 3, 1887. In the case of *Clarkson v. Manson*, 4 Fed. Rep. 260, Judge BLATCHFORD ruled that the original plaintiff in a suit brought in the state court, against whom a counter-claim in the sum of \$750 had been preferred, might remove the suit to the federal court after the filing of the counter-claim, although the sum originally sued for was less than \$500. This conclusion was arrived at on the theory that a counter-claim preferred under the statutes of the state of New York was a suit, within the meaning of the removal act of March 3, 1875. The local prejudice clause of the act of March 3, 1887, limits the right of removal to the "defendant being * * * a

citizen of another state" than that in which the suit is brought. If by the word "defendant" we are to understand only the person who is defendant as the parties are arranged when a suit is begun, then this suit is not removable; but if we are at liberty to regard a non-resident plaintiff suing in the state court, and against whom a demand is preferred in the form of a counter-claim, as a defendant, within the meaning of the statute, then the cause is removable, if local prejudice is satisfactorily shown to exist. I am strongly inclined to the opinion that the latter view is permissible, and that it ought to be adopted. The act provides, in substance, that, when a suit is brought in which there is a controversy between a citizen of a state in which the suit is brought and a non-resident, any defendant, being a non-resident, may remove the controversy to the federal court on the ground of local prejudice. 24 U. S. St. 553. A counter-claim certainly creates a controversy in which the original plaintiff occupies the attitude of a defendant. It is in reality a cross-action, which often involves an inquiry into transactions wholly distinct from those which furnish the basis of the original suit, and in such cross-action a judgment may be rendered against the original plaintiff to any amount. It frequently occurs in practice that the entire controversy turns on the counter-claim, the original cause of action stated in the petition being practically confessed. The right to plead matters by way of counter-claim has been so much enlarged by the Code of Procedure now in force in many states that it will often happen, as in this case, that a non-resident plaintiff, forced to sue in a state court for a small amount, that is perhaps, undisputed, will find himself confronted by a large demand in the shape of a counter-claim that he would have been entitled to remove to the federal court had the plaintiff in the counter-claim been the first to sue. By the language employed in the statute, congress, I think, intended to secure to the non-resident the right of removal in such cases, if the existence of local prejudice was satisfactorily shown. Unless this view is adopted, it will deprive non-residents of their right to choose the tribunal in which to have their rights determined, in a very large class of cases. The motion to strike the petition for removal from the files will accordingly be overruled. In this class of removals, where the petition is presented to the federal court in the first instance, the opposite party should have reasonable notice and opportunity to contest the allegation of local prejudice, before an order of removal is made. Such was the opinion held in *Malone v. Railroad Co.*, *supra*. In this case notice was served on May 25, 1889, and the petition for removal was filed on May 28, 1889. The notice was hardly sufficient. Two weeks' time will be allowed to file affidavits in opposition to the petition before any order is made, but the petition to remove will be entertained.

BURCK v. TAYLOR.

(Circuit Court, W. D. Texas. August 16, 1889.)

1. REMOVAL OF CAUSES—INTO WHAT DISTRICT.

Under act Cong. Aug. 13, 1888, giving the circuit courts of the United States jurisdiction of controversies between citizens of different states, and providing that an action by original process shall be brought only in the district of which the defendant is an inhabitant, except where the only ground of jurisdiction is that of diverse citizenship, in which case actions shall be brought in the district of the residence of either plaintiff or defendant, and further providing for the removal of such actions into the circuit court for the proper district, at the instance of defendant, an action brought by a citizen and resident of the Eastern district of Texas against a citizen of another state, in a state court in the Western district, is removable to the circuit court of the latter district.

2. SAME—TIME OF APPLICATION.

Section 3 of the act mentioned, requiring a petition for removal to be filed before defendant is compelled to plead to the action under the state practice, is complied with by the timely filing of the petition, though it is not actually presented to the court until after the expiration of the time to plead.¹

3. SAME—BOND.

When special bail is not originally demandable in an action, the removal bond need not contain a condition for the entry of the defendant's appearance in the federal court, though he has not yet entered such appearance in the state court, as the act mentioned only requires that condition when special bail may originally be demanded.

Motion to Remand.

F. G. Morris, for plaintiff.

Walton, Hill & Walton and *Mr. Matlock*, for defendant.

MAXEY, J. This suit was instituted by the plaintiff on the 8th day of December, 1888, in the district court of Travis county, Tex., to recover of defendant damages in excess of \$2,000, growing out of an alleged breach of contract. Citation was served upon Taylor in Travis county returnable to the March term of court. On the 5th day of March, and prior to the time required by the laws of Texas for Taylor to answer the plaintiff's petition, he filed his petition and bond for the removal of the suit to this court. The order suspending further proceedings in the state court was entered during the same term, on the 21st day of June, and a copy of the record was seasonably filed in this court. A motion is now made by the plaintiff to remand the cause, mainly upon the following grounds:

"(1) Because neither the plaintiff nor the defendant is a resident of the Western district of Texas, this suit could not have originally been brought in

¹ An extension of time to answer by consent of parties does not extend the time for filing a petition for removal. *Dixon v. Telegraph Co.*, 38 Fed. Rep. 377. And a petition for removal filed by a defendant after obtaining an *ex parte* order extending his time to plead, contrary to the state practice, is not filed in time. *Hurd v. Gere*, Id. 537. Where a plea in abatement is quashed, and defendants fail to plead to the merits *instanter*, as required by law, a petition for removal, filed nearly a month afterwards, is too late, though plaintiffs did not take a default, as they might have done. *Kaitel v. Wylie*, Id. 865. For rulings on the question as to the proper time for filing applications for removal from state to federal courts, see *Tan Bark Co. v. Waller*, 37 Fed. Rep. 545, and cases cited; *Lockhart v. Railroad Co.*, 38 Fed. Rep. 274; *Doyle v. Beaupre*, 39 Fed. Rep. 289.

this court; and as this court cannot acquire jurisdiction by removal from a state court of a case which could not have originally been brought in this court, it must follow that this court has no jurisdiction to try this case. (2) Because it appears from the record that the petition and bond for removal were not presented to the district court of Travis county for approval of the bond, or to pass on the petition, until long after the time when defendant was required by the laws of Texas to answer the plaintiff's petition. (3) Because the defendant did not enter his appearance in the district court of Travis county, and there is no condition in the bond for removal obligating himself to appear in this court, as is required to be in such bonds by law."

The first ground of objection presents a serious question, and one which has not been passed upon by the supreme court. A brief reference to the facts as disclosed by the record is necessary to render perfectly intelligible the point raised by counsel. It appears that the plaintiff is a resident citizen of the Eastern district of Texas, and that the defendant is, or was at the date of the institution of this suit, a resident citizen of Cook county, Ill. Removal of the suit is sought on the ground of diverse citizenship. The argument of plaintiff's counsel assumes that the suit is one of which this court has not original jurisdiction, because neither the plaintiff nor defendant is a resident of this district, and therefore the cause is not removable under the act of congress. By the first section of the act of August 13, 1888, the circuit courts of the United States are given original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and cost, the sum or value of \$2,000. In the same section the following provision occurs:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 St. at Large, 434.

The second clause of section 2 of the act, which applies to this suit, reads as follows:

"Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents of that state."

It is clear that to authorize removal of a suit under the second clause of the second section of the act the suit must be one of which the circuit courts have original jurisdiction, and I am not aware of any decision holding the contrary view. Now, counsel for plaintiff insists that the court would be without original jurisdiction for the reason that neither of the parties to the suit is a resident of this district, and that no United States court in Texas could take jurisdiction except the circuit court for the Eastern district,—the plaintiff residing in the Eastern dis-

strict, and the defendant in the state of Illinois. The court is unable to agree with counsel in his construction of the statute, for it seems to ignore the defined and well-recognized distinction between questions of jurisdiction proper and the mere place of suability. This distinction is clearly indicated by the supreme court in *Ex parte Schollenberger*. In that case Mr. Chief Justice WAITE, speaking for the court, says:

"The act of congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases; and certainly jurisdiction will not be ousted because he has consented." 96 U. S. 378.

The precise question here presented was raised before Judge BREWER in the case of *Railroad Co. v. Lumber Co.*, and in a well-considered opinion he held that the fact that both parties were non-residents of the district did not oust the court of jurisdiction in a case removed from the state court by the non-resident defendant. In the discussion of the question he uses this language:

"The same distinction between the general matter of jurisdiction and the particular court for suit and trial is recognized in *Fales v. Railway Co.*, 32 Fed. Rep. 673; *Gavin v. Vance*, 33 Fed. Rep. 84; *Loomis v. Coal Co.*, Id. 353. Turning to the second section, we find that the removable suits are those of which, by the first section, the federal courts are given jurisdiction. The language speaks of jurisdiction generally, and of courts in the plural. Any suit is removable of which any federal circuit court might take jurisdiction, and the mere fact that the defendant could have successfully objected to being sued in any one or more particular federal courts does not destroy the general jurisdiction of federal courts, or prevent its removal. Take the case at bar. If the suit had been commenced in this court, and process served personally upon the defendant, and it had raised no question other than upon the merits of the controversy, this court would have had undoubted jurisdiction, and the judgment it rendered would have been valid. If the jurisdiction of the court upon his failure to insist upon his personal privilege be conceded in the one case, why should there be doubt of the jurisdiction when he voluntarily seeks the court?" 37 Fed. Rep. 6, 7.

Judge NEWMAN has also construed the two sections of the statute now under consideration in the case of *Bank v. Bank*, which came before him in the Northern district of Georgia. Referring to sections 1 and 2 of the act, already quoted in this opinion, he says:

"I do not think that it can be said that jurisdiction is given by the language quoted from the latter part of section 1. It relates to the locality in which suits may be brought by original 'process or proceeding,' and is intended for the benefit of defendants. It provides where they may be required to answer suits originating in the federal courts. Jurisdiction is conferred on the circuit courts by the first part of section 1, and that jurisdiction, when founded on citizenship, is between citizens of different states, provided the jurisdictional amount is involved; and it is to that portion of the section, instead of the latter part, fixing the place where suits may be brought by original 'process or proceeding,' section 2 refers." 37 Fed. Rep. 659, citing authorities.

In the case of *Gavin v. Vance*, 33 Fed. Rep. 88, 89, Judge HAMMOND seems to take a different view of the statute, but the reasoning of the courts in *Bank v. Bank*, and *Railroad Co. v. Lumber Co.*, *supra*, is more satisfactory to my mind; and, concurring in the views expressed in those cases, the court is of opinion that the first objection of the plaintiff is not well taken.

The second objection of the plaintiff cannot be sustained. Section 3 of the act of congress provides:

"That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending," etc. 25 St. at Large, 435.

The petition and bond for removal of the cause were filed in the state court on the second day of the return-term, and under the laws of this state the defendant could have filed his answer on or before the fifth day of that term. Rev. St. Tex. art. 1263. The filing of the petition was clearly in time, and the removal proper, unless the defendant was also required to present the petition to the state court within the time permitted him to file his answer. The act of congress contains no such requirement, and reference has not been made to any adjudicated case where that construction has been held. From pressure of business, or for other good cause, the state court might not be able in all cases to act upon the petition on or before the fifth day of the term, and it would be a harsh rule to hold that the defendant's right to remove was entirely cut off by the mere delay in presenting the petition and bond to the court, where the right of removal had been otherwise perfected by obtaining an order at the same term "suspending further proceedings" in the state court, and entering a copy of the record in this court at the proper term.

As to the third ground of objection it is insisted in argument that the bond for removal should contain a stipulation obligating the defendant to appear in this court, etc. The statute prescribes the conditions of the bond, and they are as follows:

"And shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein." 25 St. at Large, 435.

It is conceded that special bail was not originally requisite in this suit. The bond contains every requirement of the statute except the condition applicable to those cases in which special bail is required, and is

therefore in all respects sufficient. Having considered all the points raised in argument, the court is of opinion that the suit is properly here, and an order will be entered overruling the motion to remand.

JONES *et al.* v. LAMAR *et al.*

(Circuit Court, S. D. Georgia, E. D. June 14, 1889.)

1. EQUITY—EXCEPTIONS TO MASTER'S REPORT.

Exceptions to the report of a master in chancery are to be regarded so far only as they are supported by the special statements of the master, or by evidence brought before the court by a reference to the particular testimony on which the exceptor relies.

2. SAME—REASSIGNMENT.

Where an exception is general, and the court is thereby called upon to review the entire mass of testimony, and to perform the duties which properly belong to the master and to counsel, it is not required to make the effort to do so, and may overrule the exception. Where, however, a reassignment of the hearing can be made without prejudice to the interests of the parties and the business of the court, it is discretionary to grant time and leave to amend the exceptions.

(*Syllabus by the Court.*)

In Equity. For hearing on the merits, see 34 Fed. Rep. 454.

Evarts, Choate & Beaman, Geo. A. Mercer, and Henry R. Jackson, for complainants.

Chisolm & Erwin, H. C. Cunningham, and F. G. Du Bignon, for defendants.

SPEER, J. This cause, having been referred to the master, comes up now for final hearing on exceptions to the master's report. The record is voluminous, the amount involved is something over \$150,000, and the report of the master is lengthy. There have been, indeed, 47 exceptions filed to the report. Upon inspection of the record the court is at the very threshold of the hearing confronted with the fact that the solicitors for complainants have entirely failed to identify, specify, or refer to the particular portions of the evidence relied upon to support the exceptions. A consideration of a few of the exceptions will illustrate the unnecessary labor it is now proposed to inflict upon the court by this imperfect method of procedure. For instance, exception 8 merely states "that the master erred in finding that there was no evidence before him that G. B. Lamar usually kept correct books of account." Again, exception 20: "That the master erred in finding (page 35) that the expenses incurred by G. B. Lamar in collecting said cotton amounted to no more than \$85,506.60." Again, exception 21: "That the master erred in finding (page 35) that the proportion of the expense for the collection of said cotton due by the estate of C. A. L. Lamar did not exceed \$25,644.48." In this manner, and wholly without reference to the testimony, com-

plainants' 47 specifications of error are made. Now, it is evident that in the discussion of all issues of fact raised by either exception the comments of the solicitors might take as wide a range as the entire record itself, and the labor of considering the entire mass of testimony, relevant and irrelevant, in order to sift out that which is pertinent to the issue raised, would be imposed on the court. The labor of the court would therefore not be abridged by the reference, and the proceedings had before the master would be fruitless. The language of Mr. Justice SWAYNE, in *Foster v. Goddard*, 1 Black, 506, referred to in the argument, that "all that is necessary is that the exceptions should distinctly point out the finding and conclusion of the master which it seeks to reverse," was directed only to the question raised by the objection of counsel in that case, viz., that "such an exception is in the nature of a special demurrer, and that these are not so full and specific that the court can consider them." To be sufficiently explicit to raise any issue of law is one thing; to point out the evidence relied upon to sustain an exception to a finding upon the facts is quite a different thing. In the case of *Harding v. Handy*, 11 Wheat. 103, 126, Chief Justice MARSHALL states the rule upon this subject as follows:

"The report of the master is received as true when no exception is taken, and the exceptions are to be regarded so far only as they are supported by the special statements of the master, or by the evidence, which ought to be brought before the court by a reference to the particular testimony on which the exceptor relies. Were it otherwise,—were the court to look into the immense mass of testimony laid before the commissioner,—the reference to him would be of little avail. Such testimony, indeed, need not be reported further than it is relied on to support, explain, or oppose a particular exception."

The decision just quoted has never been departed from, and was followed by this court in *Jaffrey v. Brown*, 29 Fed. Rep. 479, and uniformly since then. In passing upon a similar matter in the case of *Stanton v. Railroad Co.*, 2 Woods, 506, Judge WILLIAM B. WOODS said:

"This branch of the exception is too vague and general, and requires of the court the performance of duties which properly belong to the master and counsel. * * * It is impossible for the court to pass intelligently on such an exception, and no rule of equity practice requires the court to make the effort to do so."

The rule is one of practical utility, and is intended to narrow the range of investigation and consideration by the court to the evidence controlling the questions at issue, and if the solicitors will bear this purpose of the rule in mind, there will be little difficulty in preparing exceptions in accordance therewith. The case of *Harding v. Handy*, *supra*, was decided in 1826, before the adoption, in 1842, of the general equity rules. These rules contain a number of provisions intended to avoid surplusage, redundancies, and repetitions in the record which, under the former practice, frequently obscured the merits of the cause, and unnecessarily consumed the time of court. Rule 76 provides that "in the reports made by the master to the court no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before him, shall be stated or recited, but such state of facts, charge, affidavit,

deposition, examination, or answer shall be identified, specified, and referred to so as to inform the court what state of facts, charge, affidavit, deposition, examination, or answer were so brought in or used." It is not necessary, in the spirit of this rule, to set out *in extenso* in the exception the evidence relied upon to sustain it, but the evidence must be so specified and referred to as to enable the court to understand its substance, and if it is thought proper, to turn to it and ascertain its full import and effect without unnecessary labor and waste of time. Solicitors for the complainants say that they are unwilling to rely solely upon the evidence referred to by the master as the basis of his findings, and since they have specified nothing else, and since the court, under the rule in *Harding v. Handy, supra*, will not consider testimony in support of the exceptions not referred to in the report of the master, or brought to its attention by appropriate reference in the exceptions, exceptors are unable to proceed. It appearing, however, that the cause can be reassigned for hearing without prejudice to the interests of the parties or the pending business, the court will grant time and leave to amend the exceptions.

PIERCE *et al.* v. FEAGANS *et ux.*

(Circuit Court, E. D. Missouri, N. D. February 6, 1889.)

1. LIS PENDENS—WHEN APPLICABLE.

Pendency of a former suit in a state court, brought by the mortgagors against the trustee in a deed of trust and others, to restrain the trustees from selling the mortgaged property under a power of sale in the mortgage, is no defense to a suit to foreclose the mortgage in a federal court, where the parties are not identical.

2. SAME.

Although complainants in the suit in the federal court, who are defendants in the suit in the state court, might, by the state practice, file a cross-bill praying foreclosure, they are not bound to do so where they are non-residents, but may bring suit in the federal court.

3. SAME—STATE AND FEDERAL COURTS.

Pendency of a former suit in a state court is no defense to a suit of the same nature, and between the same parties, brought in the federal court.

4. SAME—PLEADING.

The defense of *lis pendens*, in equity, must be made by plea, and not by answer.

5. DEED—ACKNOWLEDGMENT—EVIDENCE.

A notary's certificate, attached to the deed of a married woman, that she acknowledged, separate and apart from her husband, that she executed it of her own free will, was corroborated by the notary. There was no evidence of fraud or duress. Defendants, who were vitally interested, and another witness, who was disinterested, but whom the notary denied was present, impeached the certificate. Defendants gave no other evidence than their and his own statements that such disinterested witness was present. The testimony of all the witnesses was taken six years after the execution of the deed, and all testified with great minuteness of detail. *Held*, that the evidence was not sufficiently clear and convincing to overcome the certificate.

In Equity. On bill for foreclosure.

W. J. Patterson, for complainants.

B. R. Dysart, for defendants.

THAYER, J. This is a bill to foreclose a deed of trust in the nature of a mortgage on property of Mrs. Addie L. Feagans, situated in Macon county, Mo. The deed of trust purports to have been acknowledged by Mrs. Feagans and her husband on July 25, 1882, to secure a loan of \$2,000, to mature on July 1, 1887. Interest was duly paid on the loan until July 1, 1885, since which date no payments, either of principal or interest, appear to have been made. The defenses interposed are twofold: *First*, a plea of *lis pendens*; and, *second*, that Mrs. Feagans' acknowledgment was not taken by the notary before whom the deed of trust was acknowledged, in substantial conformity with the laws of this state in force when the acknowledgment was taken.

1. The first of the above defenses cannot avail the defendants. The suit relied upon as establishing the defense of *lis pendens* was a suit brought by Mrs. Feagans and husband in the circuit court of Macon county, Mo., against J. B. Watkins, trustee in the deed of trust, and against Francis T. Pierce and his attorney, to restrain the trustee from selling the mortgaged premises under a power of sale contained in the mortgage. The parties to the two suits are not identical, and the relief sought is not the same. This of itself is sufficient to defeat the plea. It is true that, under the practice which obtains in the state court, the complainants, who are defendants there, might file a cross-petition, and pray for a foreclosure of the mortgage, but they are not bound to do so. Being non-residents they are entitled to invoke the jurisdiction of the federal court for the foreclosure of their mortgage, and they are not deprived of that right merely because a suit has been brought against them in the state court, of such nature that they might file a cross-bill, and obtain similar relief there. *Manufacturing Co. v. Scutt*, 22 Fed. Rep. 710. Again, the suit in the state court is pending in a different jurisdiction. It is now well settled that the pendency of a suit in a state court cannot be taken advantage of by way of a plea of *lis pendens*, to defeat a suit of the same nature, and between the same parties, in the federal courts. The two courts, though not foreign to each other, belong to different jurisdictions in such sense, that the doctrine of *lis pendens* is not applicable. *Stanton v. Embrey*, 93 U. S. 554; *Gordon v. Gilfoil*, 99 U. S. 169-178; *Sharon v. Hill*, 22 Fed. Rep. 28. And, lastly, for a technical reason the defense of *lis pendens* must be ignored. It is made by answer, and not by plea. The defense in question, being in the nature of a plea in abatement, should be made by plea, and not by answer, and, not having been so made, is waived. *Story, Eq. Pl. §§ 708, 735; Equity Rule No. 39.*

2. Passing to the second defense, it is well to note that it is not claimed in this case that any fraud or imposition was practiced on Mrs. Feagans to induce her to sign the deed of trust; nor is it claimed that her husband exercised undue influence over her, or that he so compelled her to sign it against her will. The money raised on the deed of trust or mort-

gage was needed to lift another prior mortgage on the same property, which appears to have been a valid lien; and the greater part of the money was so used. That Mrs. Feagans acted with the utmost freedom—that her will was in no sense dominated by that of her husband or any other person—cannot be doubted. The sole complaint is that she did not acknowledge to the notary, separate and apart from her husband, that she executed the deed freely and without compulsion. The contention is that the notary's certificate that she did so acknowledge it is false. Since the leading case of *Wannell v. Kem*, 57 Mo. 480, 481, holding that the certificate of a notary or other officer empowered to acknowledge deeds, is not conclusive evidence of the facts therein stated, but may be impeached, and the deed thereby nullified in so far as it affects the wife's interest in the lands conveyed, even though no fraud, imposition, or duress was actually practiced on her,—the state courts have frequently had occasion to consider the kind and degree of proof that ought to be required to overcome such certificates, even conceding that they are only *prima facie* evidence of the facts attested. Thus, in *Bohan v. Casey*, 5 Mo. App. 110, it was said that the evidence to impeach a certificate of acknowledgment of a married woman ought to be "clear and convincing," so as to satisfy the court that the certificate is false. It was further said in the same case that, when the testimony of the complainant alone is relied upon to impeach a certificate, it ought to be supported by a "concurrence of material circumstances." In *Morrison v. McKee*, 11 Mo. App. 594, the same court held that they would not set aside a finding of the lower court in favor of the validity of a deed, in the absence of any evidence of fraud, although the testimony both of the grantor and the notary tended strongly to contradict the certificate of acknowledgment. In *Biggers v. Building Co.*, 9 Mo. App. 210, where there was no evidence of fraud or collusion between the grantee and the notary, and no circumstances tending to corroborate the testimony of the complainant contradicting the certificate, the court held that the complainant's testimony did not make out a *prima facie* case as against the certificate. In *Rust v. Goff*, 94 Mo. 519, 7 S. W. Rep. 418, it was held that the evidence necessary to impeach and overthrow a certificate of acknowledgment should be "clear, cogent, and convincing;" and the same remark was repeated in *Mays v. Pryce*, 95 Mo. 612, 8 S. W. Rep. 731. In most, if not all, of the cases in the state courts wherein a successful assault has been made upon a certificate of acknowledgment that was in due form and by the proper officer, there is to be found either some evidence of fraud or imposition practiced on the wife such as was well calculated to excite suspicion of the verity of the notarial certificate, or some evidence of collusion between the parties, or proof of circumstances strongly tending to show that the officer taking the acknowledgment did not comply with the law, or a general concurrence of testimony on the part of all concerned in the transaction that the law in some material respect was not complied with. *Wannell v. Kem*, *supra*; *Sharpe v. McPike*, 62 Mo. 300; *Steffen v. Bauer*, 70 Mo. 399; *Mays v. Pryce*, *supra*. In the present case three witnesses (Mr. and Mrs. Feagans and Louis Rider) have

given evidence tending to impeach the certificate. The testimony of the notary substantially corroborates the certificate. The testimony of all four of the witnesses last named, who claim to have been present on the occasion of the acknowledgment, was taken more than six years after the event to which it relates.

As I have before remarked, there is no evidence of fraud, imposition, or duress in the case. Outside of the oral testimony last mentioned, there is not a single independent fact or circumstance tending to impeach the verity of the certificate. It is true that the recorder's memoranda of the time when the mortgage was filed for record confirms the statement of defendant's witnesses, rather than the testimony of the notary, as to the hour of the day when the acknowledgment was made, but it throws no light on the important question how the acknowledgment was taken. The notary may be right in his recollection that it was taken in the afternoon, towards evening. It may have been taken on the evening of July 24, 1882, and the certificate may have been made the following morning, and either intentionally or erroneously dated as of July 25, 1882, neither of which facts would impair it, if the acknowledgment was properly taken. But, in any event, it is the certificate that is to be overcome. That is in itself evidence of a high grade of the facts it attests, and its force is not impaired by the circumstance that the notary, in his oral testimony, given six years after the event, made a mistake as to the hour of the day when the acknowledgment was taken, even if he did make such mistake. The weight to be given to the testimony of Mr. and Mrs. Feagans is very much lessened by the consideration that they are vitally interested in the result of the suit. The court cannot overlook the fact, in a case of this character, that human testimony is often swayed by self-interest, and that it is comparatively easy, when witnesses are testifying concerning a transaction that occurred six years ago, and that has become indistinct in the memory, to make their recollection of the details of the occurrence conform to their present interest. The force of the last remark is well illustrated in the present case by Mrs. Feagan's testimony. While she does not claim to have been imposed upon by her husband, or any one else, in the matter of executing the deed of trust, and while she admits that she stated to the notary that she signed it freely, and knew what the instrument was, yet there is throughout her entire examination a disposition manifest to convey the impression that she did not know at the time, and did not learn for nearly six years thereafter, that the deed of trust in question covered her homestead. And such is the impression conveyed by her testimony. She does not say, however, what property she supposed was being conveyed or mortgaged; nor does she state whether her husband or herself had at the time any property other than the homestead to which the mortgage could relate. But notwithstanding the impression so conveyed by her evidence, it is clearly apparent to the court that she must have known, and did know, when she executed the deed of trust that it covered the homestead, and that it was agreed between herself and her husband that a new loan should be made thereon for the purpose of discharging a prior mortgage on the property.

I would not be understood as intimating that, because Mrs. Feagans knew that the homestead was being mortgaged, and freely joined therein, that therefore the conveyance is to be deemed valid, although the notary did not take her acknowledgment separate and apart from her husband. No such proposition is advanced. I merely instance the singular impression conveyed by her testimony in the respect above noted, as a sufficient reason why the court ought not, in cases of this kind, to place much reliance on the testimony of interested parties, without strong corroborating circumstances, especially when they narrate the details of a transaction that in all human probability were not at the time considered important, and did not make much of an impression on the mind. If Mrs. Feagans cannot now remember, or has forgotten, that the mortgage covered her homestead, it is not probable that her recollection is at this time very clear upon the point whether her husband left the room for a few moments when her acknowledgment was taken.

Louis Rider, who testified in defendant's favor, must be regarded as a disinterested witness. The notary, however, denies that any such person was present when the acknowledgment was taken, or that any one was present but himself and Mr. and Mrs. Feagans. Mr. Rider lived in an adjoining county at the time, but claims to have been at defendants' house on a visit when the acknowledgment was made. Notwithstanding the emphatic assertion of the notary that Rider was not present, defendants did not offer any proof besides their own and Rider's statement, that in point of fact Rider was a visitor at their house on the occasion in question. By due diligence convincing proof of that fact might (as it appears to the court) have been obtained, but no efforts seem to have been made in that direction. Then, again, Rider testifies with a minuteness of detail that is surprising, considering the fact that he was merely a casual observer of the transaction, and that his testimony was taken so long after the event to which it relates, and that in the mean time nothing whatever had occurred to keep the event fresh in his recollection.

The criticism last made applies with almost equal force to the testimony of Mr. and Mrs. Feagans, and to the testimony of the notary, Steens. All of the witnesses undertake to repeat exactly what was said by the notary and themselves, to describe the position and location of each person in the room, and to give other details that would ordinarily fade from the recollection after the lapse of much less than six years, unless the transaction was one of those occurrences that make vivid and lasting impressions on the mind. The circumstance last alluded to leads me to distrust the accuracy of Rider's recollection in some of its details. Conceding that he was a visitor at defendant's house when the acknowledgment was taken, it appears to me doubtful whether, after the lapse of six years, nothing having occurred in the mean time to call the matter to his attention and fix it in his memory, he would be able to recollect distinctly that Mr. Feagans did or did not step out of the room for a few moments while the acknowledgment was being taken. A trifling incident of that character would naturally fade from the recollection of an ordinary person who was merely a casual observer of the transaction after

the lapse of a few years, or even a few months, though the general fact that he was present when certain papers were signed and acknowledged might be recalled.

It is unnecessary to pursue the subject further. I have said enough, no doubt, to indicate to counsel the view I have taken of the material parts of the testimony, and the grounds upon which I rest my decision. In a case of this character it is not enough that there is a preponderance of evidence in favor of the defendants if it should be conceded that there is such a preponderance in the present case. In the language of the state courts, which furnishes the rule of decision, the burden is on the defendants, and the proof furnished to overcome the certificate must be "clear, cogent, and convincing." It is a record that is assailed,—a record of an official act performed more than six years ago, and made contemporaneously with the acts attested. The record is in due form of law, and it is aided by the presumption that always attends the acts of public officers, that the duty devolved on the officer was properly performed in the manner stated. In the present instance no effort is made to overcome it by circumstantial proof in its nature conclusive or very cogent; but the attempt is to impeach the record, solely by the recollection of witnesses, who, unless they are exempt from ordinary human frailty, can at best only have at this time an indistinct recollection of the material facts to which they testify. A decree must be entered for complainant. It is so ordered. Complainant's counsel may prepare and submit a decree for the court's approval. Interest will be allowed and computed on the bond at the rate of 10 per cent. per annum from maturity. Interest on the coupons will be computed at 6 per cent. per annum from their maturity. Interest on sums advanced to pay taxes will be allowed at the rate of 10 per cent. per annum.

MILLS v. KNAPP.

Circuit Court, N. D. New York. August 26, 1889.)

1. FOREIGN EXECUTOR—RIGHT TO SUE.

An executor appointed in another state has not, as such, in New York, any authority to prosecute a suit at law or in equity.¹

2. SAME—WHEN OBJECTION CAN BE RAISED.

Where a bill sets forth affirmatively, as the foundation of the right to sue, the granting of letters of administration in another state, and nothing else, and the answer puts it in issue, the right of plaintiff to sue is not admitted, and defendant can raise such objection at the hearing on the merits.

3. EQUITY—COMPLETE REMEDY AT LAW.

Where plaintiff declares in his bill that he is entitled to recover an exact sum, and asks no discovery, and shows that no accounting is necessary under the direction of the court, he shows that he has a complete remedy at law, and the court will order the bill dismissed *sua sponte*.

¹Concerning the right of a personal representative to sue in the courts of another state than that in which he was appointed, see *Gove v. Gove*, (N. H.) 15 Atl. Rep. 121, and note; *Newberry v. Robinson*, 36 Fed. Rep. 841, and cases cited.

In Equity.

C. E. Ide, for complainant.

F. P. Tabor, for defendant.

BLATCHFORD, J. This is a suit in equity to recover the sum of \$8,221.16, as profits belonging to the plaintiff's intestate resulting from the purchase and sale by the defendant of 200 shares of the capital stock of the Adams Express Company, which it is claimed the defendant bought and sold, not for himself, but for the plaintiff's intestate. The bill alleges that the plaintiff "is the duly appointed and qualified administrator of the estate and effects of one Merrill I. Mills, late of the city of Detroit, in the state of Michigan," who died on or about the 14th of September, 1882, "under and by virtue of letters of administration duly issued to him by the judge of probate of the county of Wayne, in the state of Michigan, on the 13th day of October, 1882, which said letters were issued out of and under the seal of the probate court of the said county, the same bearing date the 13th day of October, 1882, upon the petition of Cynthia A. Mills and Merrill B. Mills, the widow and son of said deceased." This is the only averment in the bill as to the issuing of any letters of administration to the plaintiff. It is apparent, therefore, that he rests his capacity to sue solely upon the grant of letters of administration to him in Michigan.

The substance of the allegations of the bill is that in October, 1869, the intestate delivered to the defendant \$2,800, which the defendant accepted as the property of the intestate, to invest it in the purchase for the intestate of 200 shares of the capital stock of the Adams Express Company; that the defendant, pursuant to said agreement, purchased for the intestate the 200 shares, of the par value of \$100 per share, for the price of \$57.50 per share, and paid the \$2,800 as part of the purchase price, and paid or agreed to pay \$8,750 as the balance of the purchase price, including brokerage, making an aggregate of \$11,550; that it was agreed between the defendant and the intestate that the former should purchase the stock and take a transfer of it in the name of the latter, but, instead of doing so, the defendant, without the knowledge or consent of the intestate, had the stock transferred to the name of the defendant, and not to the name of the intestate, and the latter did not discover that fact until after the defendant had sold the stock; that on the 12th of October, 1871, the defendant sold the 200 shares for \$79 per share, being \$15,800, less \$25 brokerage; that during the time the 200 shares stood in the name of the defendant he received seven dividends thereon, of \$400 each, that the interest on those dividends, up to the time the stock was sold, amounted to \$147.83; that during the time the stock stood in the name of the defendant he expended moneys on account of the intestate, for interest on unpaid purchase price, brokerage, etc., not exceeding \$1,775; that the profits on the purchase and sale of the 200 shares, and the moneys received by the defendant on the sale thereof, and for dividends thereon, and interest on such dividends, over and above all moneys expended by the defendant on account of the in-

testate in and about the purchase and sale of the 200 shares, amounted, on October 12, 1871, to \$8,221.16; and that the defendant, though requested by the intestate in his life-time, and by the plaintiff, has not paid over "said profits." The prayer of the bill is that the defendant account for and pay over to the plaintiff all such gains and profits as accrued and arose, or were earned or received, by the defendant on the purchase and sale and for or on account of the 200 shares, and which would have been received by the intestate but for the wrongful act of the defendant in having the stock transferred to his own name, and but for his acts in and about said stock transaction. By his answer, the defendant denies the allegations above set forth as contained in the bill. The answer does not otherwise refer to the subject of the granting of letters of administration to the plaintiff, nor does it raise the objection that the plaintiff has a plain, adequate, and complete remedy at law. After replication proofs were taken on both sides, and the case has been heard on pleadings and proofs. As part of his proofs the plaintiff offered in evidence an exemplification of a record from the probate court of the county of Wayne, in the state of Michigan, showing a petition for and the granting of letters of administration on the estate of the intestate to the plaintiff. The counsel for the defendant objected at the time to the introduction of the exemplification "as incompetent, and no proof under the statute, and does not show complainant's authority to sue in the state of New York."

It is objected by the defendant that the plaintiff shows no right to bring this suit in the state of New York. This objection must prevail. In view of the allegations of the bill and the denial in the answer, the question is raised whether an administrator appointed in one state can, by virtue of such appointment, maintain an action in another state to enforce an obligation due his intestate. In *Noonan v. Bradley*, 9 Wall. 394, 400, it was said:

"Upon this question the law is well settled. All the cases on the subject are in one way. In the absence of any statute giving effect to the foreign appointment, all the authorities deny any efficacy to the appointment outside of the territorial jurisdiction of the state within which it was granted. All hold that, in the absence of such a statute, no suit can be maintained by an administrator in his official capacity, except within the limits of the state from which he derives his authority. If he desires to prosecute a suit in another state he must first obtain a grant of administration therein in accordance with its laws."

There is no statute of the state of New York giving effect in that state to the Michigan appointment. Ancillary letters taken out in New York are a necessary prerequisite to the maintenance of the present suit. In *Parsons v. Lyman*, 20 N. Y. 103, 112, it was said to be well settled in New York that an executor or administrator appointed in another state has not, as such, any authority beyond the sovereignty by virtue of whose laws he was appointed; citing *Morrell v. Dickey*, 1 Johns. Ch. 153; *Doolittle v. Lewis*, 7 Johns. Ch. 45; *Vroom v. Van Horne*, 10 Paige, 549.

It is objected by the plaintiff that the answer does not set up the

plaintiff's incapacity to bring this suit. In *Noonan v. Bradley*, 9 Wall. 394, the plaintiff sued in the circuit court of the United States in Wisconsin, under an appointment of him as administrator made in New York. The point was taken by the plaintiff that, by pleading to the merits, the defendant had admitted the representative character of the plaintiff, and his right to sue in that capacity; but, in answer, the court observed that the declaration stated that the grant of administration to the plaintiff was by letters issued in the state of New York, and that the plea to the merits only admitted the title as stated in the declaration. So, in the present case, as the bill sets forth affirmatively, as the foundation of the right to sue, the granting of the Michigan letters, and nothing else, and as the answer puts that in issue, it cannot be held that the right of the plaintiff to sue is admitted, or that the defendant is not at liberty to raise the objection at the hearing on the merits, especially as the point was distinctly taken when the exemplification was offered in evidence.

Besides this, the plaintiff, on the face of his bill, has a plain, adequate, and complete remedy at law. He declares in his bill that the amount he is entitled to recover is \$8,221.16 as of October 12, 1871. He asks for no discovery. He shows that no accounting under the direction of the court is necessary, for he makes the accounting himself in his bill. The prayer that the defendant may "account for and pay over" "such gains and profits," which he fixes at a specified amount, is no more than a prayer that the defendant pay over such specified amount. No other equitable relief is asked. In such a case it is not necessary that the objection should have been taken *in limine* in the answer. It is taken at the hearing, and that is sufficient. This is not a case where it is competent for a court of equity to grant the relief asked. *Reynes v. Dumont*, 130 U. S. 354, 395, 9 Sup. Ct. Rep. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 9 Sup. Ct. Rep. 594. It is governed by the rule laid down in *Lewis v. Cocks*, 23 Wall. 466, where the court, finding the case to be an action of ejectment in the form of a bill in chancery, ordered the bill to be dismissed, although the objection was not made by demurrer, plea, or answer, or suggested by counsel, saying that, as it clearly existed, it was the duty of the court *sua sponte* to recognize it, and give it effect. It results from these views that, without inquiring into the merits of the case, the bill must be dismissed, with costs.

GRAHAM v. PENNSYLVANIA R. Co.

(Circuit Court, D. New Jersey. April 24, 1889.)

CARRIERS—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE.

Where a ferry-boat has two gangways by which passengers can leave, a passenger who attempts to leave by the gangway intended for teams, and who is injured by the guard-chain for such gangway being dropped on his leg while he is astride of it, is guilty of contributory negligence, and cannot recover from the owner of the boat.

At Law. Action for damages.

Edward Graham sued the Pennsylvania Railroad Company to recover damages for personal injuries. Plaintiff, while leaving defendant's ferry-boat by the middle gangway, had his leg broken by the guard-chain being thrown against it by a deck-hand. Judgment directed for defendant on its motion.

William S. Gummere and *Herbert W. Knight*, for plaintiff.

James B. Vredenburg, for defendant.

WALES, J., (*orally*.) I have concluded to grant this motion, and will briefly state the reasons for doing so. The material facts of the case are quite clear. The plaintiff, at the time of the accident when he received the injuries complained of, was a passenger on board a ferry-boat belonging to the defendant company, and had been in the daily habit of crossing the ferry for a great many years,—19 or 20 years,—and had frequently left the boat in the same way as he did on the day he was hurt; that is, by the horse gangway, instead of by one of the footways provided for passengers. On the opening of this case it occurred to me that the plaintiff, at the time of the accident, had put himself in a place where he had voluntarily exposed himself to the risk of getting hurt, and the only reason that constrained me from granting a nonsuit was that I thought perhaps the company, by its acquiescence, had permitted and encouraged passengers to leave or disembark from the boat in the manner the plaintiff had done, and that there might have been gross and inexcusable negligence on the part of the deck-hand who unhooked the chain and threw it aside just as the plaintiff was stepping over it. Exactly how and when the chain was taken down has not been satisfactorily proven. There is some conflict in the testimony on this point. But, admitting that the chain was thrown off while the plaintiff was astride of it, after all, did he not assume the risk, and directly contribute by his own act and want of care to the accident? It will not be disputed that if this were so he has no right to recover; and where the evidence is so clear that if the jury should find a verdict for the plaintiff the court would be compelled, in the exercise of a sound discretion, to set the verdict aside, it will be its duty, under such circumstances, to direct the jury to render a verdict for the defendant. Now, it is true that no public notice was given—no prohibition, no remonstrance, no regulation of any kind—to prevent pas-

sengers from placing themselves in front of the chain, or from stepping over it, and going off the boat by the horse-way; nor does it appear that passengers were ever remonstrated with by any of the officers or agents of the company, but they were allowed to pass out there freely after the gates had been removed. But then the question is suggested, are not such visible and obvious objects sufficient notice to the passengers that they must not go out by that way, and that they must take all the risks if they do? Mr. Graham attempted to step over the chain before it had been unhooked, and either stumbled and fell, or was thrown down by the unhooking of the chain while he was astride of it, and in either case contributed to the accident by being in a place which he knew was appropriated for the use of horses and vehicles, and not for passengers.

The question is one of contributory negligence. There are two gangways provided by which passengers can safely leave the boat, and if a passenger, in his eagerness and haste to get on shore, leave one of these side gangways and go into the middle gangway, where he has no business to go, does he not do it at his own risk? And if any accident befall him, is he not responsible for his own negligence and want of reasonable care? It appears to me to be a very clear case of contributory negligence. The precautions taken by the company, I think, were ample. There are the gates which, as I understand from the testimony, are never removed until after the boat has been fastened to the bridge. The gates are first opened, and then the chain is taken down. Mr. Graham was familiar with all these things. Every one accustomed to travel on that boat knew of these arrangements,—that there were gangways provided for passengers, and that the middle gangway was only for horses and vehicles. It required no great degree of intelligence for any one to understand that, while the chain was stretched across the middle gangway, passengers were forbidden to go out that way. It was therefore apparent, because of the double obstruction of the gates and chain, which speak better than any printed notice, or any words which could be uttered by the officers of the boat, that the plaintiff could not pass out that way as long as the chain was up. The chain is put there for the purpose of preventing passengers from leaving the boat by that way, and if a passenger chooses to go out over the chain he does it at his own risk. Therefore, if the jury, on such evidence as this, which shows a want of reasonable care on the part of the plaintiff, should give him a verdict, would it not be the duty of the court to set it aside? I think so.

There are two cases recently decided by the supreme court of the United States which very clearly state the law and practice in cases like this. In *Goodlett v. Railroad Co.*, 122 U. S. 391, 7 Sup. Ct. Rep. 1254, the court says:

“Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved, and that a case should never be withdrawn from them ‘unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict rendered in opposition to it.’ ”

So in *Kane v. Railroad Co.*, 128 U. S. 91, 9 Sup. Ct. Rep. 16, the same rule is repeated:

"The circuit court proceeded upon the ground that contributory negligence upon the part of the plaintiff was so conclusively established that it would have been compelled, in the exercise of sound judicial discretion, to set aside any verdict returned in his favor. If the evidence, giving the plaintiff the benefit of every inference to be fairly drawn from it, sustained this view, then the direction to find for the defendant was proper."

As I have said before, it is a settled rule that where a man brings an action against a company, or against an individual, for negligence for causing an injury to him, it is necessary for the plaintiff to show that he was free from fault, free from negligence on his part, and that he exercised a reasonable amount of care and prudence in his own conduct on the occasion; otherwise he is not entitled to a verdict. I suppose that rule is not questioned. The authorities cited by the plaintiff's counsel depend on the special facts of each case, and there must have been circumstances in each of those cases which justified the court in deciding as it did. In the present case I can see no fair inference that may be drawn from the testimony that will excuse—much less justify—the plaintiff's conduct at the time, and under all the circumstances, when he met with the accident. I was at first much impressed by the fact that the company had allowed passengers to leave the boat in the same manner as the plaintiff had done. We have all witnessed the haste and rush with which passengers leave a ferry-boat as soon as it touches the shore. Of course, familiarity with danger breeds contempt, and a man who has passed over the ferry, as this plaintiff had done, for many years in that way without an accident, comes to believe that he is perfectly safe in continuing to do so. But does the fact that he has always escaped harm before, relieve him from the necessity of exercising due care and caution? If I am in the habit of traveling every day on a railroad train, and habitually leave the train before it stops, or reaches the station, or before the wheels cease to revolve, and I at last fall and receive an injury, could I recover damages from the railroad company for such an accident? Clearly not. The fact that passengers will persist in leaving the boat by the middle gangway, and may have done so for years, and every day in the year, does not justify the action of the plaintiff and his conduct on the day of the accident. He should have gone out by one of the footways, or at least have waited until the chain had been removed before he undertook the risk of passing out by the middle of the boat. It was insisted he had a right to be in the middle of the boat, and to cross the chain as he did. I cannot take that view. He had no right to be there. In the crowds that go on board these boats, if a man chooses to rush out in the manner the plaintiff did, the company cannot help it beyond taking the precautions which they have taken to prevent it. The fact that the company has furnished two convenient and ample outlets for passengers, and that the horse gangway is guarded by a chain, is sufficient, I think, to exonerate the company from liability for such accidents as the one which happened to the plaintiff. In my opinion

this is such a clear case of contributory negligence on the part of the plaintiff that he has no right to recover, and if the case should be allowed to go to the jury, and a verdict be rendered in his favor, it would be the duty of the court to set it aside. The jury is therefore instructed to find for the defendant.

In re BIRDSONG.

(*District Court, S. D. Georgia. June 29, 1889.*)

1. JAILERS—CUSTODY OF UNITED STATES PRISONERS.

For the purpose of safely keeping, properly caring for, and humanely treating prisoners committed to his custody by a court of the United States, a keeper of a county jail of a state, who receives such prisoners, and is paid for their maintenance, is an officer of the United States court.

2. SAME—PUNISHMENT OF PRISONER—CONTEMPT—JURISDICTION.

As such officer of the court, to which he is immediately related, and as it affects United States prisoners so committed and received into his custody, the jailer may be punished by attachment for contempt for inflicting a cruel or unusual punishment on such prisoners.

3. SAME—CRUEL AND UNUSUAL PUNISHMENT—WHAT AMOUNTS TO.

It is cruel and unusual as disciplinary punishment, and unwarranted by law, to chain a prisoner by the neck with a trace chain and padlock so that he can neither lie down nor sit down, and leave him so chained in darkness alone for several hours of the night; and it is the duty of the court by appropriate action to protect prisoners from such arbitrary oppression.

(*Syllabus by the Court.*)

At Law. Rule against the jailer of Bibb county jail, in custody of United States prisoner Joe Warren, for inflicting cruel and unauthorized punishment.

Marion Erwin, U. S. Atty., for the rule.

Dessan & Bartlett, *contra*.

SPEER, J. An investigation, which resulted in the issuance of the rule in this case, was made in consequence of a publication in a local paper reciting that a United States prisoner, Joe Warren, had been guilty of disorderly conduct in jail; that the jailer had called in policemen, and with their aid had inflicted disciplinary punishment upon the prisoner. The publication contained this clause:

"He [the prisoner] was chained by the neck to the grating of the cell, and by the time he stands up until this morning, and lives a day or two on bread and water, he will probably be willing to be disciplined."

Unwilling that a statement so suggestive of cruelty in the punishment of a prisoner, so repugnant to the well-ordered methods of discipline, tempered with humanity, which characterize the treatment of prisoners in this day of Christian civilization, should escape investigation, the court did not doubt its duty to direct an immediate inquiry into the occurrence thus brought to its attention. The investigation was at once

made by the marshal; and the facts developed, in the opinion of the court, required that the jailer should be ordered to show justifying cause, if he could, why, on the night of June 25, 1889, in Bibb county jail, he chained up by the neck to the grating of his cell for several hours the United States prisoner; the punishment appearing to be cruel and unusual, in violation of the prisoner's constitutional rights, and without lawful authority. The respondent demurred to the rule for the alleged reason that the court had no jurisdiction to require the jailer, an officer of the state, to answer for any misconduct towards a prisoner committed to his custody by the United States court. It was vehemently urged that the jailer was not an officer of the United States, and that he had no relation to the court which would warrant an attachment for official misconduct. These propositions are, in the opinion of the court, not supported by the law. They are settled adversely to the respondent by distinct and most eminent authority. Mr. Justice STORY, pronouncing the decision of the supreme court of the United States in the case of *Randolph v. Donaldson*, 9 Cranch, 86, announces the obvious rule upon this subject as follows:

"For certain purposes, and for certain intents, the state jail lawfully used by the United States may be deemed to be the jail of the United States, and the keeper [*i. e.*, the jailer] to be the keeper of the United States."

Is it a lawful use to commit the prisoners of the United States to the state jail? Undoubtedly, for the Code of Georgia, § 359, so declares. Then the jail of Bibb county, Ga., is lawfully a jail of the United States, and the jailer, Nat Birdsong, is the jailer of the United States for the purpose of receiving, keeping, and properly treating prisoners of the United States; and it may be remarked that the services which the respondent renders his country in behalf of its prisoners are by no means gratuitous. It is then clearly apparent that, as to United States prisoners committed to his custody, by the order and sentence of this court, commanded as he is, to receive them by the law of Georgia and of the United States, and paid, as he is, for these services, the respondent is a jailer of the United States. Now, can it be pretended that the court is powerless to compel the jailer to the performance of his duty, or to prevent or punish its non-performance in the presence of this important relation to the administration of justice imposed by law?

The arbitrary power in a prison-keeper to iron a prisoner, or indeed, to select at his pleasure a penalty which he thinks adequate as a disciplinary measure for real or fancied misconduct, is intolerable among a free and enlightened people. It has no place among English-speaking nations. It is as repugnant, as we shall presently see, to the law of Georgia, as to the laws of the United States. It is as worthy of condemnation in the light of the state and the federal constitution, as in the benignant and merciful spirit of Christian civilization. Not even may a judge or jury assume a power so uncertain and so dangerous. "It is one of the glories of our English law," writes Mr. Justice Blackstone in his luminous and graceful Commentaries, "that the species, though not always the quantity or degree of punishment, is ascertained for every of-

fense, and that it is not left in the breast of any judge, nor even a jury, to alter that judgment which the law has beforehand ordained for every subject alike without respect of persons." 4 Bl. Comm. 377. The word "subject" is here used in the sense of "citizen." This principle of the common law is of force in this country as in England, and thus we see that neither this court, nor, indeed, the highest court in the land, would assume, even after full hearing, to exercise the power to chain up by the neck a prisoner for disorderly conduct, even the most atrocious, and even though committed in the actual presence of the court. Had any judge of America done with the most degraded convict what this jailer admits he did with the person of this prisoner, his impeachment would be inevitable. Well, may a jailer arrogate to himself powers which are withheld from the courts? Is it competent for the jailer in his discretion to inflict penalties and to exercise arbitrary powers which are not deemed safe or appropriate to be intrusted to the judges? The proposition is unworthy of any intelligent mind trained in the letter or the philosophy of the law. But we are not left in the determination of this question to the consideration of those great fundamental principles announced for the protection of the individual against unlawful punishments and penalties. The authorities are equally clear in their denial of the power exercised by the jailer with this prisoner. At common law it was not lawful to hamper a prisoner with irons, except to prevent an escape. "Otherwise," it is declared, (1 Russ. Crimes, 420,) "notwithstanding the common practice of jailers, it seems unwarrantable and contrary to the mildness and humanity of the laws of England by which jailers are forbid to put their prisoners to any pain or torment." Sir Edward Coke, perhaps the most erudite of English lawyers, certainly profoundly versed beyond any in the principles of the common law, although noted for his harshness and severity to prisoners, declared that "by the common law it might not be done." 2 Inst. 381. In consonance with the spirit of the ancient law, the statute of 4 Geo. IV., c. 64, § 10, subsec. 12, provides that no prisoner shall be put in irons by the keeper of any prison except in case of urgent and absolute necessity. 4 Bac. Abr. 479; Encyclopædia Britannica, tit. "Prison Discipline." And by the same act the jailer was provided power to punish prisoners for disorderly conduct, and for profane cursing and swearing; but the broad intelligence and humane spirit of parliament limited the maximum penalties for such conduct to close confinement in the refractory or solitary cells, and a diet of bread and water only, for any term not exceeding three days.

Let us see if there is not a cogent legislative interpretation of the jailer's duty with reference to profane or refractory prisoners, made by the general assembly of the state of Georgia. By the Georgia enactment of December 19, 1816, to define the disciplinary powers of the keeper of the penitentiary of that day, the feature of 4 Geo. IV., above quoted, was adopted *ipsisssimis verbis*. But where the English penalty for profanity, etc., was three days, the Georgia statute was limited to two days, thus mitigating by the merciful spirit of our fathers the already

clement provision of the English statute; and, if this is adequate punishment for felons convicted and serving their sentences in the penitentiary, is it not sufficient to compel good behavior in those prisoners who are simply committed for safe keeping? But to chain a prisoner around the neck with a trace chain and padlock, in a position where he can neither lie down nor sit down, and thus to leave him chained in solitude, in the night, in the darkness of his cell, for more than three hours, is to inflict a degree of torture which has no warrant in the law, either state or federal, and to expose him to danger to health and to life, from which it is the duty of society to protect him. The evidence offered on the hearing can lead to no other conclusion. The prisoner, Warren, testified that he was kicked by the jailer, and struck with the club by the policeman, and chained by the neck so that he could not put his heels to the ground from 8:30 o'clock until after 3 the next morning; that he suffered severely, and next day was compelled to send for the jail physician. Dr. Gibson testified that such treatment would likely produce fever in the sufferer. Dr. Johnson, the jail physician, testified that when the prisoner sent for him he had fever, but he thought it was catarrhal fever. But the court, in the conflict of the evidence, did not credit the statement of the prisoner. Nevertheless, by the testimony of Birdsong himself, the prisoner was chained so that he must stand for two and one-half hours; and by the testimony of Brown, the policeman, he must have been chained for more than three hours; at best, an ignominious, cruel, and unusual punishment. Besides, both physicians testified that such punishment might have resulted in dangerous, or even fatal, consequences; and it is clear to any unprejudiced mind, that had the prisoner swooned,—a natural result of such inhumanity,—his death from strangulation would have been inevitable. It was, in fact, punishment by the pillory, but a pillory where the links of the trace chain and the padlock encircling the bare neck of the prisoner were substituted for the wooden frame. This punishment was abolished in England in 1837. 7 Wm. IV., and 1 Vict. c. 23. It was done away with in France in 1832, and in this land of humanity and lawful methods it was forbidden by the act of congress of February 28, 1839, (5 St. at Large, 322;) and yet the jailer testified that this was his usual method for the punishment of refractory prisoners,—a method which called imperatively for the ruling of the court declaring it illegal.

But it is insisted that the court may not proceed by attachment against the jailer; that the remedy is by indictment. This proposition is likewise altogether unfounded in the law. In 2 Hawk. P. C. c. 22, § 31, the rule is stated as follows: "Also jailers are punishable by attachment, as all other officers are by the courts to which they more immediately belong, for any gross misbehavior in their offices." 4 Bac. Abr. 471. This principle is embodied in the law of the state. Code Ga. § 4711; also section 206, par. 4. The power of the court to proceed by attachment is thus made clearly to appear, by the common law and the statutes of the state; and the Revised Statutes on this topic are in substantially the same language as the Georgia Code. But it is insisted that the United

States prisoners in the jail of the state, by virtue of section 359 of the Code, are "under like penalties, and subject to the same action, as prisoners committed under the authority of the state." This we concede entirely. We declare, however, that there is not, nor has there been at any time in the history of the state, any law of any character which will justify or condone the act of chaining for hours a prisoner by the neck, in a standing position, as a means of punishment for any offense whatever. Nor is the testimony of the jailer, and statement urged in argument, that the grand juries and county commissioners of Bibb county approve this punishment, satisfactory. It does not appear that this practice was ever brought to the attention of the grand jury. Nor was any order or judgment of the county commissioners to such effect put in evidence. But if, as the jailer and his counsel insist, such was the action of these bodies, it was without warrant of law, and this is happily a government of law.

Much has been said as to the character of the individual who was punished. This is not a question of individuals. If the jailer is intrusted with arbitrary power to chain prisoners in a standing position to punish them, what guaranty is there that he will not misuse it? Hundreds of citizens of this state are yearly consigned by the United States courts to the custody of this and other jailers for offenses which are *mala prohibita* simply. If the jailer is judge, jury, and executioner, can it be predicted with certainty what will be the character or color of the next victim of the chain and padlock? It is a rule we are considering,—a rule for the protection of the unfortunate as well as of the vicious. The constitution forbids a cruel or unusual punishment, and there is no syllable relative to the character or color of the victim in that matchless charter for the preservation of right and the prohibition of wrong. In consideration of the premises, and to emphasize its judgment that an unwarrantable and illegal punishment has been inflicted on this prisoner, and to protect this and other prisoners, the court assesses a penalty of \$50, with costs, against the jailer. In the anticipation, however, that this first offense will not be repeated, the court will not enforce payment by the respondent, but will suspend the sentence until further order.

UNITED STATES v. KEE *et al.*

(District Court, D. South Carolina. August 22, 1889.)

1. OBSTRUCTING JUSTICE—INTIMIDATING WITNESS.

Defendant is guilty of violating Rev. St. U. S. § 5399, providing a punishment for intimidating a witness by threats, etc., when he beats one summoned as a witness before a United States commissioner for the purpose of intimidating or influencing him in giving his testimony.

2. SAME.

Where defendant, not knowing that one C. is a witness in a case in which defendant's father is summoned as a witness, threatens and beats C. on ac-

count of insulting language used by him concerning his father in connection with the case, the beating having no relation to the character of C. as a witness, he is not guilty of a violation of section 5399.

Information for Intimidating a Witness.

C. M. Furman, Asst. Dist. Atty.

J. K. Henry, for defendants.

S. MONTON, J., (*charging jury*.) You are trying an information against John Kee for violating section 5399, Rev. St.,—that is to say, for threatening, intimidating, impeding, and influencing one Ben Corder, a witness in a cause before a commissioner of this court. In reaching your conclusion you must be satisfied by the evidence that the defendant did threaten and beat Ben Corder in the manner stated by the witnesses for the government. Next, that defendant knew or had reason to know that Corder was a witness for the United States in the case before the commissioner. Then, that he did threaten and beat him because he was such witness, and for the purpose of intimidating, impeding, or influencing him in giving his testimony. The defense is that Corder had stated that the father of defendant, a very old man, who had professed during his whole life to be a "teetotaler," and of late years a prohibitionist, had secretly purchased whisky from a negro; that defendant had warned Corder if he ever repeated what he styled the "malicious falsehood," he would punish him; that his father had been summoned before the commissioner to testify to the fact of the sale in a case brought against the negro, and had been so summoned upon the information of Corder, given after the warning, defendant not knowing that Corder was himself a witness. If you are satisfied that the threats and consequent beating were uttered and inflicted because of this insulting charge against the old man, having no relation to the character of Corder as a witness, without knowledge that he was a witness, and induced entirely by the repetition of the insult, you may find the defendant not guilty. If the threats and violence were intended to prevent Corder from testifying, you may find defendant guilty.

UNITED STATES *v.* CALHOUN.

(*District Court, D. South Carolina. August 29, 1889.*)

INTERNAL REVENUE—SALE OF SPIRITUOUS LIQUORS BY APOTHECARY.

An apothecary, who *bona fide* uses spirituous liquors in the preparation of a medicine, to be used as such, and not as a beverage, does not violate Rev. St. U. S. § 3242, by not paying the special tax required of a retail liquor dealer.

Indictment for Selling Liquor without Payment of Special Tax.

Abiel Lathrop, Dist. Atty.

A. H. Dean, for defendant.

SIMONTON, J., (*charging jury*.) The defendant, an apothecary, is charged with violating section 3242, Rev. St., being a retail liquor dealer without paying the special tax. It is not denied that he sold to the several persons, witnesses for the government, a compound of rye whisky and calisaya bark. The defense is that this was a medicine originally put up under a prescription of a physician. An apothecary who *bona fide* uses spirituous liquor exclusively in the preparation or making up of medicines need not pay the special tax. These are the questions you must answer in this case: In the sale made by defendant to the witnesses for the government, did he *bona fide* sell them the compound as medicine, and not as a beverage, or was the compound simply whisky in disguise? Is it a medicine to cure disease, or is it intended to gratify the thirst for drink? If it is a medicine, has it intoxicating quality? If so, was this known to defendant? Did he sell it knowing or having reason to know that it was purchased to be used as a beverage? If it was sold *bona fide* as a medicine, to be used as a medicine, defendant is not guilty.

TRAVERS v. BUCKLEY *et al.*

(*Circuit Court, D. Massachusetts. August 19, 1889.*)

PATENTS FOR INVENTIONS—PRIOR CONDITION OF ART.

In view of the prior use of detachable blocks notched at the end and under the edge for spreading hammocks, there is no invention in the second claim of letters patent granted to Travers November 18, 1879, in "the novel use of detachable notched distending blocks" in improved hammocks.

In Equity. Bill to enjoin infringement of patent.

Briesen, Steele & Knauth, for complainant.

Browne & Browne, for defendants.

COLT, J. This case now comes before the court on final hearing. Since the hearing upon motion for an injunction (35 Fed. Rep. 133) the defendants have strengthened their position as to the prior condition of the art. The evidence now before me proves, I think, the prior use, for spreading a hammock, of a detachable straight block notched at both ends, a detachable straight block notched at both ends and on the under edge, a curved block, in the form of a barrel stave, notched at both ends, and a curved block having properly spaced holes in it through which the lanyards passed. The Travers patent was for an improved hammock, and the invention consisted of several distinct improvements, among which, as the specification states, "is the novel use of detachable, notched distending blocks." It may be that in the patent, considered as a whole, there was invention. The only point in controversy here is whether there was invention in the use of the detachable block which is made the subject of the second claim, and I am satisfied, in view of what the prior

art discloses, that there was no exercise of the inventive faculty in the production of this block. An examination of the records in the two cases shows that the evidence before Judge WALLACE in the case of *Travers v. Beyer*, 26 Fed. Rep. 450, was not the same as in this case. It follows that the bill should be dismissed.

KENT v. SIMONS *et al.*

(Circuit Court, D. Massachusetts. August 21, 1889.)

1. PATENTS FOR INVENTIONS—ANTICIPATION.

Letters patent No. 325,430, for improvements in buttons consisting in an open central bore for use with spring studs, though all the elements, separately considered, are found in prior patents for ordinary buttons, are valid, the combination being new, and producing an improved result.

2. SAME—INFRINGEMENT.

Such patent is infringed by a fastener in which the cap is set by pressing down the edges so as to do away with the filling for the cap, as described in the patent, the fastener being the same with some slight changes in construction.

In Equity. Bill to enjoin infringement of patent.

W. B. H. Dowse, for complainant.

Harry E. Knight, for defendants.

COLT, J. This is a bill brought for the alleged infringement of letters patent No. 325,430, issued September 1, 1885, to Albert G. Mead, for improvements in buttons. The invention consists in certain improvements in glove fasteners of the type known as "metallic fasteners," which have a metallic button-hole member secured to one flap of the glove, with an opening on its under side to receive a spring stud attached to the other flap. It is not claimed that Mead was the first inventor of a fastener composed of a metallic button member and a metallic button-hole member, but the invention relates to an improved construction in the button-hole member, and especially in the retention of the button finish in fasteners of this type. The specification says:

"This invention relates to buttons, more particularly those secured to the fabric or cloth by metallic fastenings, and provided with an open central bore, which adapts them for use especially with spring studs, while in the particular 'button finish,' so-called, combined with the central bore; and in the general arrangement and disposition of the several parts with respect to each other, is embodied the subject of my invention."

The claims involved in this suit are the first and second:

"(1) In a button, provided with a central opening for receiving a spring stud, the combination of an inclosing cap, a perforated bottom disk, a second disk above the first, the button being attached as a whole to the fabric independent of said stud, substantially as set forth. (2) A convex, imperforate cap inclosing the interior of a button, in combination with a disk to which the

lower edges of said cap are attached, and which has a central opening, a second disk within said cap, and provided with a central tubular lip, which extends downward into the central opening of the first disk, and an eyelet for attaching the latter to the fabric, substantially as set forth."

The defenses relied upon in this case are anticipation, as shown by prior patents, and non-infringement. As bearing on this question of anticipation, it is necessary to construe the Mead patent. The defendants insist that the Mead patent is for an improvement in ordinary metal buttons, as shown in figure 3 of the patent, and that its use with a spring stud is only one of the forms in which the button may be used. I cannot accept this construction of the patent. The specification states that the invention relates more particularly to buttons provided with an open central bore, which adapts them for use especially with spring studs, and in the first claim the language is "a button provided with a central opening for receiving a spring stud." The principal object of the Mead invention was the production of an improved button adapted for use with a spring stud, and incidental thereto the patentee says that by putting a shank or neck on the button to allow space for the fabric, it may be employed as an ordinary button. Taking this view of the patent, that the invention of Mead is primarily an improvement in metallic fasteners to be used with spring studs, I think the patent is valid. There are many prior patents in this branch of the art, but as to this particular type of button, I think Mead made a patentable improvement over prior buttons of this class. All the elements of the Mead fastener, separately considered, may be found in prior patents for ordinary buttons, or for fasteners composed of a metallic button member, and metallic button-hole member, but the combination as arranged by Mead is new and produces an improved result; that improvement consisting largely in the convenient form of the central opening for receiving the spring stud, while at the same time preserving the "button finish." The Mead improvement is manifestly of limited scope in view of the many prior devices, but I do not think it was anticipated by anything found in those devices, and I believe its production, notwithstanding what preceded it in the art, involved the exercise of the inventive faculty. Upon the question of infringement I have no doubt. The defendants' fastener is the Mead fastener, with some slight changes in construction. In defendants' fastener the cap piece is so set by pressing down the edges as to do away with the necessity of any filling for the cap, such as Mead describes, and which is made an element in the combinations covered by the third and fourth claims of the patent. The present suit is upon claims 1 and 2, and these the defendants' fastener clearly infringes. Decree for complainant.

MORSS v. KNAPP *et al.*

(Circuit Court, D. Connecticut. August 17, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

Letters patent No. 233,240, dated October 12, 1880, were issued for an adjustable dress-form. The form was expanded by means of two opposing braces vertically sliding on a standard, and forming two sides of a triangle, which held the ribs in position. Defendants attached to two rotary collars the links of the lazy tongs, and divided the waistband into four sections, and made the ribs expand in four divisions. The braces in the patent are not merely extension braces, but converge to or towards the same point, and secure each other against rotation. Defendants' braces are extension, and not locking, braces, and are not intended to secure each other against rotation. *Held*, that there is such a substantial doubt in regard to any infringement by defendants that a preliminary injunction will not be granted.

In Equity. Motion for preliminary injunction.

Payson E. Tucker and *Charles F. Perkins*, for complainant.

John K. Beach, for defendants.

SHIPMAN, J. This is a motion for a preliminary injunction against the alleged infringement by the defendants of the second claim of letters patent No. 233,240, to John Hall, dated October 12, 1880, for an adjustable dress-form. The invention, which is the subject of the second claim, and the claim, are stated in *Morss v. Knapp*, 37 Fed. Rep. 351, where it is said:

"The principle of the invention is the expansion or adjustment of a skeleton frame radially, in all directions, from a common center. A central pole, or standard, supports the entire form. In the part which supports the skirt, upright, thin, elastic ribs are held towards the standard by elastic bands secured to each rib. There are two series of oppositely inclined braces, one above the other. Those of the upper series are hung by their inner ends to a collar on the standard, and, extending obliquely downward, are hinged to the respective ribs. The braces of the lower series are hinged by their inner ends to a lower collar on the standard, and, extending obliquely upward, are hinged to the ribs at the point where the members of the upper series are hinged. The two collars, called 'sliding blocks,' are adjustable. When the form requires expansion, the lower collar is elevated, which expands the lower series, but the expansion is governed by the opposing action of the upper series, which compels the movement of the ribs to be substantially parallel with the central standard."

The mechanism is like that of the old-fashioned reel or "swift" for winding yarn. The expanding mechanism of the defendants' form, which is alleged to infringe, is thus described: It "consists of two concentric disks arranged upon a common axis, upon which they may independently rotate. Outside of these disks there is a waistband divided into four segments, and each segment is connected with the disks by means of two links, one link from each segment being hinged to the upper disk, and the other link of each segment being hinged to the lower disk." When the dress-form is in a closed position, the most convenient way to expand it "is for the operator to take hold of two opposite segments of

the waistband and pull the same apart. This will cause the disks to rotate, one in one direction and one in the other, and the inner ends of the connecting links will move in the arc of a circle." It is truly said by the complainant that, within certain limits, the form is expanded radially, in all directions, from a common center. Beyond those limits, the expansion is not radial, but is attended with a change of shape. The complainant next—and here the parties are at issue—insists that the radial expansion is effected in the manner and by the mechanical means shown in the patent, and that each part of the defendants' form corresponds with a similar part in the patented device. The complainant particularly asserts that the links of the one are the double braces of the other, and oppose each other in action, and perform the same office of expansion or contraction, the difference being that in one the plane of action is horizontal and in the other it is vertical; in other words, that the defendants' links are the complainant's braces, with the position changed, so that they move by a horizontal instead of by a vertical movement, and that the defendants' collars slide circumferentially around the standard instead of vertically upon it. The complainant does not probably mean that the defendants' form is merely the Hall form with the position of the respective parts changed, without the exercise of inventive skill in making the change. The patentee caused the ribs to expand by the familiar means of two opposing braces vertically sliding upon a standard, and forming two sides of a triangle, which held the ribs in position. If the defendants had merely changed these braces to a horizontal plane, and merely changed the blocks so that they would move circumferentially, he would have had a useless device. It was necessary to do more, and to establish a new system of braces and blocks. Instead of using the common method by which the reel had been expanded, he attached to two rotating collars the links of the lazy tongs, divided the waistband with its ribs into four sections, and made the ribs to expand in four divisions. The requirements of this method of expansion demanded much more than a simple change from one plane of movement to another plane; and if it is said that the defendants' present form is the complainant's device with merely formal differences, such use of language is general, rather than exact. But it is said that, granting that the defendants used ingenuity and exercised inventive skill in making the change, they used, when it was made, the patentee's method of expansion by the opposing action of two more braces, and therefore infringed upon the complainant's exclusive rights. There is a species of opposing action, by means of the various links of the defendants' form, by which the four sections are prevented from becoming quadrilateral, but the question is, in my opinion, a serious one whether this method of opposition can properly be called the same with that which is exhibited in the patented device. The considerations which raise this doubt are the following: It cannot be true that any action by which the ribs are pulled in different directions is to be considered the opposing action of the Hall braces. In the patented device, the double braces co-act. They are not merely extension braces, which simply expand the ribs, but

they converge to or towards the same point, and, by this co-action, control or secure, and are intended to secure, each other against rotation. The defendants' links are extension, and not locking, braces. When they are extended, and the collars are clamped, the links, in the language of the defendants' expert, "rotate on their pivots," very much as they would do if parallel to each other, and it is apparent that they are not intended to secure each other against rotation. This mutual control, by means of opposed action, is necessary in a device acting vertically. It does not exist in the defendants' links, but the result is partially attained by an additional set of single supporting braces, which are attached about half way down the skirt. There is such a substantial doubt in regard to infringement as to prevent the granting of the motion, which is therefore denied.

JENKINS *et al.* v. RUBERG *et al.*

(Circuit Court, D. Massachusetts. August 5, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—MACHINES FOR MAKING METALLIC SHOE-SHANKS.

Reissued letters patent No. 8,163, issued April 9, 1878, to John Hyslop, Jr., for improvements in machines for making metallic shoe-shanks, describe a combination of the punching, cutting, and bending mechanism, arranged to operate as set forth. Machines made under letters patent issued to Ruberg January 11, 1887, embrace these three steps, but in the Ruberg machine the projections for making the reverse bends are absent, and there is nothing to correspond to the guide-way of the Hyslop machine, by means of which the blank is to be taken from the cutting device, and delivered to the bending mechanism. The arrangement of the shears and bending dies in Ruberg's machine is also different. Hyslop was the first man to combine the three operations in a machine for making metallic shoe-shanks, but the combination of punching and cutting mechanism was old. *Held*, that the Ruberg machine was not an infringement of Hyslop's patent.

At Law. Action for infringement of letters patent.

C. H. Drew, for plaintiffs.

J. E. Maynadier, for defendants.

COLT, J. This suit is brought upon reissued letters patent No. 8,163, dated April 9, 1878, granted to John Hyslop, Jr., for improvements in machines for making metallic shoe-shanks. The invention relates to the organization of a machine by which metal shanks for shoes are cut, punched, and bent, and have their opposite ends reversely bent by one continuous operation. The first and only claim in controversy is as follows:

"In a machine for making metallic shoe-shanks, the combination, substantially as described, of the punching mechanism, the cutting mechanism, and the bending mechanism, arranged to operate as set forth."

At the date of the Hyslop invention it can hardly be said that it was new to cut and punch at each end a strip of metal by one operation, but

the evidence discloses that Hyslop was the first man to combine in one machine the successive operations of cutting, punching, and bending for the production of a metallic shoe-shank. It is admitted that the defendants' machine made under his patent of January 11, 1887, embraces these three successive steps, but it is contended that the cutting and bending devices are quite different from those described in the Hyslop patent. It cannot, of course, be held that the Hyslop patent covers all machines for making metallic shoe-shanks which have cutting, punching, and bending mechanisms. The only question in the case, therefore, is narrowed down to this: Whether the cutting and bending mechanisms found in the Ruberg machine are the equivalent of those described in the Hyslop patent. What did Hyslop invent, and does the defendant accomplish the same result by substantially the same or equivalent means? Giving the Hyslop patent a fairly broad interpretation by reason of his being the first person to combine all these operations in a single machine, still I cannot bring my mind to the conclusion that the Ruberg machine infringes that patent. The Ruberg machine leaves out some of the important features which Hyslop makes essential parts of his machine, and substitutes no equivalents therefor. The projections for making the reverse bend are absent from the Ruberg machine. There is nothing in the Ruberg machine which corresponds to the guide-way of the Hyslop machine by means of which the blank is taken from the cutting device and delivered to the bending mechanism. In the Hyslop patent this mechanism is made up of the lips or flanges, *h*, against which the front edge of the plate is held to gauge the cut, the incline, *m*, down which the blank falls guided by the lips, *h*, and the stop pins, *c*², secured to the top of the bending die, and which serve to arrest the blank as it falls down the incline. In Ruberg's machine the organization is more simple. The bending dies are placed close to or just back of the stationary cutter, and the blank is brought into position between the bending dies before it is cut from the strip. When the strip of metal in the Ruberg machine, from which the blank is to be cut, is fed into the machine, and comes against the stops, which give the width of the blank to be cut, that portion of the strip which makes the blank is directly over the stationary or lower die, and in position for the upper die to act upon it immediately after the blank is cut. The arrangement of the shears and bending dies in the Ruberg machine is very different from their arrangement in the Hyslop patent. The combination of punching and cutting mechanism was not new with Hyslop. He did invent one way of combining cutting mechanism with bending mechanism, and Ruberg devised another way to accomplish the same result. The ingenious expert for the complainant has sought to show that the means employed by both are substantially the equivalent of each other, but I find the fact to be otherwise, and it follows that judgment should be entered for the defendants.

AMAZEEN MACHINE CO. v. KNIGHT *et al.**(Circuit Court, D. Massachusetts. August 12, 1889.)*

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Where it appears, on a bill to restrain the infringement of a patent by making and selling duplicate parts of the patented machine, that defendants had been accustomed to make duplicate parts for plaintiff and its assignors, and to repair the patented machine for others, of which plaintiff was aware, a preliminary injunction should be denied.

In Equity. Motion for preliminary injunction.

C. F. Perkins, for complainant.

T. W. Porter, for defendants.

COLT, J. This is a motion for a preliminary injunction. The defendants are charged with infringing three patents, Nos. 200,682, 220,906, and 273,931, issued to Christopher Amazeen, for improvements in leather-skiving machines. The defendants carry on a general machine-shop, and they repair Amazeen skiving-machines, and they are charged in this suit with having repaired or rebuilt a second-hand machine, and with having duplicate parts of these machines on hand for sale. It appears in evidence that for years a number of firms besides these defendants, in Boston and elsewhere, have dealt in various parts of the Amazeen machine. It appears by the affidavit of John Walker, of Boston, that he was formerly a member of the firm of Eddy, Sherman & Co., and became acquainted with Amazeen in 1879; that the firm then began making machines for Amazeen, and that they also made all the duplicate parts that were required to replace those worn out in old machines; and that they not only supplied Amazeen with all such parts as he required for his customers, but also sold such parts on their own account, with full knowledge of Amazeen himself, to their customers or to whoever called for them. Afterwards Amazeen sold out his patents to Dorr & Eaton, and they continued to buy duplicate parts of Eddy, Sherman & Co., and to send machines to them to be repaired, and they still continued to make it a regular part of their business to keep a stock on hand and sell generally duplicate parts of the machine. On their bill-heads was printed the fact that they made and dealt in the parts of the machine. Subsequently Dorr & Eaton sold the patents to the complainant, and its manager, Mr. Bailey, often sent machines to Walker, who was then doing business by himself, for repairs. Walker produces 19 letters from Bailey, ordering repairs of different machines, and he swears that Bailey knew that he was making and selling duplicate parts of the Amazeen machines. On the bill-heads which Walker rendered was a printed notice that he repaired these machines. I am aware that Bailey, the complainant's agent, denies any knowledge until shortly before this suit was brought that any party was selling to the public parts of the Amazeen machine. However this may be, it is clear from the evidence that numerous parties in Boston, from the time the Amazeen

machine came into general use, have openly and publicly furnished to their customers duplicate parts of the machine for the purposes of repair. What effect, if any, this may have upon the case at final hearing I do not decide; but I do not think, under these circumstances, the court should grant a preliminary injunction. The Amazeen patents are for improvements in skiving-machines. These machines are made up of various elements in combination. It cannot be denied that a good many of the working parts of the machine were replaced in the alleged infringing machine repaired by the defendants. Bearing in mind, however, the character of the Amazeen patents, I am not prepared to decide, upon the papers before me, whether, under the law governing this class of cases, the machine had so far lost its identity or had been so reconstructed that the defendants should be held as infringers. *Manufacturing Co. v. Foundry Co.*, 34 Fed. Rep. 393, and cases cited. Without expressing any opinion upon the merits of the case, which will properly come up at final hearing, I am of opinion, for the reasons given, that the complainant is not entitled to a preliminary injunction. Injunction denied.

FISCHER v. HAYES.

(Circuit Court, S. D. New York. August 15, 1889.)

PATENTS FOR INVENTIONS—DAMAGES FOR INFRINGEMENT.

Where a master reports that the profits of defendant derived from the infringement of plaintiff's patent cannot be computed from the evidence, nominal damages only can be assessed, though it is apparent that there were profits.

In Equity. Application for assessment of damages for infringement of patent.

Edmund Wetmore, for plaintiff.

Livingston Gifford, for defendant.

WHEELER, J. This cause has now been heard upon the supplemental report of the master as to profits of the defendant from infringement of the plaintiff's patent. The substance of the report, as it now stands, is that from all the evidence before the master the amount of such profits "cannot be computed or determined." Therefore, while that there were some profits is apparent from the report, no definite extent of them attributable to the infringement for which the defendant is chargeable appears. There is no foundation for a decree for the payment of anything beyond merely nominal damages. *Fischer v. Hayes*, 22 Fed. Rep. 529; *Garretson v. Clark*, 111 U. S. 120, 4 Sup. Ct. Rep. 291; *Black v. Thorne*, 111 U. S. 122, 4 Sup. Ct. Rep. 326; *Dobson v. Carpet Co.*, 114 U. S. 439, 5 Sup. Ct. Rep. 945. No exceptions are filed to the report, and the only question is as to what is a proper decree upon the facts stated.

Report accepted and confirmed, and decree thereupon ordered for the payment by defendant to the orator of six cents profits as damages, with costs.

RUSSELL v. HYDE.

(Circuit Court, D. Maine. August 16, 1889.)

1. PATENTS FOR INVENTION—INJUNCTION.

Reissued letters patent No. 10,418, dated December 4, 1883, issued to A. Russell and F. Curtis for improvement in ships' pumps, claimed as the principal improvement a barrel whose length was less than its diameter, making it easily lined. Defendant's pump had a barrel whose length was considerably in excess of its diameter. *Held*, that the absence of this marked feature throws so much doubt on the question of infringement that a preliminary injunction will not be granted.

2. SAME.

Neither will it be granted where another claim is for a bucket externally dome-shaped, that is, having the form of an inverted cup, where defendant's bucket is not dome-shaped, and differs in other particulars.

In Equity. Motion for injunction.

C. C. Powers and C. Hall, for complainant.

W. L. Putnam and Livermore, Fish & Richardson, for respondent.

COLT, J. This is a motion for a preliminary injunction. The defendant is charged with infringing claims 5, 10, 11, 12, 13, and 14 of reissued letters patent No. 10,418, dated December 4, 1883, issued to Albert Russell and Francis Curtis for improvements in ships' pumps. The patent has already been before this court. *Russell v. Laughlin*, 26 Fed. Rep. 699. The main ground of defense to the present motion is non-infringement. The Russell pump is constructed with a barrel whose length is less than its diameter, which makes the pump short and easily lined, and this is one of the principal improvements described in the patent. The specification says:

"It is a part of said [invention] to produce a piston or bucket pump which is of good capacity, yet quite short, which is attained by making the barrel of large diameter in proportion to its length. This is a very desirable feature of the invention, since such a pump may be lined most successfully, as hereinafter set forth, and is particularly suitable for ships, where it is important that as much of the pump as possible be above deck, * * * and yet not of great height, for convenience in operation and keeping in order."

In the last five claims of the patent, which the defendant is charged with infringing, one of the main elements is a piston pump, having a barrel whose length is not greater than the diameter thereof. Now the Hyde pump does not have this special feature, because the barrel is there found to have a length considerably in excess of its diameter. Without going into less important differences, the absence of this marked feature in the defendant's pump throws so much doubt on the question of infringement that I am satisfied no preliminary injunction should be

granted respecting these claims. The theory of the plaintiff that the pump barrel of the patent means the working pump barrel, and that the Hyde barrel is like the plaintiff's because it has a bore whose working length for the bucket is not greater than its diameter, I cannot accept, because it is contrary to the plain meaning of the words, and inconsistent with the language of the specification. Nothing is said in the specification about the working length of the barrel not being greater than the diameter thereof; on the contrary, the specification states that the barrel is made short, so that it may be successfully lined, and for general convenience on ship-board. The construction contended for would be doing violence, not only to the ordinary meaning of the language used, but to the plain intention of the patentees.

The fifth claim remains. The feature of the pump covered by this claim consists of a bucket externally dome-shaped; that is, having the exterior or upper surface of the annular part turned down outwardly, so as to bring the outer edge and packing at or near the bottom of the bucket. By this arrangement it is said the pump may be made very short, and the bearing of the bucket or packing is in the best position for working evenly. The proceedings in the patent-office, on the taking out of the original patent, seem to limit this claim to a bucket which is dome-shaped. By "dome-shaped" is meant something having the form of an inverted cup or half globe. The defendant's bucket is not dome-shaped, and in some other particulars it differs from the Russell bucket. These differences raise grave doubts on the question of infringement. Upon the facts presented in this case I am satisfied the present motion should be denied.

WELSH v. THE NORTH CAMBRIA.

(District Court, E. D. Pennsylvania. June 25, 1889.)

ADMIRALTY—JURISDICTION—PERSONAL INJURIES.

In the absence of a statute providing a maritime lien for damages caused by the personal injuries and death of one engaged in loading a vessel, a libel in admiralty to recover damages for such injuries and loss cannot be sustained. *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140, followed.

In Admiralty. On motion to dismiss libel.

Action by Bridget Welsh, widow of Peter Welsh, on her own behalf and that of her minor children, Mary Welsh and Bartholomew Welsh, against the steam-ship North Cambria, for damages resulting from the injury and loss by death of Peter Welsh while unloading the cargo of the vessel.

Alfred Driver and *J. Warren Coulston*, for libelants.

E. B. Convers, for respondents.

BUTLER, J. The question of jurisdiction is raised on this motion by consent. That the libel cannot be sustained independently of statutory

provision, is settled by *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. Rep. 140. That the Pennsylvania statute, on which the case is put, does not create an admiralty lien, and thus authorize the seizure, seems entirely clear. There is nothing whatever in the statute indicative of a purpose to create such a lien, and if there was I would hold the statute to be inoperative in this respect. The states have no power, I believe, to interfere with the admiralty system of laws; they can add nothing to it, nor take anything from it. The subject lies within the exclusive domain of congress. It is true that the supreme court has held that, as respects pilotage and a few other subjects, the states may exercise powers vested in the federal government until the latter assumes the exercise of its authority. The disfavor, however, with which this (apparently illogical) doctrine—born, doubtless, of the excessive tenderness which formerly existed respecting “state rights”—is regarded to-day, justifies a very confident belief that it will not be extended beyond the subjects to which it has been applied. To this doctrine must be ascribed the decision in *The Lottawanna*, 21 Wall. 580, that liens created by state statute for the repairs of vessels, etc., in home ports, within the state, may be enforced by admiralty courts. As this court held, however, in *The E. A. Barnard*, 2 Fed. Rep. 712, such statutes do not create an admiralty lien, or engraft any new provision upon the system of admiralty laws. The court in such case has jurisdiction, as the debt arises from an admiralty contract; and *The Lottawanna* decides no more than that the state may make this debt a lien for the purpose of securing and regulating distribution between its own citizens, in the absence of provision respecting it by congress. Even this is acknowledged to be anomalous, and is put upon “long usage,” rather than any well-defined principle. The views of this court on the subject generally are stated in *The E. A. Barnard*, above cited. I will not repeat them. They are as applicable here as they were there.

The decision of the district courts respecting the subject are not harmonious. In *The Sylvan Glen*, 9 Fed. Rep. 335, and *The Manhasset*, 18 Fed. Rep. 918, the state statutes were denied effect in the admiralty. This view is also supported by the judgment in *The Vera Cruz*, L. R. 10 App. Cas. 59. In other instances the question has been decided differently. It has been so fully discussed in the cases cited that I will not enlarge upon it. Libel dismissed.

THE COLUMBIA.¹UNITED STATES *v.* THE COLUMBIA.*(District Court, E. D. New York. July 26, 1889.)*

SHIPPING—VIOLATION OF PASSENGER ACT.

On the evidence in this case the court found that the steam-boat Columbia, during an excursion trip from New York to Rockaway, on Sunday, July 17, 1888, carried 777 passengers in excess of the number allowed her by law; but, as the libel only charged an excess of 677, and limited the demand to \$7,108, and no application was made to amend the libel, *held*, that the steam-boat was liable to a penalty of \$10.50 for each of 677 passengers carried, or \$7,108.

In Admiralty.

Mark D. Wilber, U. S. Dist. Atty., for libellant.

Blair & Rudd, for claimant.

BENEDICT, J. This is a proceeding on the part of the United States to enforce a lien upon the steam-boat Columbia for carrying passengers in excess of the number allowed by law, on Sunday, July 17, 1888. On that day the Columbia made an excursion trip from New York to Rockaway, starting from Twenty-Second street, New York city, stopping at Tenth street, then at pier 6 North river, in New York city, then at Jewell's wharf Brooklyn, thence proceeding to Rockaway and return. By law she was forbidden to carry a greater number of passengers than 3,000. The charge in the libel is that on the occasion in question she carried 3,677. The law applicable to the case is not in dispute. The steam-boat is conceded to be liable to pay \$10.50 for each passenger in excess of 3,000 proved to have been carried by her on this occasion. The only question to be decided is the question of fact whether the proofs show that the passengers on board the steam-boat on the occasion in question numbered more than 3,000.

The evidence in support of the charge consists of the testimony of two passengers who were on board the Columbia on the trip described, and who testify to having counted the passengers as they left the boat upon her arrival at Rockaway. This count of passengers was made under the following circumstances: The two witnesses,—one named William H. Ripley, and the other, William M. Rogers,—with their families, constituting a party, were passengers on the boat. The boat, as they describe it, was terribly crowded. In fact she had a greater number of passengers than she had carried before during that season, or has carried since, so her assistant purser says. Induced by the crowded condition of the boat, these two passengers, after the boat had left Jewell's wharf, arranged between themselves to ascertain the number of passengers on board by counting the passengers when they should leave the boat on her arrival at Rockaway. In pursuance of this agreement, as the passengers passed

¹Reported by Edward G. Benedict, Esq., of the New York bar.

off the boat at Rockaway, Rogers stood on the deck over one gangway, and Ripley stood on the deck over the other of the two gangways by which the passengers left the boat, and each counted the passengers as they passed out on the gangway below him. Ripley swears that on this occasion 1,982 passengers passed out on the gangway below him, and Rogers swears that 1,795 passengers passed out on the gangway below him. Each testifies that he was able to count the passengers as they passed out, and that of the passengers who passed out of the boat he actually counted the number stated by him. As against this evidence the first position taken in behalf of the boat is that when these witnesses respectively swear that of the passengers that passed out under them, respectively, they counted the numbers stated, they swear to what was impossible for them to do, and for that reason their testimony should be rejected. But, while it may be conceded to be difficult to make an accurate count of all the passengers leaving the boat under such circumstances, it must also be conceded that the evidence does not prove it impossible that these witnesses should have counted the number of passengers they state. They are intelligent persons, who have no interest whatever adverse to the steam-boat, and they declare on oath that there was nothing to prevent their counting the passengers by the plan they adopted. Each declares that it was possible to count the passengers as they passed out on the occasion. This count was written down at the time, and the result was ascertained by them without any knowledge on their part in regard to the number of passengers which the steamer was allowed by law to carry. This positive testimony is not, in my opinion, affected by the testimony of the custom-house inspectors, produced by the owners, who narrate the difficulties they have experienced in counting passengers, one of whom says: "I never have found an excess of passengers on any steamer yet." But it is said that the count of Rogers is discredited by himself, because when he reported the case to the district attorney he reported 100 less passengers than he counted, having deducted 100, as he now says, to allow for mistakes. But on the stand Rogers gives positive testimony that on the occasion in question he counted 1,795 passengers who passed out on the gangway below him. It is the count, and not the report to the district attorney, which is important here. The appearance of these two witnesses upon the stand, the character of the statements they give, their intelligence and evident freedom from bias, all go to confirm the belief that what they say in regard to the number of passengers counted by them on the occasion in question is true. In the absence of controlling evidence to the contrary, such testimony is all-sufficient to prove that this boat carried upon the day in question passengers in excess of the number allowed by law.

But it is further contended on the part of the defense that the testimony of these two witnesses is overthrown by the proof furnished from the boat of the number of passenger tickets taken in on the trip in question. The proofs show that the boat took passengers at Twenty-Second street, at Tenth street, at pier 6, in New York, and at Jewell's wharf, in

Brooklyn. There had been, as appears, a custom-house officer detailed to special duty in the First division of the collector's office, whose duty it was to prevent overloading of the boat. His instructions, as he narrates them, do not appear to me to be very efficient to secure an enforcement of the law; for he says: "A portion of my duty was, if I had reason to believe that boats were to be crowded, I was to make a requisition on my deputy collector, who sent that requisition to the surveyor, and he detailed officers to count the passengers on the boats that I might name." But this is not important, for the officer was not present at all on the Sunday in question, because, as he says: "I was taken very sick that morning, and didn't leave the house." The boat, therefore, on this occasion took passengers without government supervision. Most passengers surrendered tickets on going on board. A few—how many does not appear—had no tickets, and paid money to the purser. Some passes were out, and how many came in on passes does not appear. The tickets were taken in at the gangway as the passengers came on board the boat, by the purser and the assistant purser. It was usual to bunch the tickets taken at any landing into packages of 100 during the passage of the boat to the next landing, but on the trip in question, when the boat arrived at pier 6, only part of the tickets taken at the prior landings had been bunched. While the boat was at pier 6, Perkins, the general agent of the line, and Hoffmire, the president of the company owning the boat, boarded her. As they came onto the boat, Perkins thought he saw an unknown man counting the passengers. He instantly called Hoffmire's attention, and also the superintendent's attention, to the man, and as soon as the boat left pier 6 proceeded to the purser's office for the purpose, as he says, of ascertaining how many passengers could be taken at Jewell's wharf without exceeding the number allowed by law. About 15 minutes were occupied in going from pier 6 to Jewell's wharf. During that time the purser's office was visited by Perkins, by Hoffmire, by the assistant purser, and the master of the boat, and by two persons afterwards selected to count the passengers that should come on board at Jewell's wharf. Perkins says that in the purser's office he counted 23 bunches of tickets. One bunch contained only 14 tickets. How many tickets were in the other bunches he did not ascertain, but upon the assumption that each bunch contained 100 tickets he says: "I told Hoffmire we could easily take in 700 passengers more, as there was, as near as I could make out, but 2,214 passengers on board the boat." Upon this report Hoffmire directed that the passengers coming on board at Jewell's wharf should be counted, and that no more than 700 should be taken on board the boat. When the boat arrived at Jewell's wharf, the two persons already referred to were directed to count the passengers as they came on board, and to give a signal when 700 had been counted. Thereafter, when 675, according to one of the counters, and when 650, according to the other, of in-going passengers had been counted, the signal was given, and the reception of the passengers was stopped. The boat then departed for Rockaway, leaving some 300 passengers behind on Jewell's wharf, who were unable to get on board. The proof satis-

factorily shows the number of passengers taken on board at Jewell's wharf, and the case turns upon the testimony as to what was done in the purser's office after it was reported that an unknown man had been seen counting the passengers. This proof is far from convincing to show that only 2,214 passenger tickets had been taken up at the time the vessel left pier 6. When the vessel left pier 6 some tickets had been bunched; others had not. Of the six persons who were in the purser's office, some took part in counting the tickets; others "run the bunches over." That Perkins there found 23 bunches of tickets is no doubt true, but his testimony is by no means sufficient to justify the conclusion that only 2,214 tickets had been taken at the gangways; for Perkins did not count the number of tickets in the bunches he found, and he has no knowledge that the bunches that he counted contained all the tickets that had been taken. There is in addition some testimony from the master of the boat to the effect that before the boat arrived at pier 6 the purser had told him the number of the tickets taken, but his statements, when carefully examined, show that his testimony does not help the case of the claimants. After a careful scrutiny of all the evidence produced in behalf of the boat, I am unable to find in it proof that the number of tickets taken in on that day before the boat reached Jewell's wharf was 2,214. This is a vital point of the defense. Without that point made certain, the other evidence from the steamer amounts to little or nothing. Moreover, it appears that the number of tickets taken did not accurately represent the number of passengers on board, for some paid money and some came in on passes. Furthermore, it is to be noticed that Perkins' statement that there were no more than 2,214 passengers on board at the time was repudiated by Hoffmire. Upon the assumption that no more than 2,214 were on board when she left pier 6, the boat could take 786 passengers at Jewell's wharf without exceeding her limit. The proof is that Hoffmire directed that no more than 700 should be taken. Inasmuch as it is impossible to believe that Hoffmire determined to refuse to take 86 passengers which he believed could be lawfully taken, and with safety, when there were some 300 passengers upon the dock waiting to go on board, the fact that he directed that no more than 700 should be taken seems to me to indicate that he was not convinced by Perkins' statement that the number of passengers on board the boat did not exceed 2,214. If Hoffmire, the president of the company, being there present, and seeing the crowd, thus discredited Perkins' count of tickets, it is difficult to see how the court can be asked to hold that count of tickets sufficient to overthrow the actual count of persons made by Ripley and Rogers. Perkins' count is also discredited by the purser's return on the trip in question. The claimants produce a written return made by the purser after the boat had left Jewell's wharf, which purports to show the number of tickets taken at each landing on this trip, and this return gives as the number of tickets taken prior to pier 6 a different number from that reported by Perkins to Hoffmire. This return of the purser, while it discredits the count made by Perkins, cannot be held sufficient to overthrow the testimony of Ripley and Rogers. It is impossible to conclude

from the purser's testimony that there is any certainty that the tickets counted by him when making his return were all the tickets that had been taken in on that day. And one cannot overlook the fact that this return was made, as the report of Perkins was, after it was known that a question had been raised as to the number of passengers on the boat, and when it was believed that the passengers on board had been counted by some unknown person. Under such circumstances the officers of the boat must surely be strongly biased in favor of the boat, and their testimony of less weight for that reason. I am therefore constrained to take the testimony of Ripley and Rogers to be true, and to hold it to be sufficient proof that the number of passengers on board the boat exceeded the number allowed by law by 777. It may properly be added that, if the owners of boats, in view of the provisions of the law respecting an excess of passengers, would provide a regular and accurate method by which to ascertain and to record on every trip the exact number of passengers taken, they would be better able to answer charges like the present than are the owners of this boat. By law the boat is to be charged \$10.50 for each passenger in excess of 3,000 carried on this occasion. The conclusion I have reached as to the number would warrant a decree for \$8,158.50, but, inasmuch as the libel only charges an excess of 677, and limits the demand to \$7,108, and no application has been made to amend the libel, I limit the decree to the sum demanded. Let a decree be entered for the sum of \$7,108 and costs.

GIBSON *et al.* v. THE ALICE CLARK.

(District Court, S. D. Georgia, E. D. April Term, 1889.)

SALVAGE—COMPENSATION.

The steam-boat C., laden with compressed cotton to the value of \$30,000, was going down the Savannah river, when her cargo took fire. She gave distress signals, which were heard by another steamer, similarly laden, (the E.,) which overtook her. The C. was moored in a swamp, and was throwing the cotton overboard. The evidence on behalf of the E. tended to show that the C. then verbally requested assistance of the E.'s crew, which was rendered by throwing water with a hose, and by means of buckets. The cargo was saved, with but little loss; and, while the crew of the C. could have saved it alone, the E. rendered valuable assistance. The C.'s evidence tended to show that she did not ask the E.'s help, but whistled to arouse her own crew, and would have refused assistance had she understood it to be other than gratuitous. The E. was only detained an hour, and her exertions neither called for great skill nor exposed her to peril. *Held* that, while she was entitled to salvage, the amount should not exceed \$400.

In Admiralty. Libel for salvage.

J. R. Saussy, for libelants.

Denmark, Adams & Adams, for respondents.

SPEER, J. The proceedings under consideration were instituted by the owner, officers, and crew of the steam-boat Ethel against the steam-boat Alice Clark, her engines, boilers, tackle, etc., and her cargo, to recover

compensation for salvage services alleged to have been performed on the 28th day of May, 1887, in putting out a fire which it is alleged was rapidly destroying the Alice Clark and the large values in cotton with which she was laden. The steam-boats in question are both engaged in plying between Augusta and intervening landings. Amid the positive conflict of evidence, usual in cases of this character, this much seems clearly apparent: On Saturday, May 28, 1887, when the Ethel was on the down trip to Savannah, and about 85 miles from that city, with the Alice Clark a short distance ahead, on the same trip, the master and crew of the Ethel heard signals of distress sounded by the whistle of the Alice Clark. The Ethel, in response to the signals, increased her speed, and overtook the Alice Clark about a mile lower down the river, when it was discovered that the cargo of the latter was on fire. The cargo was of compressed cotton, piled on the deck of the Clark in the usual manner. The Clark had been run into the bank, had thrown out lines, and was moored to trees in the swamp. The crew of the Clark were attempting to throw off the cotton and extinguish the fire, which had made considerable headway. It is in serious dispute whether there was any verbal demand made on the crew of the Ethel by the master of the Alice Clark for assistance other than that afforded by the signals of distress, but it is evident that the crew of the Ethel was eager to render assistance. The boat rounded up alongside the Alice Clark, taking a position very near her, and a stream of water from the hose of the Ethel was promptly thrown on the burning cotton. The crew of the Ethel was also equipped with water buckets, which likewise were used for the extinguishment of the fire. By the joint efforts of both crews the fire was extinguished, and to do this it was found necessary to throw 57 bales of cotton overboard. The Ethel was not delayed more than an hour as a result of these occurrences, and at the expiration of that time the steamers proceeded in company to Savannah. It is insisted the libelants that the pumps of the Clark would not work; that one of them was so surrounded by cotton that it could not be reached; that the hose was useless; that the crew were exhausted and demoralized; and that several of them, alarmed at what seemed the inevitable destruction of their boat, had betaken themselves to the forest which fringed the shores of the Savannah. On the other hand, it is asserted with equal positiveness by the officers and crew of the Clark that, while notes of distress were sounded upon the steam-whistle, it was done simply to arouse the crew of the latter craft, and not to invoke the assistance of the Ethel; that the hose and water buckets of the Clark, brought into immediate requisition, extinguished the fire, and that they were engaged in throwing over the bales of cotton which had been exposed to the fire, with a view of passing it under the wheel of the Clark, which was kept in motion for that purpose, to "baptize" them thoroughly, and thus to extinguish any spark of fire which might linger in the fiber of the cotton; that the services of the Ethel were neither needed nor requested, and would have been refused, had it been deemed that they were prompted by mercenary motives, and not by a spirit of courtesy and kindness.

The ascertained facts, however, as hereinbefore shown, warrant us, under repeated announcements of the courts, to declare these salvage services. *The Blackwell*, 10 Wall. 11; *The Gler*, 31 Fed. Rep. 425; *The Connemara*, 108 U. S. 357, 2 Sup. Ct. Rep. 754. Saving a ship from imminent danger of destruction by fire is as much a salvage service as saving her from the perils of the sea. To co-operate voluntarily in extinguishing the fire, when not under legal obligation so to do, is meritorious service; and, even though the Clark might, and doubtless would have been saved without the co-operation of the Ethel, yet the services of the Ethel contributed substantially to that result; and it is in accordance with the law and with public policy that the salvors should be rewarded, not merely *pro opere et labore*, but as a reward given for perilous services voluntarily rendered,—as an inducement to seamen, and others, to embark in such undertakings to save life and property. There are, however, several considerations specified as important by authoritative decisions which will make the allowance for the salvage services to the Clark and her cargo far less in amount than the libelants demand. The labor expended was trifling; the skill exerted not at all extraordinary; the risk incurred by the salvors, with due precaution on their part, not great. The value of property saved was large,—some \$30,000,—but it must be remembered that the fire could in all probability have been readily extinguished by throwing the bales of compressed cotton into the river, with little effort and with small injury to the cotton, the compressed bales being almost impervious to the water. Besides, the court does not credit the evidence which would produce the impression that the crew of the Clark was totally demoralized. They rendered valuable and effective services in the extinguishment of the fire. The whole delay of the Ethel was not more than an hour. On the whole, the court “willingly, and not grudgingly,” (see the opinion of Judge HUGHES, *The Minot*, 30 Fed. Rep. 212,) allows the sum of \$400 for salvage services, to be assessed between the boat and the cargo in proportion to their respective values as agreed upon. Of this sum we award \$150 to the owners of the Ethel, \$50 to the master and pilot,—the same person,—\$25 to the mate and to each engineer, and to each other member of the crew,—15 in number,—\$8.33 $\frac{1}{3}$. The costs are assessed against the Alice Clark and cargo, in proportion to their assessed values, respectively.

MCKINNON v. THE REED CASE.

(District Court, W. D. Pennsylvania. July 25, 1889.)

1. SEAMEN—WAGES—ASSAULT BY MATE.

An assault and battery, committed by the mate upon a seaman, without cause, justified the latter in leaving the vessel before the expiration of the voyage for which he signed articles.

2. SAME.

The vessel is not liable to such seaman for wages, board, medical services, and railroad fare, after invitation by the master, in good faith, to return to the vessel, and an offer to stand between him and harm.

In Admiralty. Libel for wages.

Clark Olds, for libelant.

J. Ross Thompson, for respondent.

ACHESON, J. A careful consideration of this case has brought me to the following conclusions:

1. The assault and battery which the mate committed upon the libelant justified the latter in leaving the schooner, and he is justly entitled to his wages up to and inclusive of the day on which he quit the vessel.

2. But the master of the schooner, in good faith, as it appears to me, having invited the libelant to return to the vessel, and complete the voyage, and, as testified to by Mrs. Fish, having assured the libelant that he would stand between him and harm, and would put him on the master's watch, the libelant, refusing to return, could not claim wages for the rest of the voyage, or put the schooner to the expense of his trip home by rail.

3. The evidence is that the master invited the libelant to return to the vessel the next day after he quit her, and therefore I do not see that the schooner can be held for his board while at Escanaba. Nor is the bill for medical services satisfactorily proved, were it otherwise allowable.

Let a decree be drawn in favor of the libelant for \$28, with interest from August 6, 1887, and costs.

BROWNING v. REED.

(Circuit Court, D. Indiana. June 19, 1889.)

REMOVAL OF CAUSES—TIME OF APPLICATION.

Under act Cong. March 3, 1887, as corrected by act Aug. 13, 1888, requiring an application for removal from state to federal court to be made at or before the time the defendant "is required by the laws of the state or rule of the state court in which the suit is brought to answer or plead," where, on the third day of the term, defendant is ruled to answer, and files a plea in abatement on the next day, which is overruled on demurrer on the sixth day, a petition for removal, not filed until the seventh day, is too late, even if the plea in abatement suspended the rule to answer, as such rule became operative on the overruling of the plea.

At Law. On motion to remand.

Friedly & Giles, for plaintiff. *Dunn & Dunn* and *J. W. Buskirk*, for defendant.

WOODS, J. This case comes from the Lawrence circuit court, and the motion to remand is made upon the ground that the petition for removal was not presented in time. The record shows that the defendant was duly served with process in the customary form, and on the return-day appeared specially, and moved the court to set aside the summons and return. On the next day—being the third day of the term—the court overruled this motion, and ruled the defendant to answer. On the next day the defendant filed a plea in abatement, to which on the next day the plaintiff demurred, and on the next day this demurrer was sustained. This was on Saturday, the sixth day of the term; and on Monday, the seventh day, the petition for removal was presented. The rule to answer, as entered on the third day of the term, required an answer on the next day, and on that day the application for removal ought to have been presented, unless the filing of the plea in abatement operated to extend the time. Whether or not a plea in abatement has such effect, it is not necessary in this case to decide. If so, it must be upon the theory that, in respect to the time when a removal can be had, the plea suspends the operation of the rule to answer; and, conceding, but not deciding, this to be so, nevertheless, when the plea was overruled on the sixth day of the term, the rule to answer became at once again operative, and, if a removal was desired, it should have been then applied for, and the delay until the next day of the term was, I think, fatal to the right. By the act of March 3, 1887, as corrected by the act of August 13, 1888, the application must be made at or before the time the defendant "is required by the laws of the state or rule of the state court in which the suit is brought to answer or plead to the declaration or complaint of the plaintiff." The conclusion reached seems to be supported by the decision of Judge BLODGETT in *Kaitel v. Wylie*, 38 Fed. Rep. 865. See, also, *Dixon v. Telegraph Co.*, Id. 377, and *Hurd v. Gere*, Id. 537. For the statutes of Indiana in respect to the subject, reference is made to *McKeen v. Ives*, 35 Fed. Rep. 801. The motion is therefore sustained.

AUSTIN v. GAGAN *et al.*

(Circuit Court, N. D. California. August 5, 1889.)

1. REMOVAL OF CAUSES—CASE ARISING UNDER UNITED STATES STATUTE—PETITION.

In order to remove a cause from a state to a United States court, under the act of 1887, on the ground that it arises under a statute of the United States, the record must affirmatively show, from the facts alleged, that some disputed construction of the statute will arise for decision in the case.

2. SAME.

Where the contest is about the facts only, the law being undisputed, there can be no removal.

3. SAME—TIME OF APPLICATION—SUBSEQUENT EXTENSION OF TIME TO PLEAD.

The application for removal, under the act of 1887, must be made at or before the expiration of the time to answer, as prescribed by the statute or rules of court in force at the time of the service of the summons. Subsequent extensions of time to answer by special orders of the court, or by stipulations of the parties, cannot extend the time to apply for a removal under the statute.

4. SAME—TIME TO FILE BOND.

The bond required by the statute, as well as a petition, must be filed at or before the time for answering expires, to effect a removal.

5. SAME—FILING NUNC PRO TUNC.

The court cannot, by an order made after the time to answer has expired, directing the bond to be filed *nunc pro tunc* as of a day prior to such expiration of time, cut off the right of the plaintiff to remain in the state court, which has already become vested and fixed under the statute.

(Syllabus by the Court.)

On Motion to Remand.

James G. Maguire, for the motion.

F. I. Wilson, *contra*.

Before SAWYER, Circuit Judge.

SAWYER, J. One ground of the motion is, that the petition does not present a case, which appears from the facts stated, to arise under the laws of the United States. One party claims the land in dispute as a homestead, and the other that the land is mineral, and therefore, not subject to be entered as a homestead. But it does not appear from any facts stated, that there is any disputed construction of either statute under which the respective parties claim. For anything that appears, both parties may agree as to the construction of the statutes, and the whole case turn upon a question of fact, as to whether the land is mineral land or not, or whether either party has performed the acts conceded to necessary to give the right claimed. Indeed I infer from the facts stated in the petition, that the contest will really be upon the facts, and not the law. In my judgment the record does not present a case for removal under the decision in *Trafton v. Nougues*, 4 Sawy. 178, which was followed by Justice FIELD in *Gold-Washing Co. v. Keyes*, whose ruling was affirmed in 96 U. S. 199. See, also, *McFadden v. Robinson*, 10 Sawy. 398, 22 Fed. Rep. 10; *Hambleton v. Duham*, 10 Sawy. 489, 22 Fed. Rep. 465; and *Theurkauf v. Ireland*, 11 Sawy. 512, 27 Fed. Rep. 769,—to the same effect. Under any other rule the circuit court would

have jurisdiction—at least until the want of jurisdiction is disclosed at the trial—in every action of ejectment, where either party traces titles to a United States patent, no matter what the matters of contest may be, and thus nearly all the litigation respecting titles to lands lying west of the Alleghany mountains might be swept into the national courts.

The jurisdiction should affirmatively appear upon the record from the facts stated, and not from the mere statement of the conclusion of the petitioner. The petition is insufficient in this respect.

The summons was served on April 8, 1889, which required the parties to appear and answer in pursuance of the provisions of the statute of California, within 10 days after service of summons. The time for answering, then under the laws of California, expired on April 28th. The time for answering was extended from time to time by stipulation of parties till May 29th. On the latter day the defendants answered, and at the same time filed their petition for removal. This was not in time. The party must file his petition for removal "at the time, or any time before the defendant is required by the laws of the state, or the rules of the state court in which the suit is brought, to answer, or plead to the declaration or complaint of plaintiff,"—not at or before the expiration of the extended time within which parties may choose to stipulate for filing an answer, or demurrer. The statute means at any time before the defendant is required to answer by the laws of the state, when the time is specially regulated by the statutes, and by the general rules of practice governing the matter adopted by the courts, when the matter is thus regulated, instead of by specific statutes of the state,—not within the time provided by special orders extending the time, or application by or stipulations of the parties. As we said in *Dixon v. Telegraph Co.*, 38 Fed. Rep. 377, the prior act allowed the petition to be filed at any time during the term at which it might first be tried. But the supreme court, repeatedly, held, that the act meant the term at which it could be first at issue, and be ready for trial, provided the parties filed their pleadings at the time appointed by law, whether the court, or the parties were ready for trial or not. And it was also held that the extension of the time of joining issue by orders of the court, or a stipulation for time between the parties, could not extend the time for filing a petition for removal to the next term. *Car Co. v. Speck*, 113 U. S. 84, 5 Sup. Ct. Rep. 374; *Gregory v. Hartley*, 113 U. S. 746, 5 Sup. Ct. Rep. 743. And this has often been the ruling in this court as will be seen by consulting the reports of its decisions. Even the statute as thus construed was deemed by congress to be too liberal, and in 1887 the act was amended so as to require the petition to be filed at or before the time when the law or established rules of court required the defendant to plead. This law must be construed in the same way as the former, as to the matter of extending the time to plead by the court, or by stipulation of the parties. The party must make his election; and file his petition at, or before the time when his pleading is first due under the law, or rules as they exist when service of summons is made, or he waives his right to a removal. This must be the rule, or the parties by stipulation, or the court by special orders,

on their application, may extend the time to apply for a removal, indefinitely, and the policy of the law be thereby defeated. See, also, *Keeney v. Roberts*, and cases cited, 12 Sawy. 39, *post*, 629, and *Theurkauf v. Ireland*, 11 Sawy. 512, 27 Fed. Rep. 769.

The policy of the law, is to require parties to take the first opportunity to change the forum, and in default thereof the right is waived. Under the old law, the party was compelled to elect upon first appearing. The petition is too late and the case improperly removed on that ground also. The bond filed with the petition on the last day of the time to answer as extended by the stipulation, contained no amounts of money, an unfilled blank having been left, so that it did not appear for what money the obligors were bound. Afterwards, on June 27th, another bond was filed reciting the defect in the first bond filed and that this bond, which was in due form, was filed in place of the prior bond. The court made an order that it be filed *nunc pro tunc* as of May 27th. But clearly the court could not by this order, give the bond a retroactive effect, so as to cut off a right which had vested in the mean time. Now the first bond was effective, or it was not. If it was effective, there was no necessity for the second, and it was useless. If it was not effective, then the case was not removed by the filing of the petition or until after the filing of the new bond, and this was long after the expiration of the time prescribed by the statute, and the right of the plaintiff to remain and litigate his case in the state court, had become vested and fixed. It was not, thereafter, in the power of the court to divest it by this or any other order. The case was not in fact, or in law removed until after the time for removal had expired.

That the bond was necessary to effect a removal, seems clear. The statute provides for the filing of both a petition and bond containing certain prescribed conditions. The required petition and bond having been filed within the time prescribed, the statute proceeds: "It shall *then* be the duty of the court to accept the said petition and bond, and proceed no further in such suit,"—that is to say, after filing of the prescribed petition and bond, but not till "then." See *Desty, Removal*, 142. The filing of a bond is required by the same language as the filing of a petition, and it must receive the same construction with reference to the bond, as with reference to the petition.

The paper filed as a bond, was so radically defective, in matters of substance, that it was no bond at all. Consequently, no bond was filed till a month after the stipulated extension of time to answer had expired, and two months after the lapse of the statutory time. It was therefore without effect. In *Burdick v. Hale*, 7 Biss. 96, the bond, like that under consideration, had no sum specified—the place for the amount being left blank—and Circuit Judge GRESHAM, and I think rightly, held, the defect to be fatal, as the court was not authorized to dispense with any substantial condition to a removal required by the act. In *Torrey v. Locomotive Works*, 14 Blatchf. 269, Judge BLATCHFORD, now of the supreme court, made a similar ruling as to a less vital defect in the bond. A similar decision was made in *McMurdy v. In-*

insurance Co., 4 Wkly. Notes Cas. 18. Judge COXE in the circuit court, N. D. New York, approved and followed these decisions with reference to a bond which made no provision for payment of costs. *Webber v. Bishop*, 13 Fed. Rep. 49. So Field in his treatise on Jurisdiction of the Federal Courts says: "If the bond is manifestly defective, as where no sum for the penalty is inserted, this would be ground for remanding the case to the state court from which it come." Section 190. See, also, section 178, p. 156. There are some decisions holding that slight defects may be cured, as in *Harris v. Railroad Co.*, 18 Fed. Rep. 833, and cases cited. But none of them are cases where substantially there was no bond at all, till long after the time for removal had expired. In my judgment the court cannot dispense with any substantial condition to a removal required by the statute, and cannot supply a substantial condition after the time for removal has expired, and the right of the other party has attached. For all of the various reasons indicated, a removal was not effected. The cause must, therefore, be remanded with costs, and it is so ordered.

KEENEY v. ROBERTS.

(Circuit Court, D. California. July 19, 1886.)¹

REMOVAL OF CAUSES—ACT OF 1875—TIME OF REMOVAL.

Under the removal act of 1875 a case cannot be removed after the term at which it could have been first tried in the state court, and where counsel do not take the objection it is the duty of the court to do so.

Before SAWYER, Circuit Judge.

SAWYER, J. This suit was commenced in the superior court of the state December 27, 1881. The answer was filed, and the case put at issue, and was ready for trial, May 2, 1882. The petition for removal to this court was not filed till January 25, 1884—nearly two years after it could have been tried. Not less than half a dozen terms of the superior court passed at which it could have been tried. The application for removal was too late, and the removal at that time was not authorized by the act of 1875, under which the petition was filed. *MacNaughton v. Railroad Co.*, 10 Sawy. 113, 114, 19 Fed. Rep. 881; *Car Co. v. Speck*, 113 U. S. 86, 87, 5 Sup. Ct. Rep. 374; *Gregory v. Hartley*, 113 U. S. 745, 5 Sup. Ct. Rep. 743. The court should take the objection, if counsel do not. *Williams v. Nottawa*, 104 U. S. 209–211; *Farmington v. Pillsbury*, 114 U. S. 144, 5 Sup. Ct. Rep. 807. The petition and record do not show a proper case for removal, and no order for removal was in fact

¹This opinion was not published at the time of its delivery because of failure to receive a copy of it. It is published at this time on account of its citation in *Austin v. Gagan*, ante, 626.

made. The case is still pending in the state court, and liable, at any time, to be properly called up and tried. As the state court is not obliged to let go its hold, till a proper case for a removal, under the statute, has been presented in the record, and as it has never done so, in fact, it has jurisdiction to proceed, at any time, and try the case. *Gregory v. Hartley*, 113 U. S. 745, 5 Sup. Ct. Rep. 743. The case must be remanded to the state court, at the cost of petitioner, and it is so ordered.

SWIFT v. SUTPHIN.

(Circuit Court, N. D. Illinois. September 13, 1889.)

CONSTITUTIONAL LAW—REGULATION OF COMMERCE—MEAT INSPECTION LAW.

Act Minn. April 16, 1889, prohibiting the sale within the state of dressed meat, unless the animal within 24 hours before slaughter was inspected by state officers and found healthy and suitable for food. having the effect of excluding dressed meat from animals slaughtered outside the state, is unconstitutional as usurping the power of congress to regulate interstate commerce, and abridging the privileges and immunities of citizens of other states.

At Law. On demurrer to pleas.

A. H. Veeder and M. B. Loomis, for plaintiff.

C. H. Wood, for defendant.

BLODGETT, J. This is an action of *assumpsit* upon a contract entered into between the parties on the 10th day of May last, whereby it was provided that the parties should go into partnership in the city of Duluth, Minn., for the purpose of selling there, on commission, fresh dressed meats, slaughtered and prepared for market by Swift & Co. at the Union Stock-Yards in Chicago, Ill. The contract further provided that the proposed partnership should continue for five years from June 1, 1889; that the capital of the firm should be \$15,000, one-half to be contributed by each party; and further provided that if either party should fail or refuse to enter into such partnership, or perform its conditions as stipulated, the party so failing or refusing should forfeit and pay to the other party the sum of \$7,500. The declaration charges that the plaintiff has always been ready and willing to perform his part of the contract, but that the defendant refuses to enter upon said partnership, or in any manner comply with said agreement; wherefore the plaintiff claims damages as stipulated in the contract. The defendant, by way of defense, interposes two pleas, both of which set up, in somewhat different phraseology, an act of the general assembly of the state of Minnesota, approved April 16, 1889, prohibiting the sale of such meats as the partnership was formed to sell, unless the animals from which such meats should be taken had been inspected within 24 hours before slaughtering, and found healthy and in suitable condition to be slaughtered for human food, by inspectors appointed under the provisions of said statute. Plaintiff de-

murs to both these pleas, upon the ground that the statute invoked as a defense is in contravention of the constitution of the United States, and therefore void.

The statute in question purports by its title to be "An act for the protection of the public health, by providing for inspection before slaughter of cattle, sheep, and swine designed for slaughter for human food." The first section prohibits the sale, in the state of Minnesota, of any fresh beef, veal, mutton, lamb, or pork for human food, except as therein-after provided. By the second section it is made the duty of the several local boards of health of the several cities, villages, boroughs, and townships within the state to appoint one or more inspectors therein, to hold office for one year, and to have jurisdiction co-extensive with the board making the appointment; and it further provides that the standing boards shall prescribe the form of certificate to be issued by the inspectors, and fix the fees for inspection, which are not to be greater than are actually necessary to defray the cost thereof. By the third section it is made the duty of the inspectors so appointed to inspect, within 24 hours before slaughter, all cattle, sheep, and swine to be slaughtered for human food within their respective jurisdictions, and, if found healthy and in suitable condition to be slaughtered for human food, to give to the applicant a certificate in writing to that effect; but if found unfit for food by reason of infectious disease, such inspectors are required to order the immediate removal and destruction of such diseased animals. By the fourth section it is enacted that any person who shall sell, expose, or offer for sale for human food in said state any fresh beef, veal, mutton, lamb, or pork whatsoever, which has not been taken from an animal inspected and certified to be fit for slaughter by the proper local inspector, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$100, or by imprisonment not exceeding three months. By section 5 it is provided that every certificate made by inspectors under the act shall contain a statement to the effect that the animal or animals inspected, which are to be described as to kind and sex, were, at the date of such inspection, free from all indication of disease, apparently in good health, and in fit condition to be slaughtered for human food; and the sixth section provides a penalty for any false certificate made by an inspector. The demurrer to these pleas raises the question as to whether the statute in question is or is not void under the provisions of article 1, § 8, of the constitution of the United States, which clothes congress with power to regulate commerce with foreign nations, and among the several states; and also under the provisions of section 1 of article 14 of the amendments, on the ground that it abridges the privileges and immunities of citizens of other states.

Dressed meats have been from time immemorial articles of local commerce. It may be said that every civilized community has its butchers, engaged in the slaughtering and sale of animals for human food; and the courts will take judicial notice that within the last few years, by means of new appliances for the preservation of such meats, and the facilities for rapid transportation by means of railroads, a large and it may be said a

new business has grown up in the slaughtering and transportation of these dressed meats for human food to distant points from the place of slaughter, so that this business has now become an important item of interstate commerce. The press teems with accounts and statements of the magnitude of the business. The traveler journeying over our railroads meets at almost every point cars constructed and adapted expressly for such business. The records of the patent-office show the invention and patenting of many cars and warehouses specifically designed for conducting such business, and at the late session of congress a committee was appointed by the senate to investigate during the present recess, and report at the next session upon some of the phases and methods of said business; so that there can be no doubt, from common knowledge, that to-day dressed meats for human food are articles of interstate commerce. The act in question purports by its title to be an act for the protection of the public health, by providing for the inspection before slaughter of animals designed for slaughter for human food, and its validity is asserted on the ground that it is a police regulation, coming within the sphere of the state government; but even a cursory glance at its provisions shows that its practical effect and operation is to exclude all dressed meats from animals slaughtered outside of the state of Minnesota. The animals must not only be inspected within 24 hours before they are slaughtered, but they must be inspected within the state; that is, by state officers, who would have no power to act except within the state. It will therefore be assumed that this statute, in effect, excludes and prohibits the sale in the state of Minnesota of dressed meats intended for human food, from animals slaughtered outside that state.

While the state legislatures are clothed with large discretion in the exercise of their police powers for the protection of the health, property, and persons of their citizens, there can be no doubt that this power must be exercised so as not to interfere with matters over which the federal government has exclusive jurisdiction; and no matter how speciously a state statute may be worded, if in its operation it impinges upon the sphere of the federal government it is so far void. In *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, it was said by the supreme court of the United States:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed, are under a solemn duty, to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution. * * * Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guaranteed by that instru-

ment, or interfere with the execution of the powers confided to the general government."

In *Brown v. Maryland*, 12 Wheat. 439, Chief Justice MARSHALL, speaking for the court, said:

"There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. * * * If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse, of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right, not only to authorize importation, but to authorize the importer to sell."

So in the *License Cases*, 5 How. 588, it was said by Mr. Justice McLEAN:

"The federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them, nor inhibited to them. From this it is clear that, while these supreme functions are exercised by the federal and state governments within their respective limitations, they can never come in conflict. And when a conflict occurs, the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the states are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government."

And in *Railroad Co. v. Husen*, 95 U. S. 465, Mr. Justice STRONG, speaking for the court, said:

"We admit that the deposit in congress of the power to regulate foreign commerce and commerce among the states was not a surrender of that which may properly be denominated 'police power.' What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. It cannot invade the domain of the national government. * * * Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution. * * * While we unhesitatingly admit that a state may pass sanitary laws, and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine, and reasonable inspec-

tion laws,—it may not interfere with transportation into or through the state, beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce.”

So in *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, a case which involved the constitutionality of the statute of Iowa prohibiting common carriers from bringing intoxicating liquors into that state, Mr. Justice MATTHEWS, in the opinion of the court, replying to the argument that the statute then in question was a proper exercise of the police power, says:

“If, from its nature, it does not belong to commerce, or if its condition, from putrescence or other cause, is such, when it is about to enter the state, that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction; and, as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power; that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States. * * * The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation; for it takes from congress, and leaves with the states, the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the states determine, what shall or shall not be regulated. Upon this theory, the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is, in effect, the controlling one. The police power would not only be a formidable rival, but, in a struggle, must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning adopted by the state and its courts could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drank, or to food and clothing; and with nearly equal claims to propriety, as malt liquors, and the produce of fruits other than grapes, stand on no higher ground than the light wines of this and other countries, excluded, in effect, by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing. * * * It cannot, without the consent of congress, expressed or implied, regulate commerce between its people and those of the other states of the Union, in order to effect its end, however desirable such a regulation might be.”

It is urged in behalf of the defendant that while the power to regulate commerce is so far vested in congress that the state law cannot prohibit commercial commodities from being brought into a state, this does not prevent the state legislature from prohibiting the sale after they are brought within the jurisdiction of the state. This position seems to me to be

abundantly answered in the quotation already made from the opinion of the supreme court in *Brown v. Maryland*, that the power of congress to regulate the introduction of articles of commerce necessarily implies the right to authorize the sale of commercial articles so introduced; and in the opinion in the *Bowman Case*, heretofore referred to, it is said by Mr. Justice MATTHEWS:

"It is easier to think that the right of importation from abroad, and of transportation from one state to another, includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported."

And Mr. Justice FIELD, in his concurring opinion in the same case, says:

"So, in the present case, it is perhaps impossible to state any rule which would determine in all cases where the right to sell an imported article under the commercial power of the federal government ends, and the power of the state to restrict further sale has commenced. Perhaps no safer rule can be adopted than the one laid down in *Brown v. Maryland*, that the commercial power continues until the articles imported have become mingled with and incorporated into the general property of the state, and not afterwards. And yet it is evident that the value of the importation will be materially affected if the article imported ceases to be under the protection of the commercial power upon its sale by the importer. There will be little inducement for one to purchase from the importer, if immediately afterwards he can himself be restrained from selling the article imported; and yet the power of the state must attach when the imported article has become mingled with the general property within its limits, or its entire independence in the regulation of its internal affairs must be abandoned. The difficulty and embarrassment which may follow must be met as each case arises."

The statute now in question meets at the border of the state an article of commerce intended for human food, and arbitrarily declares it unfit for such purpose, and prohibits its sale. This seems to me a palpable invasion by the state of the domain of congress. That the state authorities may provide for the inspection of such articles, and prohibit their sale if found, in fact, unfit for use as food, must be conceded; but even the power of inspection is undoubtedly so limited by the first clause of article 14 as that the citizen of another state, owning such article, is to be treated in the same manner as a citizen of the state into which the article is imported. Upon this point the following extract from the opinion in the *Bowman Case* is pertinent:

"If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article. the use or abuse of which it may deem deleterious. It may not choose, even, to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect."

And the same principle is affirmed in the *License Cases*, 5 How. 504; *Ward v. Maryland*, 12 Wall. 418; and many other cases that might be cited.

It is further urged on the part of the defendant, in support of this legislation, that the inspection of the living animal from which the meat to be sold for human food is to be taken is necessary before slaughter in order to accurately determine whether the animal is fit to be slaughtered for such purpose. This reasoning is more specious than sound, and might be applied with the same force to any manufactured, or partly manufactured, article which is the subject of commerce, and especially such as is intended for human food. The wholesomeness of flour, cured meats, corn meal, tobacco, canned fruits, fish, etc., could perhaps be more accurately determined if the raw material from which such goods were produced could be inspected before manufacture; but the admission of the doctrine that a state can interdict the introduction and sale of an article of commerce, unless an inspection is made by the proper officer of said state of the raw material from which such goods are produced, would put all commerce in the state within the control of its legislature. As is said by Mr. Justice FIELD, in his concurring opinion in the *Bowman Case*, "what is an article of commerce is determined by the usages of the commercial world, and does not depend upon the declarations of any state." The authorities, then, seem to me to fully establish the proposition that no article of commerce can be excluded from introduction into and sale in a state by state inspection laws or prohibition laws, and the common commercial usage and course of trade, and not the legislature of the state, determines what are articles of commerce. Tested by these rules, I am of opinion that the statute in question is unconstitutional and void, and furnishes no answer to the plaintiff's case.

Since preparing the notes for this decision, I have been furnished with a newspaper clipping of the opinion by Judges ENSIGN and STEARNS, of the eleventh judicial district of the state of Minnesota, in the *Case of Christian, infra*, which arose upon a writ of *habeas corpus*, Christian having been tried for a violation of this act, and sentenced to imprisonment, in which I am pleased to see that these learned judges have, in an able and exhaustive opinion, arrived at the same conclusion as myself in regard to the validity of this statute. The demurrer to the pleas is sustained.

The following is the opinion of Judges STEARNS and ENSIGN, referred to above.

In re CHRISTIAN.

Application for a Writ of *Habeas Corpus*.

Cash & Williams, for relator.

Edmund Sherwood, Co. Atty., for the State.

PER CURIAM. The question to be determined in above proceedings is the validity of chapter 8, Gen. Laws Minn. 1889, entitled "An act for the protection of the public health by providing for inspection, before slaughter, of cattle, sheep, and swine designed for slaughter for human food." Section 1 provides: "The sale of any fresh beef, veal,

mutton, lamb, or pork, for human food, in this state, except as hereinafter provided, is hereby prohibited." Section 2 furnishes the method of appointing inspectors. Section 3 specifies the powers and duties of the inspectors. "Sec. 4. Any person who shall sell, expose, or offer for sale, for human food, in this state, any fresh beef, veal, mutton, lamb, or pork, whatsoever, which has not been taken from an animal inspected and certified before slaughter, by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than \$100, or by imprisonment not exceeding three months for each offense." If the act is unconstitutional, the conviction and sentence are void, and the petitioner is entitled to his discharge. *Ex parte Siebold*, 100 U. S. 371, 379, 9 Amer. & Eng. Cyclop. Law, 225, 226, note 3, and cases cited. The effect of the act is to prohibit wholly the importing for sale in this state of any fresh meat whatsoever, and the question arises whether such a prohibition is not a violation of the provisions of the federal constitution.

First. We believe that this act violates the provisions of section 8, art. 1, of the constitution, which gives congress the power, among other things, "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." *Second.* It violates the provisions of section 2, art. 4, of the constitution: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The first clause above mentioned has been called by the courts the "commercial clause" of the constitution. There are certainly principles that have been established by the courts in construing it.

1. The word "commerce," as used in the clause, whether "with foreign nations," "among the several states," or "with the Indian tribes," embraces all transportation, purchase, sale, and exchange of all such commodities as are transported, bought, and sold by the usage of the commercial world. Chief Justice MARSHALL, in *Gibbons v. Ogden*, 9 Wheat. 1, on page 189, says: "The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term applicable to many objects to one of its significations. Commerce undoubtedly is traffic, but it is something more; it is intercourse. It describes that commercial intercourse between nations and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." Again, in *Brown v. Maryland*, 12 Wheat. 419, on pages 446, 447, Chief Justice MARSHALL says: "If this power [in congress to regulate commerce] reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize the sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell." In the *Passenger Cases*, 7 How. 283, Justice MCLEAN, on page 401, adopts a like definition.

2. The power to regulate commerce, as above defined, is vested in congress exclusively; and, if congress has failed to regulate any branch of such commerce, it indicates its will that the same shall be left free, and not that the several states may regulate it. The clause was construed by the supreme court of this state, as regards commerce with the Indian tribes. In *Foster v. Blue Earth County*, 7 Minn. 140, (Gil. 84,) on page 145, the court say: "It is not necessary to expend argument at the present day to prove that this power for the regulation of commerce granted by the states is vested solely and exclusively in congress. The question has been most thoroughly examined by the supreme court of the United States in reference to that portion of the grant which refers to the Indian tribes, and it has been held by that court that the term 'commerce' comprehends intercourse of every character with the tribes." In *Welton v. Missouri*, 91 U. S. 275, the court, on page 282, says: "The fact that congress has not seen fit to prescribe any specific rules to govern interstate commerce does not affect the question. Its inaction on this subject, when considered with reference to its legislation with respect to foreign commerce, is equivalent to a declaration that interstate commerce shall be free and untrammelled. As the main object of that commerce is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri. The views here expressed are not only supported by the case of *Brown v. Maryland*, already cited, but also by the case of *Woodruff v. Parham*, 8 Wall. 123, and the case of the *State Freight Tax*, 15 Wall. 232. In the case of *Woodruff v. Parham*, Mr. Justice MILLER, speaking for the court, after observing with respect to the law of Alabama, then under consideration, that there was no at-

tempt to discriminate injuriously against the products of other states or the rights of their citizens, and the case was not therefore an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity, said: "But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, [commercial regulations,] and therefore void." The question under consideration in the Missouri case was the validity of a Missouri statute declaring that whoever deals in the sale of goods or merchandise, the products of any other state, should be deemed a peddler, and provided for licensing such peddlers. The plaintiff in error was a dealer in sewing-machines manufactured in another state, and was convicted and fined for selling the same without license. As shown above, the act was held void, being an interference with matters confided solely to congress. See, also, *Bowman v. Railway Co.*, 125 U. S. 507, 508, 8 Sup. Ct. Rep. 689, 1062, where the cases are cited by Justice FIELD in his concurring opinion.

3. Naturally flowing from the two propositions above mentioned is a third, viz.: Any act of a state legislature interfering in any manner with the free transportation, sale, or exchange between citizens of different states of or in any article of commerce, is an attempted regulation of such commerce, and therefore beyond the power of the state, and void. There are, it is true, certain regulations of commerce that a state may make, where their operation is, from their very nature, local, and where congress has made no general regulation of the subject. But these regulations are considered more as an aid to, than as a regulation of, commerce. "The subjects, indeed, upon which congress can act under this power [to regulate commerce] are of infinite variety, requiring for their successful management different plans or modes of treatment. Some of them are national in their character, and admit and require uniformity of regulation affecting alike all the states; others are local, or are mere aids to commerce, and can only be properly regulated by provisions adapted to their special circumstances and localities. Of the former class may be mentioned all that portion of commerce with foreign countries or between the states which consists in the transportation, purchase, sale, and exchange of commodities. Here there can of necessity be only one system or plan of regulations, and that congress alone can prescribe." *Mobile v. Kimball*, 102 U. S. 691, (697.) Then follow regulations of the second class, which a state may prescribe in the absence of congressional regulation,—such as harbor pilotage, buoys, beacons, bridges, dams, etc. See, also, *Cooley v. Port-Wardens*, 12 How. 299; *Pound v. Turck*, 95 U. S. 459; cases cited by Justice BRADLEY in his dissenting opinion in *Railroad v. Illinois*, 113 U. S. 585, 7 Sup. Ct. Rep. 4. It cannot be contended that this act can be maintained as a regulation of the second class of subjects above mentioned.

But counsel for state claim that this act is valid as an exercise of the police power of the state, and as such ought to be upheld. In order to get the correct disposition of this claim it is indispensable to have a clear understanding of the nature and extent of the power, as given by courts and writers. Blackstone defines it to be "the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations." 4 Bl. Comm. 162. "The police of a state, in a comprehensive sense, embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with the like enjoyment of rights by others." *Cooley*, Const. Lim. 572. Judge REDFIELD, in *Thorpe v. Railway Co.*, 27 Vt. 140, (149), says: "This police power of the state extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state. According to the maxim, *sic utere tuo ut alienum non laedas*, which being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." "The police power of the state is co-extensive with self-protection, and is not inaptly termed the law of overruling necessity. It is that inherent and plenary power in the state which enables it to prohibit all things hurtful to the comfort, safety, and welfare of society." *Lake View v. Cemetery Co.*, 70 Ill. 192. "With the legislature the maxim of law, *salus populi suprema lex*, should not be disregarded. It is the great principle on which the statutes for the security of the people is based. It is the foundation of criminal law, in all governments of civilized countries and other laws conducive to safety and consequent happiness of the people. This power has always been exercised by government, and its existence cannot be denied. How far the provisions of the legislature can extend is always submitted to its discretion, provided its acts do not go beyond the great principle of securing the public safety, and its duty to provide for the public safety within well-defined limits, and with discretion, is imperative. * * * All laws for the protection of the lives, limbs, health, and quiet of persons, and the security of all property within the state, fall within this general power of the government." *State v. Noyes*, 47 Me. 189, (211.) The above definitions clearly disclose the great principle upon which the power rests, viz., public safety. Any law which goes

beyond this principle, which undertakes to abolish rights, the exercise of which does not infringe the rights of others, or to limit the rights beyond what is necessary to provide for the public welfare and general security, cannot be in the police power of a government.

The question has frequently arisen whether state acts, ostensibly as police regulations, do not intrude on the exclusive right of congress to regulate commerce among the states under the constitutional provision above considered. The supreme court of the United States, in considering this question, has established certain well-defined principles to ascertain what is and what is not an interference on the part of a state with interstate commerce.

First. The police power of a state cannot be exercised with respect to a subject-matter beyond its control. Regulation of interstate commerce is beyond state control, being confided exclusively to congress. *Henderson v. Mayor of New York*, 92 U. S. 259. This case arose on the validity of an act of the state of New York requiring every carrier of passengers from a foreign country to give bonds that they would not for four years become a public charge, or, in lieu thereof, to pay \$1.50 for each immigrant landed. It was sought to be sustained under the police power to protect the state from paupers. But it was held void, being an attempted invasion on the rights of congress. Justice MILLER, on page 271, says: "This power, frequently referred to in the decisions of this court, has been, in general terms, somewhat loosely called the 'police power.' It is not necessary for the course of this discussion to attempt to define it more accurately than it has been defined already. It is not necessary, because, whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it, and no urgency for its use, can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of congress by the constitution." Again, on page 272, he says: "But, however difficult this may be, it is clear from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void, no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states." See, also, exhaustive opinion of Justice STRONG in *Railroad Co. v. Husen*, 95 U. S. 465, (470, 473.) See, also, *Salzenstein v. Mavis*, 91 Ill. 391. It follows that if fresh meats, the sale of which are prohibited by this act, are articles of commerce, the act must be held void.

Second. In the exercise of police power over subject-matters within their power the states cannot establish unnecessary or unreasonable regulations, and the courts will judge whether an act is a proper exercise of police power from its purpose and effect, notwithstanding its language or its ostensible purpose. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson v. Mayor of New York*, supra, 268. In *Chy Lung v. Freeman*, 92 U. S. 275, a statute of California, similar to the statute of New York in the *Henderson Case*, came up for consideration, and was held void. On page 280, Justice MILLER says: "We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad, nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." In *Railroad Co. v. Husen*, 95 U. S. 465, an act of the state of Missouri was held void which prohibited the driving or carrying of any Texas, Indian, or Mexican cattle through the state between March 1st and November 1st of each year. On page 472, Justice STRONG, giving the opinion of the court, said: "While we unhesitatingly admit that a state may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while for the purpose of self-protection it may establish quarantine and reasonable inspection laws,—it may not interfere with the transportation into or through the state beyond what is absolutely necessary for its self-protection. It may not, under the cover of exerting its police powers, substantially prohibit or burden either foreign or interstate commerce." Again, on page 473, the court says: "It is not a quarantine law. It is not an inspection law. It says to all natural persons and to all transportation companies, 'You shall not bring into the state any Texas cattle or any Mexican cattle or Indian cattle between March 1st and December 1st in any year, no matter whether they are free from disease or not, no matter whether they may do any injury to the inhabitants of the state or not. * * *' Such a statute, we do not doubt, it is beyond the power of a state to enact. To hold otherwise would be to ignore one of the leading objects which the constitution of the United States was designed to secure." Again, on the same page: "The police power of a state cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise. And, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the federal constitution. And, as its range sometimes comes very near to the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

The case of *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, contains

an exhaustive discussion of this whole subject, and an able review of the authorities. An act of the state of Iowa, forbidding carriers to bring within the state intoxicating liquors, except under certain regulations prescribed in it, was held void. On page 488, Justice MATTHEWS says: "It has never been regarded as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequence of its use or abuse." Again, on page 489, the court quotes with approval from the opinion of Justice CATRON in the License Cases, 5 How. 504, (599,) as follows: "The assumption is that the police power was not touched by the constitution, but left to the states, as the constitution found it. This is admitted; and whenever a thing from character or condition is of a description to be regulated by that power in the state, then the regulation may be made by the state, and congress cannot interfere. But this must always depend on facts subject to legal ascertainment, so that the injured may have redress. And the fact must find its support in this: whether the prohibited article belongs to and is subject to be regulated as part of foreign commerce or of commerce among the states. If from its nature it does not belong to commerce, or if its condition from putrescence or other cause is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And, as an incident to this power, a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power. That is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States.

* * * What, then, is the assumption of the state court? Undoubtedly, in effect, that the state had the power to declare what should be an article of lawful commerce in the particular state; and, having declared that ardent spirits and wines were deleterious to morals and health, they ceased to be commercial commodities there, and that then the police power attached, and consequently the powers of congress could not interfere. The exclusive state power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but on the declaration found in the state laws, and asserted as the state policy, that it shall be excluded from commerce. And by this means the sovereign jurisdiction in the state is attempted to be created in a case where it did not previously exist. If this be the true construction of the constitutional provision, then the paramount power of congress to regulate commerce is subject to a very material limitation; for it takes from congress and leaves with the states the power to determine the commodities or articles of property which are the subjects of lawful commerce. Congress may regulate, but the states determine what shall or shall not be regulated. Upon this theory the power to regulate commerce, instead of being paramount over the subject, would become subordinate to the state police power; for it is obvious that the power to determine the articles which may be the subjects of commerce, and thus to circumscribe its scope and operation, is in effect the controlling one. The police power would not only be a formidable rival, but in a struggle must necessarily triumph over the commercial power, as the power to regulate is dependent upon the power to fix and determine upon the subjects to be regulated. The same process of legislation and reasoning * * * could bring within the police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food and clothing; and with nearly equal claims to propriety, as malt liquors and the produce of fruits other than grapes stand on no higher ground than the light wines of this and other countries, excluded in effect by the law as it now stands. And it would be only another step to regulate real or supposed extravagance in food and clothing." Again, on page 494, he says: "If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article, the use or abuse of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or of all articles that it may select as coming into competition with those which it seeks to protect. The police power of the state would extend to such cases, as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion that would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the constitution or congress have intended to limit the freedom of commercial intercourse among the people of the several states."

Respecting the second question above suggested, viz., that it violates the provisions of section 2, art. 4, of the constitution, we think this is clearly shown by the cases above cited. See, also, following cases: *Ward v. Maryland*, 12 Wall. 418; *Tiernan v. Rinker*, 102 U. S. 123; *Walling v. Michigan*, 116 U. S. 446, (459,) 6 Sup. Ct. Rep. 454; *In re Watson*, 15 Fed. Rep. 511, and note. Now, applying these well-established principles to the act under consideration, we can see no reasonable theory upon which it can be upheld.

First. There is no question that fresh, wholesome meat is an article of extensive commerce among the states at the present time. Of late years it has greatly increased,

and been facilitated by the device of refrigerator cars that are seen daily by the hundreds on all our trunk lines. Meat is transported hundreds of miles in a short space of time, and when it reaches its destination it is as fresh and wholesome as when placed in the car. It is one of the greatest and most important articles of interstate commerce, and it is not in the power of this state to prohibit commerce in it. Justice FIELD, in *Bowman v. Railway*, supra, on page 501, says: "What is an article of commerce is determinable by the usages of the commercial world, and does not depend upon the declaration of any state." In *Telegraph Co. v. Telegraph Co.*, 96 U. S. 1, Chief Justice WAITE, on page 9, says: "The powers thus granted [to congress to regulate commerce] are not confined to the instrumentalities of commerce, or the postal service, known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and circumstances." The same may undoubtedly be said of articles of commerce. This consideration alone would seem decisive of the question. Fresh meat is an article of interstate commerce. Its regulation is exclusively in congress; therefore a state law regulating it is void.

Second. Under the principles laid down governing police powers it is equally void. It is not an inspection law. It will not examine fresh meat to see whether or not it is wholesome. It puts all—the good and the bad alike—under the ban of destruction. It utterly destroys interstate commerce in this article, under the guise, it is true, of protecting the public health. But public health does not demand for its protection that wholesome fresh meats, the products of other states, be destroyed. A state cannot exercise such arbitrary power, no matter under what guise.

It is not necessary to enlarge. There is no mode of reasoning by which the act can be sustained, and the prisoner is discharged.

In re BARBER.

(Circuit Court, D. Minnesota. September 23, 1889.)

CONSTITUTIONAL LAW—POLICE POWER—INTERSTATE COMMERCE—MEAT INSPECTION LAW.

Act Minn. April 16, 1889, prohibiting the sale within the state of dressed meat unless the animal from which it was taken was inspected by local inspectors appointed thereunder within 24 hours before slaughter, having the effect of excluding from sale all dressed meats from animals slaughtered outside of the state, is not a lawful exercise of the police power of the state, and is unconstitutional, as invading the power of congress to regulate interstate commerce, and as abridging the privileges and immunities of the citizens of other states.¹

Petition for Writ of *Habeas Corpus*.

W. H. Sanborn, for petitioner.

Mr. Cole and C. W. Bunn, for the State.

NELSON, J. The petitioner is brought before me upon a writ of *habeas corpus*. He alleges in his petition that he is restrained of his liberty by the sheriff of Ramsey county under a warrant of commitment issued by a justice of the peace, being found guilty of violating the following act of the legislature of the state of Minnesota, approved April 16, 1889, entitled "An act for the protection of the public health by providing for the inspection, before slaughter, of cattle, sheep, and swine designed for slaughter for human food." "Be it enacted," etc.:

"Section 1. The sale of any fresh beef, veal, mutton, lamb, or pork for human food in this state, except as hereinafter provided, is hereby prohibited."

¹For opinion of Judge JOHNSTON on the constitutionality of the Indiana statute, see note at end of case, post, 646.

Section 2 provides for the appointment of local inspectors. Section 3 defines the duties of the inspectors, who must inspect the animals within 24 hours before slaughter.

"Sec. 4. Any person who shall sell, expose, or offer for sale, for human food in this state, any fresh beef, mutton, lamb, or pork whatsoever, which has not been taken from an animal inspected and certified before slaughter by the proper local inspector appointed hereunder, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by fine of not more than \$100, or by imprisonment not exceeding three months, for each offense."

The petitioner alleges that this act of the legislature is in contravention of the constitution of the United States, and void, and that he is entitled to be discharged. The particular provisions of the constitution relied upon are article 1, § 8, which declares that "the congress shall have power * * * to regulate commerce * * * among the several states," and also, article 4, § 2, which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." The proper proceedings are taken to form the issue. The counsel appearing on behalf of the state claim that the law was passed as a sanitary regulation under the power reserved to the states in article 10 of the constitution of the United States.

The question of the validity of the act is to be determined under the proceedings. Is the law a valid and lawful exercise of state power to protect the public health, or does it pass beyond the constitutional limit, invade the federal domain, and substantially prohibit or burden interstate commerce, and also violate the rights secured to the citizens of the several states? By its title the act purports to be for the protection of the public health, and it is urged that upon its face it does not deal with commerce, and does not directly invade the domain of interstate commerce, but merely regulates the mode of sale of an article of commerce, after it has become a part of the mass of the property of the state. The states have never yielded to the federal government control over internal commerce or their right to self-protection. They have plenary power to protect the lives, health, comfort, and safety of all persons, and for the protection of all property within the state. Health inspection and quarantine laws are among the recognized lawful legislation of a state, and are necessary and advisable for the public welfare. They are self-defensive, and no federal power is trenching upon by their enactment. Such laws may, in many instances, incidentally affect interstate commerce, yet are not necessarily a regulation of it. If the law of the state of Minnesota is a proper and reasonable exercise of its police power, it violates no provision of the constitution of the United States. There has been a conflict for many years and much litigation in respect to the extent of the powers reserved to the states in the federal constitution. This controversy is perennial. The supreme court of the United States has explained in many later cases its previous decisions in regard to the extent of the police power of the states; yet the line of demarcation between the delegated power of congress and the reserved powers of the

states is not defined with such accurate precision that it is easy to determine the boundary limit in all cases. But the supreme court always has stood firm, and tenaciously resisted every attempt of a state to encroach upon the exclusive power of the federal government under the commercial clause of the constitution, and there is a consension of opinion among the judges upon that subject.

The counsel for the state urges that this statute is a reasonably self-protective law. They put it forcibly in this form:

"Whatever the state deems it necessary to do within her own borders for the protection of the health of the citizen she may constitutionally do under the primal and paramount law of self-protection, which is nature's earliest enactment, to which no human legislation ever ran counter. Subject to this only qualification, that from facts apparent on the face of the law or of which the court may take judicial cognizance, the cogent presumptions in its favor are not overthrown by bad faith in its enactment."

If I clearly understand counsel, this is not an unfair statement of the reserved powers of the states. It is only this, in substance: a law to protect health may be enacted by a state, and is valid unless it is a usurpation upon the general government by the invasion of a power exclusively vested in congress. If a state arrogates power so delegated, and exercises control over a subject exclusively confided by the federal constitution to congress, it certainly is guilty of bad faith, for it violates that covenant by which we became one people. The states, as I said, are clothed with plenary police power and large discretion in its exercise for the protection of the public health and comfort, but in order to determine whether the act of the state is really a usurpation of power, the courts are required to look at the effect and operation of the law, and are not bound by mere form. In *Henderson v. Mayor*, 92 U. S. 259, Mr. Justice MILLER, speaking of the police power of the states, said:

"Whatever may be the nature and extent of that power, where not otherwise restricted, no definition of it and no urgency for its use can authorize a state to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of congress by the constitution. * * * It is clear, from the nature of our complex form of government, that whenever the statute of a state invades the domain of legislation which belongs exclusively to the congress of the United States, it is void; no matter under what class of powers it may fall, or how closely allied to powers conceded to belong to the states."

So, in *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. Rep. 273, Mr. Justice HARLAN, speaking for the court, says:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are of necessity limits beyond which legislation cannot rightfully go. * * * The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty, indeed are under a solemn duty, to look at the substance of things whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect

the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution. * * * Undoubtedly the state, when providing, by legislation, for the protection of the public health, the public morals, or the public safety, is subject to the paramount authority of the constitution of the United States, and may not violate rights secured or guaranteed by that instrument, or interfere with the execution of the powers confided to the general government."

While it must be admitted that the line of distinction between what is a legitimate police regulation and what constitutes an interference with commerce is "dim and shadowy," it is settled that when a law reaches beyond its professed object and into the domain of the federal government, no matter what may be its title, or in what form the details are expressed, it is unconstitutional. The practical effect and operation of this law excludes the importation of all dressed meats to be sold for manufactured food from animals slaughtered outside of the state of Minnesota. It excludes without reference to its quality or condition a commodity known to be an article of commerce by the usages of a commercial world, and an important item of interstate traffic, and practically declares that it does not belong to commerce. It says to all persons engaged in the business of selling dressed meats for food in this state: You must have the animal from which the meat is taken inspected by local inspectors in the state within 24 hours before slaughtered, or suffer extreme penalties. It is not questioned that sound, dressed beef is an article of commerce, but this law is attempted to be maintained as a reasonable regulation of the mode of sale after it has become a part of the mass of property of the state, and it is urged that, as it does not forbid the importation of dressed meat, but only the sale for human food after importation, it is valid. In the argument counsel stated that "private families could import for their own consumption, and that innkeepers and like public resorts are not prevented from buying dressed meat outside of the state and bringing it in for use." If this is a correct interpretation of the law,—if individuals, for private use, as food, and innkeepers, who feed thousands of people, can freely import for use, and the sale is only forbidden,—how does such a measure protect the public health and promote the public welfare? Does it not conclusively show that the legislature was not influenced by considerations for the public health, safety, and comfort, but its policy was directed to other ends? The authorities, however, establish the propositions—*First*, that no article of commerce can be excluded from importation and sale in a state by the statutes like the one in question; *second*, that any act of a state interfering in any way with the free traffic between citizens of different states in any article of commerce is an attempted regulation of such commerce and an invasion of the power exclusively conferred upon congress, and its non-action with respect to any particular commodity is a declaration of its purpose that the commerce in that commodity shall be free. When this law is tested by the decisions of the supreme court of the United States it will be found that it oversteps the limit of the state ju-

isdiction and needlessly obstructs interstate commerce. In *Brown v. Maryland*, 12 Wheat. 447, Chief Justice MARSHALL, delivering the opinion of the court, said:

"There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. * * * If this power reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse. One of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell."

The same principle was asserted in the *License Cases*, 5 How. 588. Mr. Justice McLEAN said:

"The federal government is supreme within the scope of its delegated powers, and the state governments are equally supreme in the exercise of those powers not delegated by them nor inhibited to them. From this it is clear that while these supreme functions are exercised by the federal and state governments within their respective limitations they can never come in conflict, and when a conflict occurs the inquiry must necessarily be, which is the paramount law? And that must depend upon the supremacy of the power by which it was enacted. The federal government is supreme in the exercise of powers delegated to it, but beyond this its acts are unconstitutional and void. So the acts of the states are void when they do that which is inhibited to them, or exercise a power which they have exclusively delegated to the federal government."

In *Railway Co. v. Husen*, 95 U. S. 465, the court said:

"We admit that the deposit in congress of the power to regulate commerce among the states was not a surrender of that which may properly be denominated 'police power.' What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety. * * * But, whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confided exclusively to congress by the federal constitution. * * * Neither the unlimited powers of a state to tax, nor any of its large police powers, can be exercised to such an extent as to work a practical assumption of the powers properly conferred upon congress by the constitution. * * * While we unhesitatingly admit that a state may pass sanitary laws and laws for the protection of life, liberty, health, or property within its borders; while it may prevent persons and animals suffering under contagious or infectious diseases, or convicts, etc., from entering the state; while, for the purposes of self-protection, it may establish quarantine and reasonable inspection laws,—it may not interfere with the transportation into or through the state beyond what is absolutely necessary for its self-protection. It may not, under cover of exerting police powers, substantially prohibit or burden either foreign or interstate commerce."

So, in *Bowman v. Railway Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062, Mr. Justice MATTHEWS, speaking of police power of the state, says:

"If from its nature it does not belong to commerce, or if its condition, from putrescence or other cause, is such when it is about to enter the state that it no longer belongs to commerce, or, in other words, is not a commercial article, then the state power may exclude its introduction. And as an incident to this power a state may use means to ascertain the fact. And here is the limit between the sovereign power of the state and the federal power; that is to say, that which does not belong to commerce is within the jurisdiction of the police power of the state, and that which does belong to commerce is within the jurisdiction of the United States."

I forbear further quotation, and refer to the opinion of the court in full.

Undoubtedly the state may provide for the reasonable inspection of dressed meat or any article of commerce, and prohibit its introduction into the state if found in fact unwholesome and unfit for use as food, but it cannot encroach upon the power of congress to regulate interstate commerce. It cannot go to the extent of prohibiting the introduction of a sound commercial commodity. A state may exclude any infected article of commerce from reaching the importer, but this law excludes the sound and infected alike, and declares it unfit for human food under the guise of a health regulation. Such a law transcends the police power of a state, for it attempts to obstruct commerce, and if it can exclude sound, dressed meat, it may prohibit the importation and sale of any commodity, and, as said, thus "commercial anarchy and confusion would result from the diverse exertions of power by the several states of the Union." The case of *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, does not overrule the decisions above cited. No conflict arose in that case between the police power of the state and the power of congress to regulate interstate commerce, and nothing therein said is inconsistent with the previous decisions of the court in regard to the commercial clause of the constitution. That the law violates article 4, § 2, I think is manifest from the preceding quotations and the authorities cited by counsel. *Ward v. Maryland*, 12 Wall. 418; *Tiernan v. Rinker*, 102 U. S. 123; *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454; *In re Watson*, 15 Fed. Rep. 511. I have come to the conclusion that the law is not a proper and lawful exercise of the police power of the state, and is unconstitutional. The petitioner is discharged.

The following is the opinion of Hon. WILLIAM JOHNSTON in the circuit court for Porter county, Ind., which is published in this connection on account of the similarity of the Indiana statute to the Minnesota statute discussed in the above cases:

JAMES E. HARVEY v. THOMAS HUFFMAN.

JOHNSTON, J. The petition in this case states that James E. Harvey was, on the 19th day of June, 1889, in the city of Hammond, offering to sell, and selling, fresh meat of an animal slaughtered in the state of Illinois, and which animal had not been inspected by the inspector of the city of Hammond, or in Lake county, Ind., before such slaughter; that on the said day he was arrested for such sale and so offering to sell, taken before a magistrate, tried, convicted, and fined; that he refused to pay or replevy such fine, and that a *mittimus* was issued to commit him to the jail of Lake county; that the defend-

ant in the case is the officer to whom said *mittimus* was issued, and who has the petitioner in custody, preparatory to his incarceration in the jail. He therefore prayed that a writ of *habeas corpus* might issue, which writ was granted, issued, served, and made returnable on June 24th. The defendant, in his return to the writ, admits the foregoing facts, and with such return sets up a copy of the proceedings had before the magistrate. To this return the petitioner files his exceptions, putting in question the constitutionality of the act of the legislature under which he was arrested and fined, and which is as follows: "Section 1. It shall be illegal to sell, or offer or expose for sale, in any incorporated city within the state, beef, mutton, lamb, or pork for human food, except as hereinafter provided, which has not been inspected alive within the county by an inspector or his deputy, duly appointed by the authorities of said county in which said beef, mutton, lamb, or pork is intended for consumption, and found by such inspector to be pure, healthy, and merchantable; and for every such offense the accused, after conviction, shall be fined not more than two hundred dollars, nor less than ten. Sec. 2. That the city council is hereby empowered and required to appoint in each incorporated city within the county, one or more inspectors and deputies, furnish the necessary blanks, and decree the fees for such inspection: provided, that where farmers slaughter cattle, sheep, or swine of their own raising or feeding for food, no other inspection shall be required, or penalty enforced, than such as are already provided by law to prevent the sale and consumption of diseased meats. Sec. 3. Nothing herein contained shall prevent or obstruct the sale of cured beef or pork known as dried, cured, or canned beef, or smoked or salted pork, or other cured or salted meats."

Section 1119, St. Ind. 1881, provides, among other things, that "no court shall have power to inquire into the legality of the judgment or process whereby any party is in custody upon any process issued on any final judgment of a court of competent jurisdiction." This might at first blush appear to deprive this court of authority to issue the writ; but, notwithstanding this provision, the validity of a judgment may always be assailed on the ground that the act of the legislature under which the indictment was found is unconstitutional. An unconstitutional law is void, and is no law. The offense created by it is not a crime, and conviction under it is illegal and void. Ex parte Siebold, 100 U. S. 371. If this statute is constitutional and valid, then the relief prayed for cannot be granted; otherwise the petitioner is entitled to the benefit of the writ, and should be discharged. Courts are loath to interfere, and should be very guarded and careful in rendering any opinion that destroys the effect of an act of the legislature; but when such act is clearly unconstitutional they should not hesitate so to pronounce it.

I shall first consider the case with reference to the first exception to the return. If the act in question does not interfere with interstate commerce, then, as to that exception, it is valid. If it does so interfere, it is an assumption of power on behalf of the state beyond its authority, and is unconstitutional and void. It was this exercise of power by the several states over matters which could only be safely intrusted to national authority which rendered the original articles of confederation only a rope of sand; and the confusion produced by the hostile interests of the several states led to the adoption of our present constitution. As Chief Justice MARSHALL has stated the rule on the subject: "The oppressed and degraded state of commerce previous to the adoption of the constitution can scarcely be forgotten. It was regulated by foreign nations, with a single view to their own interests; and our disunited efforts to counteract their restrictions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties, but the inability of the federal government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce, on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the federal government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by congress. It is not, therefore, a matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the states. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity." Brown v. Maryland, 12 Wheat. 446. The provision referred to in the constitution of the United States is section 8, art. 1, which provides that congress shall have the power "to regulate commerce with foreign nations and among the several states." Any law, then, of any state, which contravenes this provision of the constitution, is null and void. Does, then, this statute of Indiana attempt to regulate, or does it interfere with, interstate commerce? True, it is entitled an act for the protection of the public health by promoting the growth and sale of healthy cattle and sheep; yet, in whatever language a statute may be framed, its purpose and its constitutional validity must be determined by its natural and reasonable effect. This statute amounts to a prohibition against the introduction into our state for consumption of all dressed fresh meats. None other can be marketed in our cities except such as has been inspected alive within the bounds of

the county and state in which the city is situated, or such as farmers within the state may have raised or fed and slaughtered. It is well known that dressed fresh meat has become an important article of commerce, and is quite extensively shipped from one state to another, as well as into foreign countries. In fact, in very many of our cities our meat markets are largely supplied with fresh meats shipped from adjoining states. It is, then, judged by the authorities on the question, an article of interstate commerce. Whenever an article has begun to move as an article of trade from one state to another, commerce in that commodity between the states has begun. *The Daniel Ball*, 10 Wall. 557; *Kidd v. Pearson*, 128 U. S. 11-25, 9 Sup. Ct. Rep. 6. That the transportation of property from one state to another is a branch of interstate commerce is undeniable. *Railroad Co. v. Husen*, 95 U. S. 469. In Webster's Unabridged Dictionary "commerce" is defined as "the exchange of merchandise on a large scale between different places or communities." This embraces two distinct ideas: First, that of exchange in its largest sense, including barter,—the giving of one commodity for another; and sale,—the exchange of an article of property for money, the representative of all values. From this definition it will be seen that there can be no commerce unaccompanied by exchange or sale. The other idea embraced in the definition is that of transportation; for, to constitute commerce, the exchange must be between different places or communities; and any law that either prevents the transportation or sale of merchandise totally destroys commerce by the exercise of that power alone. Commerce, then, involves the idea of carrying the commodity intended for exchange to another place, where, as we may say, the market is to be held, and the sale accomplished. Hence, without both transportation and liberty of sale, there can be no interstate commerce.

No power of congress has been more jealously guarded against usurpation than this; and the attempt of different states in varied form to invade it in pursuit of some partial and temporary advantage, and the uniform and wise ruling of the supreme court of the United States against all attempts to evade and avoid this exclusive power of the national legislature, is one of the most interesting subjects of federal jurisprudence. In 1872 the legislature of Missouri passed an act providing that no Texas, Mexican, or Indian cattle should be driven or otherwise conveyed into or remain in any county of the state between the 1st day of March and the 1st day of December in each year, except as the same were conveyed through the state by railroad or steam-boat. This statute, in practical effect, is not far different from the one under consideration. Each, in effect, amounts to a prohibition of certain articles of commerce. The supreme court of the United States pronounced this statute an invasion of the exclusive power of the national legislature, an interference with interstate commerce, and therefore unconstitutional and void. *Railroad Co. v. Husen*, 95 U. S. 465. In this case the court says: "It is a plain regulation of interstate commerce,—a regulation extending to prohibition. Whatever may be the power of a state over commerce that is completely internal, it can no more prohibit or regulate that which is interstate than it can that which is with foreign nations. Power over one is given by the constitution of the United States to congress in the same words in which it is given over the other, and in both cases it is necessarily exclusive." Again, the court says: "Transportation is essential to commerce, or, rather, it is commerce itself; and every obstacle to it, or burden laid upon it, by legislative authority, is regulation." A like statute of the state of Illinois was for a like reason held void in *Salzenstein v. Mavis*, 91 Ill. 391, overruling the prior case of *Yeazel v. Alexander*, 58 Ill. 254. To the same effect with the foregoing are the following authorities: *Bowman v. Railroad Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 659, 1063; *Case of State Freight Tax*, 15 Wall. 232; *Ward v. Maryland*, 12 Wall. 418; *Welton v. State of Missouri*, 91 U. S. 275; *Henderson v. Mayor of New York*, 92 U. S. 259; *Chy Lung v. Freeman*, Id. 275; *Mining Co. v. Auditor General*, 32 Mich. 488.

Again, the power vested by the constitution in congress to legislate upon the subject of interstate commerce not only extends to the transportation, but to the power and right to vend, the articles of commerce when transported to their destination. On this subject Chief Justice MARSHALL says, in *Brown v. Maryland*, 12 Wheat. 446, 447: "If this power [to regulate commerce] reaches the interior of a state, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms with the intent that its efficacy should be complete, should cease at the point where its continuance is indispensable to its value. To what purpose should the power to allow importation be given unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell." The power vested in congress by the constitution governs property which is transported as an article of commerce from foreign countries, or among the states, from hostile or interfering state legislation, until it has mingled with and become a part of the general property of the country, and protects it even after it has entered a state

from any burden imposed by reason of its foreign origin. *Welton v. State of Missouri*, 91 U. S. 275. It may, however, be contended that the act in question is a proper exercise of the police power of the state, and as such ought to be upheld. As a police power of the state in its range comes very near the field committed by the constitution to congress, it is the duty of the courts to guard vigilantly against any intrusion. "What the police power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety." *Railroad Co. v. Husen*, 95 U. S. 470, 471. It extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property, within the state. *Thorpe v. Railroad Co.*, 27 Vt. 149. "It may also be admitted that the police powers of a state justify the adoption of precautionary measures against social evils. Under it a state may legislate to prevent the spread of crime or pauperism, or disturbance of the peace. It may exclude from its limits convicts, paupers, idiots, and lunatics, and persons likely to become a public charge, as well as persons afflicted by contagious or infectious diseases. * * * and would justify the exclusion of property dangerous to the property of citizens of the state; for example, animals having dangerous or infectious diseases. * * * But whatever may be the nature and reach of the police power of a state, it cannot be exercised over a subject confined exclusively to congress by the federal constitution. It cannot invade the domain of the national government. *Railroad Co. v. Husen*, 95 U. S. 471; *Salzenstein v. Mavis*, 91 Ill. 391. It is, then, no answer to the charge that such regulation of commerce by a state is forbidden by the constitution, to say that it falls within the police power of the state; for, to whatever class of legislative powers it may belong, it is prohibited to the states, if granted exclusively to congress by that instrument. In *Graffty v. City of Rushville*, 107 Ind. 511, 8 N. E. Rep. 609, our own supreme court says: "The conclusion plainly deducible from the decision is that neither states nor municipalities can enforce any law or ordinance the effect of which is to embarrass commercial communication between the different states, or to discriminate against the products of one state, or exact licenses from persons residing in foreign states which are not required of its own citizens under like circumstances." In the case of *Telegraph Co. v. Pendleton*, 95 Ind. 12, the court says: "We think, however, that the ultimate conclusion deducible from the later decisions is that the states cannot embarrass commercial communication, abridge the freedom of commerce, discriminate in favor of the products of one state, lay burdens upon the instruments of commerce, or exact licenses from persons * * * engaged in interstate commerce." In *Bowman v. Railroad Co.*, 125 U. S. 465-494, 8 Sup. Ct. Rep. 689, 1062, the supreme court of the United States says, in discussing the Iowa prohibitory statute: "If the state of Iowa may prohibit the importation of intoxicating liquors from all other states, it may also include tobacco, or any other article the use or abuse of which it may deem deleterious. It may not choose even to be governed by considerations growing out of the health, comfort, or peace of the community. Its policy may be directed to other ends. It may choose to establish a system directed to the promotion and benefit of its own agriculture, manufactures, or arts of any description, and prevent the introduction and sale within its limits of any or all of articles that it may select as coming into competition with those which it seeks to protect. The police power of the state would extend to such cases as well as to those in which it was sought to legislate in behalf of the health, peace, and morals of the people. In view of the commercial anarchy and confusion which would result from the diverse exertions of power by the several states of the Union, it cannot be supposed that the constitution or congress have intended to limit the freedom of commercial intercourse among the people of the several states." It would hardly be expected that such a court would hold that a state may not restrict traffic in alcohol, (which possesses no virtue for food or drink,) but may absolutely prohibit all commerce in fresh meats.

The act of the legislature under consideration makes no distinction between the good and bad, but all alike is indiscriminately condemned. The act provides that all uncured meat from every other state, the good, the pure, and the wholesome, with the tainted and the diseased, shall alike be excluded from the cities of the state; and this, it is said in the title of the act, "for the protection of the public health." The third section of the act provides "that nothing herein contained shall prevent or obstruct the sale of cured beef or pork known as dried, cured, or canned beef, or smoked or salted pork, or other cured or salted meats." Note the use of the word "prevent" in this section. Its employment here tends to the conclusion that the legislature understood the first section had prohibited the sale of uncured meats from other states. It was this which, in the opinion of the law-makers, rendered the proviso necessary, saving other meats from its operation. By this third section all kinds of meats, cured, salted, smoked, or dried, no matter how badly the animals from which they were taken were diseased, nor from whence they came, are welcome to admission, and the market is open and free. Thus pure, dressed, fresh beef is excluded, and tainted and diseased canned, salted, smoked, and dried meats are invited. It seems apparent that the purpose of the act was to exclude foreign dressed meats from the city markets of Indiana; and, if such be the case, a consideration of the police powers of the state is unnecessary. Nor can the legislation be sustained as a mere inspection law. The state of Indiana need not admit to her markets meat which is unfit for human food, and she

may take such steps as are necessary to ascertain whether or not it is so. When she has ascertained that it is non-commercial, she may exclude it; but no declaration, however solemn, and no pretext, however specious, will authorize her to exclude a product which is pure and harmless. It does not provide for the inspection of the commodity for the purpose of ascertaining its quality. It proceeds upon the theory that all uncured meat is noxious and injurious to health. It excludes it in advance and without examination to ascertain its condition. It pronounces a judgment without a hearing. All uncured meat is condemned, interdicted, excluded. It has never been regarded as within the legitimate scope of the inspection laws to forbid trade in respect to any known article of commerce, irrespective of its condition and quality, merely on account of its intrinsic nature and the injurious consequences of its use or abuse. The very meaning of inspection is that there should be an examination, and not an exclusion without a hearing. The object of inspection laws is to improve the quality of the articles produced by the labor of a country to fit them for exportation, or it may be for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the states, and prepare it for that purpose. *Turner v. Maryland*, 107 U. S. 83, 2 Sup. Ct. Rep. 44; *Gibbons v. Ogden*, 9 Wheat. 203. They are deemed necessary to fit the inspected article for the market by giving to the purchaser public assurance that the article is in that condition and of that quality which makes it merchantable, and fit for use or consumption. They are not founded on the idea that the things in respect to which inspection is required are dangerous and noxious in themselves. *Bowman v. Railroad Co.*, 125 U. S. 465, 8 Sup. Ct. Rep. 689, 1062. If the state of Indiana has the power to enforce such a statute, then with equal propriety it may exclude every other product of interstate commerce. It may exclude flour for the reason that the grain from which it was ground was not inspected within the county and state where it is to be consumed; sugar, because it is produced and refined in another state; fruits, because our own soil will or will not produce them; in fact, everything shipped us for home comfort and consumption. And so likewise may other states prohibit the shipping of those articles into our state. The great state of Pennsylvania may prohibit the introduction of its coal into our state; Illinois may prohibit the shipping of its merchandise to us; Michigan, her fruits and lumber; and so on. This policy might thus be extended until in effect we would become as isolated and walled in as a Chinese city.

Another provision of the constitution of the United States with which this act appears to come in conflict is section 2, art. 4: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." Inasmuch as a resident of the county—for example, of Lake county—is entitled to have his animal inspected at home on his own premises, and the citizen or resident of Porter county, Ind., or of Cook county, Ill.,—each adjoining Lake,—is obliged to produce his animals for inspection at some point in the latter county, remote from his home and his farm, it is an unauthorized and unjust discrimination, and obnoxious to the constitutional provision above named.

Ward v. Maryland, 12 Wall. 418, is a case where the question of the constitutionality of a statute of Maryland was called in question. This statute provided that all resident traders should take out a license to do business ranging from fifteen to one hundred and fifty dollars, and that a non-resident trader should take out a license, for which he should pay three hundred dollars. The court pronounced the statute void on account of its imposing a discriminating tax, and being in conflict with the foregoing provision of the constitution. To the same effect is *Tiernan v. Rinker*, 102 U. S. 123. In *Walling v. Michigan*, 116 U. S. 446, 6 Sup. Ct. Rep. 454, the court says a tax imposed by a statute of a state upon an occupation which necessarily discriminates against the introduction and sale of the products of another state, or against the citizens of another state, is repugnant to the constitution of the United States. Other reasons might be given and authorities cited, but it is unnecessary to further prolong this opinion. I have no doubt but the sole purpose of the act was to exclude foreign dressed meat from the city markets of Indiana. The act, therefore, invades the exclusive right of congress conferred on it by the constitution, and is void. The exceptions to the return to the writ are sustained, and the petitioner is discharged.

FELLOWS *et al.* v. WALKER, Auditor, *et al.*

(Circuit Court, N. D. Ohio, W. D. June 7, 1889.)

1. CONSTITUTIONAL LAW—LOCAL AND SPECIAL LAWS.

Act Ohio Jan. 22, 1889, which is equally applicable to all cities of a certain class, is not unconstitutional as a special act because there may be but one city of that class.

2. SAME—TAXATION—PUBLIC PURPOSES.

The fact that the act authorizes the issuing of bonds for the purpose of supplying municipal corporations and their citizens with natural gas does not render it unconstitutional as exercising the power of taxation for a private purpose.

3. INJUNCTION—AGAINST MUNICIPAL CORPORATION.

Injunction will not lie against the issuing of such bonds on the ground that taxation will have to be resorted to for their payment, when the act provides that the revenue derived from the sale of gas is to be applied to the payment of the principal and interest of said bonds.

On Application for Injunction.

E. D. Potter, Jr., Doyle, Scott & Lewis, and Stevenson Burke, for complainants.

W. H. A. Read, City Sol., G. W. Kinney, and Brown & Geddes, for defendants.

JACKSON, J. This is an action brought by Fellows and others, non-resident tax-payers of the city of Toledo, against the city of Toledo and its officers, to enjoin the defendants from executing and selling \$75,000 of bonds issued by the city for the purpose of securing natural gas and piping the same to the city of Toledo, upon the ground that the act of the legislature authorizing such issue is unconstitutional. Application is made for a preliminary injunction.

Defendants urge that the bill fails to show necessary jurisdictional facts, in that it does not appear that any one of the complainants is interested to the extent of \$2,000, and that different tax-payers cannot unite their several interests for the purpose of making up the jurisdictional amount. While the court is of the opinion that the real subject-matter of controversy is the validity of the obligation incurred by the entire issue of \$75,000 of bonds rather than the separate interest of each complainant therein, still the question is one of such doubt that the court does not now decide it, and prefers to express no opinion thereon at this time. The application must therefore be decided upon the bill, answer, and affidavits. It should be said at the outset that the court has nothing whatever to do with the questions of the policy of such legislation or the manner of carrying out the same, or the benefits to be derived by the corporation therefrom. These are questions for legislative discretion and determination. The question for this court to determine is simply whether the act in controversy was a proper exercise of constitutional legislative power. The constitutionality of the act is denied because it is said to be a special act conferring

corporate powers; that it is special because the city of Toledo is the only city of the third grade of the first class in the state of Ohio, and the only city to which this act is or can be applicable. But this objection cannot be sustained. It is well settled by authority in Ohio that the classification of municipal corporations is valid, and that legislation which is applicable to a class is general, although there may be at that time but one city in that class. The act in question is equally applicable to all cities of the third grade of the first class, whether now belonging thereto or hereafter coming into that category. The answer denies the averment of the bill that Toledo is the only city of the state to which the act is or can be applicable, and it does not appear that it is the only city that is or can be a city of the third grade of the first class.

It is next insisted that the act is made to take effect upon the approval of some authority other than the general assembly. But the language of the act is otherwise. As a matter of fact, it is made to take effect and be in force from and after its passage. Moreover, it is an enabling act designed for those cities, which accept it in the manner and upon the conditions specified, and takes effect from the date of its passage. It stands upon the same basis precisely as general acts authorizing the creation of corporations.

The next and the main ground upon which the bill rests and the injunction is sought is that the supplying of municipal corporations and their citizens with natural gas is not a public purpose or use for which the taxing power which is necessarily involved can be properly exercised. It is urged that while the act authorizes the city to procure natural gas for its own use and for use in public buildings, etc., (which complainants concede would be a public use,) the main object and primary purpose of the act is to enable the city to supply its individual inhabitants with fuel for private use and consumption at a cheaper rate than they can obtain it from other sources; that such being, as complainants insist, the direct object and purpose of the act, the taxing power of the city cannot be constitutionally exercised for the attainment of such an object. In the first place, this is not, in the opinion of the court, a proper view to take of the legislation. The court would not be justified from a reading of the act in saying which was the primary object and purpose of the act, even assuming (what the court does not admit) that the supplying of private individuals with gas is a purely private advantage. It could just as well be urged that the primary object of the bill is to furnish gas for the city and the city buildings, etc., and that the supplying of the citizens was merely incidental thereto, as to urge that the primary object of the bill is to supply individuals, and that the furnishing of the city and city buildings, etc., is incidental. The act, upon its face, is not open to such splitting or subdivision. As a whole, it stands on the same footing as legislation for furnishing water and illuminating gas. It calls for the exercise of only the same powers as are constantly exercised by municipal corporations in supplying the city and its citizens with manufactured gas for illuminating purposes, and in furnishing water for public and private use. But even conceding that the primary

object of the act is to enable the city to supply its individual citizens with natural gas for fuel or illuminating purposes, the court is unable to say that the grant of such a power is in excess of the legislative authority. Unquestionably the legislature may authorize a city to furnish light, or facilities for transportation or water, to its citizens, with or without cost, as the legislature or city may determine. So long as the act is for the benefit of the public or the entire municipality, or all the citizens of the municipality, it does not lose its character as an act for a public purpose so as to become private in the sense that prevents the exercise of the power of taxation. The case of *Association v. Topeka*, 20 Wall. 655, is an illustration of an attempt to exercise the taxing power for a purely private purpose. The benefit was to one private individual, the bonds were issued to him by name, the aid was to him and his private business alone. But here the benefits and the aid are to the city in its public, corporate capacity, and to every inhabitant thereof equally and alike. The court is wholly unable to distinguish this act from those conferring power upon municipalities to acquire and operate gas-works and water-works, and in connection therewith to furnish gas and water to the individual inhabitants. And it is of no consequence whether this source of supply, either of gas or water, is wholly within or wholly without the corporate limits of the city. The question of public interest determines the question of right to supply gas and water, and not the mere location of the works or source of supply. In *Walker v. Cincinnati*, 21 Oh. St. 14, and in *Coke Co. v. Hamilton*, 37 Fed. Rep. 832, decided by the circuit court of the United States for the southern district of Ohio, it has been settled that the legislature of Ohio has authority under the constitution of that state to invest municipalities with such powers as are conferred by this act. Since the decision in *Sharpless v. Philadelphia*, 21 Pa. St. 147, it is no longer an open question whether municipalities may engage in enterprises such as the one contemplated by the act in question in this case. The court does not undertake to define the line which distinguishes public from private uses. Nor is it necessary or even possible to do so. It is enough to say that, in the opinion of the court, the act of January 22, 1889, authorizing the city of Toledo to issue bonds for natural gas purposes, is clearly within the general scope of legislative power, is for a public use and purpose, and is not in contravention of any of the provisions of the constitution. The court being of the opinion that the legislation is valid, it follows, of course, that the injunction applied for must be refused.

But even if these questions were open to doubt in the mind of the court, it does not follow that complainants would be entitled to an injunction, because it does not necessarily follow that taxation will have to be resorted to for the payment of these bonds. The act provides that the revenues derived from the sale of gas are to be applied to the payment of principal and interest of the bonds, and these revenues may be sufficient to meet the bonds without resort to taxation.

Injunctions are not granted in cases like the present, except where complainants' rights are clear, and where an injury more or less irrepa-

rable is likely to result to complainants unless the defendants are enjoined. In this case complainants' rights are not clear, and the injury likely to result to them is not shown to be irreparable or even serious. On the other hand, the allowance of an injunction would be attended with serious and possibly irreparable loss and damage to the city of Toledo.

Many other reasons might be given, but it is sufficient to say that the legislation in question is not open to the objections presented by the bill, and therefore complainants are not entitled to the injunction. It is accordingly denied.

HARRISON *v.* ULRICH *et al.*

(Circuit Court, S. D. California. August 12, 1889.)

1. EJECTMENT—EVIDENCE.

In an action of ejectment for land in California, where both parties assert title to the premises under patents of the United States, issued upon concessions of former governments, confirmed by the tribunals of the United States, the controversy can only be determined by reference to those concessions, or by the proceedings had for their recognition and confirmation under our government.

2. PUBLIC LANDS—TERRITORY OF UPPER CALIFORNIA—ISSUE OF PATENTS.

A grant made by the superior political chief of the territory of Upper California, in conformity with the colonization law of Mexico of 1824, and the executive regulations of 1828, followed by the ceremony of juridical possession, by which, after citation to the neighboring proprietors to be present at the proceeding, the land was measured, its boundaries marked, and the grantee put in possession, vested the title in fee in the grantee, subject only to the possibility of its being divested by the refusal of the departmental assembly to give its approval to the grant. A patent of the United States, issued upon a title of that character, confirmed by the tribunals of the United States, and located by the executive officers of the United States, is unaffected by a subsequent patent, based on a confirmation of a title depending upon the validity of an order made by a governor of California, commissioned by the Spanish crown, which order did not in itself convey any interest in the land, and was not followed by any proceeding which purported to have that effect.

3. ADVERSE POSSESSION — RUNNING OF STATUTE AGAINST THE SPANISH CROWN.

Under the law of Spain and Mexico, mere possession, however long continued, of any portion of the public domain, under an instrument which did not purport to transfer the property, did not create a title which would enable the possessor to hold the land against the Spanish crown or against the Mexican government.

4. PUBLIC LANDS—MEXICAN GRANTS.

Under the regulations of Mexico of 1828 it was the duty of the governor, and not of the grantee, to submit to the departmental assembly grants issued by him, for their approbation. His neglect in this respect suspended the definitive validity of the grant; that is, prolonged the liability of the estate to be defeated by the action of the assembly and of the supreme government thereon, but did not operate to divest the estate already vested in the grantee.

5. SAME—ISSUE OF PATENTS.

By a patent issued by the United States upon a grant made in conformity with the colonization law of 1824, followed by the ceremony of juridical possession, confirmed and located by the United States, whatever title is in the United States passes to the patentee. After a patent so issued, no title remains in the United States which they could convey by any subsequent patent. However conclusive against the United States, and parties claiming un-

der them by title subsequent, a patent may be, it in no respect impairs the right of a previous patentee to contest the title upon which the subsequent patent has issued for the premises.

6. SAME—POWER OF SPANISH POLITICAL CHIEF.

Whether the political chief of the territory of Upper California, under the the Spanish crown, possessed any power to alienate the fee of any portion of the public doman, doubted.

(*Syllabus approved by the Court.*)

At Law. Action of ejectment.

William Matthews and Wells, Van Dyke & Lee, for plaintiff.

Rhodes & Barstow, Chapman & Hendricks, and J. W. Towner, for defendants.

Before FIELD, Justice, and SAWYER, Circuit Judge.

FIELD, Justice. This is an action for the possession of land in the county of Los Angeles, Cal., amounting to 13,723 acres and a fraction of an acre. It is submitted to the court without the intervention of a jury, by stipulation of the parties. The complaint alleges ownership in fee of the demanded premises by the plaintiff on the 1st day of July, 1886, and the wrongful and continued exclusion of him from them ever since by the defendants, to his damage of \$10,000. The answers controvert all the allegations of the complaint, and also plead the statute of limitations in bar of the action. No testimony was offered in support of this plea, and it must therefore be considered as abandoned.

The plaintiff derails whatever title he possesses to the land by two patents of the United States, each for an undivided half of a tract known as the "Rancho Las Bolsas,"—one issued June 19, 1874, to Ramon Yorba and others; the other issued August 27, 1877, to Juan Jose Murillo and his wife. Both of these patents embrace the demanded premises. The defendants who have not disclaimed, or against whom the action has not been dismissed, were in possession of the premises at the commencement of the action, and claim title to them through a patent of the United States issued December 21, 1883, to Bernardino Yorba and others, for a tract known as the "Rancho Santiago de Santa Ana." This patent also embraces the demanded premises.

As the patents of both parties cover the land, the controversy can only be determined by reference to the concessions of the former government, or by the proceedings for their recognition and confirmation taken under our government. The patents are based upon the supposed validity of the asserted title or equity of the patentees when the jurisdiction of Mexico passed to the United States. Whoever previously possessed the better right to the possession of the lands would have been maintained by the government of that country in his claim against contestants, and those who have succeeded to that better right are entitled, under our government, to the like protection. The patents were not issued until those concessions had been recognized by the tribunals of the United States as genuine, and as conferring a right or equity upon the respective claimants, which was entitled to protection under the act of March 3, 1851. It was not the purpose of that act, or of the proceedings under it, to su-

persede rights or equities relating to lands conferred by the former government, but to confirm and perfect them by giving the holder such record or documentary evidence of their validity as would enable him to enforce them in the courts of the country. We must, therefore, look into the character of those concessions, and, if they furnish no solution of the matter in contention, we must consider the effect of proceedings had before the the tribunals of the United States upon their respective pretensions. *Henshaw v. Bissell*, 18 Wall. 255, 266. Nearly all the original documents issued by the former governments, or certified copies thereof, have been produced in evidence, as well as attempted translations of them. These translations, it is true, are in bad English, and are often inaccurate. We cannot, however, be misled by them, for we have the originals or copies to which we can refer to verify or correct them. Turning to those concessions, and looking first to those produced on behalf of the plaintiff in support of his contention, we find the facts to be substantially as follows:

In 1784 one Manuel Nieto, a subject of Spain, obtained from Pedro Fages, then military governor or comandante of California, under the Spanish crown, a concession of some kind relating to a large tract of land within the present county of Los Angeles, embracing about 33 square leagues. This concession is not in evidence, and we are only made acquainted with its character by references to it in other documents of admitted genuineness before us. It gave to Nieto permission to occupy the land, but from what subsequently took place it is evident that it did not purport to pass the title to him, although in proceedings before the land commission it is often spoken of as a grant, vesting the fee or ownership in him. Under the concession Nieto entered upon the land, and continued in its occupation until his death, in 1804. It would also seem from these documents that Nieto left surviving him four children,—Jose Antonio, Juan Jose, Manuela, and Antonio Maria,—who continued in possession of the land after his death; and that in 1832 two of these, Jose Antonio and Antonio Maria, died, leaving widows surviving them. In the following year, (1833,) on the 26th day of July, one Luciano Grijalva, representing the interests of Juan Jose Nieto, presented a petition to Jose Figueroa, then superior political chief of the territory of Upper California, in which he recited the concession of Governor Pedro Fages to Manuel Nieto, the latter's possession of the land, his death, and the subsequent uninterrupted occupation by his heirs, and prayed, in order that they might enjoy the favor conceded to their father, that separate titles be given to each of them for the several parts corresponding with those designated on an accompanying map, as follows: The tract of Santa Gertrudes to Dona Josefa Cota and her children, as widow of the deceased Antonia Maria Nieto; the tract of Las Bolsas to Dona Catarina Ruiz and her children, as the widow of the deceased Jose Antonio Nieto; the tract of Los Cerritos to Dona Manuela Nieto; and the remainder, which comprehended the tracts Los Coyotes, Alamitos, and Palo Alto, to Don Juan Jose Nieto, who, as head of the family, had determined upon this division for the benefit of its members. To avoid all ground of dis-

pute he asked that possession be given to each one of his or her portion thus designated. On the subsequent day, July 27, 1833, the political chief made a decree reciting the former concession by Governor Pedro Fages to Manuel Nieto, and the peaceable and uninterrupted possession by which he and his heirs had enjoyed the fruits of the lands, and declared them (the parties for whose benefit the petition was presented) owners in fee of the premises, designating the portion granted to each, namely: To Juan Jose Nieto the tracts called "Los Coyotes," "Alamitos," and "Palo Verde;" to Dona Manuela Nieto the tract called "Los Cerritos;" to Dona Josefa Cota, widow of Don Antonio Maria Nieto, the tract called "Santa Gertrudes;" to Dona Catarina Ruiz, the widow of Don Jose Antonio Nieto, the tract called "Las Bolsas." The governor also directed that titles for these several tracts should be issued to the parties, in order that juridical possession might be given to them. On the 22d of May, 1834, pursuant to this decree, formal grants were issued by him to the parties, to each one for his or her separate portion, and among them one to Dona Catarina Ruiz for the tract "known by the name of 'Las Bolsas,' bounded by the tracts of Los Alamitos and Los Coyotes, the river Santa Ana, and the coast;" he declaring, by virtue of the authority conferred upon him by the decree of the previous year, and in the name of the Mexican nation, "the ownership in fee" of the tract to be vested in her, and that she might be put in peaceable possession thereof. The fourth condition attached to the grant stated the land to be seven square leagues in extent, as shown on an accompanying map, and directed the judicial officer who should give the grantee possession to cause it to be measured, so as to point out its boundaries, the surplus to remain to the nation. In March, 1835, juridical possession of the land was given to her, after citation to the neighboring proprietors to be present at the proceeding; that is to say, the possession of the land was officially delivered to her, under the direction of a magistrate of the vicinage. A copy of the record of this proceeding is before us, and it shows that all the formalities required by the laws of Mexico were fully complied with. The proceeding involved a measurement of the land, the marking of its boundaries, and the putting of the grantee in possession. To the record a map of the land was attached.

As stated above, the plaintiff deraigned his title through two patents of the United States, each being for an undivided half of the tract known as "Las Bolsas." The first patent, bearing date on the 19th of June, 1874, was issued upon a final decree confirming the claim of Ramon Yorba and others, founded upon the grant of the Mexican government to Catarina Ruiz, issued, as mentioned above, on the 22d day of May, 1834. Their petition was presented to the land commission on the 20th of October, 1852. It traced the title of the claimants to Manuel Nieto, who, as averred, died in 1804 or 1805, "seised in fee as owner" of the tract of land situated in the county of Los Angeles, "bounded by the river San Gabriel, by the old road to Santa Ana, by the river Santa Ana, and by the coast;" that Nieto acquired his title to the land by grant from Governor Pedro Fages some time between the years 1784 and 1785,

which it was believed was subsequently ratified by the viceroy of New Spain; that four children survived him, who succeeded to his title and possession, and that after the death of two of them the land was divided by Governor Figueroa between the surviving sons and the widows of the deceased sons, and to them separate titles were issued for their respective portions; that to Catarina Ruiz the grant was issued for the tract called "Las Bolsas," and under her the claimants derived their title. It seems from the language of the petition that the claimants treated the concession to Nieto as a grant of title,—an instrument transferring the ownership of the lands to him; but, as already stated, the concession to him did not reach the title, and was only a permission to graze his cattle upon the tract mentioned. It may be doubted whether the political chief of the territory under the Spanish crown possessed any power to alienate the fee of any portion of the public domain. On this subject the land commission, which had occasion to examine the question when the title claimed under the concession to Manuel Nieto was before it, uses this language:

"The concessions under the Spanish authority, made in the Californias before the independence of Mexico, do not purport to be perfect titles; at least none of that character have fallen under the notice of the commission. One only has received confirmation, and that on the ground that an equitable, though not legal, title was established. The old grants were generally mere rights of possession or provisional, and, in almost every case, when the government was established after the Mexican revolution, the parties applied for new grants, which they received, not as a mere evidence of a former subsisting title, but in the form, and under the terms, and subject to the conditions, imposed by the law of 1824 and the regulations of 1828. Under these, the power of the governors over the public domain was defined. It was a power to grant under certain conditions, not a power to recognize and give new evidence of private titles already existing, without conditions or limitations. He had entire discretion as to choice of grantees, and this power enabled him to do most ample justice to persons who held under provisional grants previously issued, or who occupied without a shadow of title or right to the possession. All these presented themselves to the new authorities for concessions under the new order of things, and readily received grants for the ancient possession. The archives of this commission are full of such documents, and the custom was all but universal." Record in *U. S. v. Conception Nieto*, from land commission, in clerk's office of U. S. district court, No. 423.

Certain it is that Governor Figueroa, when he made the decree ordering grants to the heirs of Nieto on the 27th of July, 1833, and when he signed the formal grants to them on the 22d of May, 1834, did not consider that the concession to Manuel Nieto passed the ownership of the land. Had it done so, he would have had no power to make grants of the land to others, and to subject his grants to possible forfeitures for breach of conditions annexed. His action shows conclusively that he regarded the land as still part of the public domain of Mexico, to be disposed of under its colonization laws. The documentary evidence introduced before the land commission by the claimants, and upon which the decree of confirmation was made, consisted of the grant to Catarina Ruiz on the 22d of May, 1834, the record of the juridical possession given

to her, and instruments transferring her title to them. The claim was confirmed September 22, 1854, to the extent of the undivided three-fourths of the rancho. On appeal to the district court of the United States the decree was modified, and the confirmation limited to an undivided half of the rancho. Subsequently, on the 4th of March, 1858, the government waived its appeal from the decree of the district court, which thereupon became final. The boundaries given in the decree and recited in the patent are as follows:

"The lands of which confirmation is hereby made are one undivided half of the tract called 'Las Bolsas,' situated in the county of Los Angeles, said tract of Las Bolsas being a part of the lands originally granted to Manuel Nieto by Governor Pedro Pages, in or about the year 1784, and which said grant was recognized and confirmed by the decree of date July 27, 1833, made by Governor Jose Figueroa in the petition of Luciano Grijalva, presented on behalf of the heirs of the said Manuel Nieto; and by the grant of date May 22, 1834, issued by said Governor Figueroa to Catarina Ruiz, widow of Jose Antonio Nieto, a son of said Manuel Nieto; reference for the boundaries for the tract of Las Bolsas being had to the said petition of Luciano Grijalva, and to the map accompanying the same, contained in the *expediente* filed in this case, to-wit: On the south, the sea; on the west, the lands called 'Los Alamitos;' on the north, the lands called 'Los Coyotes' and the tract solicited by Don Patricio Ontiveras; and on the east, the Rio de Santa Ana, as the same ran at the date of said petition."

The claim to the other undivided half of the Rancho Las Bolsas was presented to the land commission by Maria Cleofa Nieto Murillo and her husband on the 6th day of November, 1852. It was rejected by the board, because the claimants failed to connect themselves with the grant to Catarina Ruiz, but upon appeal to the district court this decree was reversed, and the undivided half of the land was confirmed to the claimants. The decree recites:

"Reference for boundaries of said tract of the 'Las Bolsas' being had to the said petition of Luciano Grijalva and to the map accompanying the same, contained in the *expediente* filed in this case, to-wit: On the south by the sea, on the west by the land called 'Los Coyotes' and the tract solicited by Don Patricio Ontiveras, and on the east by the river Santa Ana, as the same ran at the date of the petition."

A survey of the land, confirmed by the decree in favor of Ramon Yorba, was made in 1858, under the direction of the United States surveyor general, and on the 16th of April, 1861, was ordered into the United States district court for review, under the act of June 14, 1860. Exceptions were filed to the survey, which affected the boundary on the west side, but did not affect the line along the east, along the river and its old bed, which is the line in dispute in this case. The exceptions to the western line were sustained, but no change was made on the eastern line; and, in accordance with the direction of the district court, a modified survey of the land was made and returned into the court, which was finally approved February 6, 1874. Upon this approved survey the patent to Yorba of the undivided half of the rancho was issued. The rancho, under the confirmation to the Murillos, was again surveyed under the direction of the surveyor general of the United States for Cali-

fornia, in December, 1868, and was approved by him April 3, 1877, and by the commissioner of the general land-office, August 27, 1877, and upon it the patent to them was issued.

It is plain from this brief statement that on the 22d of May, 1834, the title passed from the Mexican government to Catarina Ruiz by the grant of Governor Figueroa, and by the juridical proceedings which followed in 1835 she was placed in possession of the premises granted. Her estate in the lands thus became perfect, subject only to the possibility of its becoming divested by the subsequent refusal of the departmental assembly to give its approval to the grant. The regulations of Mexico of 1828 for the colonization of the territories of the republic provided that grants of land by the governors thereof to families or private persons should not be held to be "definitively valid" without the previous approval of the departmental assembly, to which the documents relating to such grants were to be forwarded. But this provision did not prevent the title from passing by the grant of the governor. As said by the supreme court of the United States in *Hornsby v. U. S.*, 10 Wall. 238.

"Such approval was not a condition precedent to the vesting of the title. According to the regulations of 1828 the authority to make grants of land in California was lodged solely with the governor. It was not shared by him with the assembly. That body only possessed the power to approve or disapprove of grants made by him. Until such approval the estate granted was subject to be defeated. With such approval the grant became, as it was termed in the regulations, 'definitively valid;' that is, it ceased to be defeasible, and the estate was no longer liable to be divested, except by proceedings for breach of its other conditions. Besides, it was the duty of the governor, and not of the grantee, to submit to the assembly grants issued by him for their approbation. His neglect in this respect suspended the definitive validity, as it was termed, of the grant; that is, it prolonged the liability of the estate to be defeated by the action of the assembly and of the supreme government thereon, to which the matter was referred in case the approval of the assembly was not obtained; and no other consequence followed. His neglect was not permitted to operate to divest the grantees of the estate already vested in them. In many instances years elapsed before the approval was obtained, although the grantees were in the mean time in the possession and enjoyment of the property, and in many instances no approval was had previous to the conquest."

No action was taken to divest the estate of the grantee under the former government, because her grant was not then approved, and the power of the departmental assembly of course ceased with the cession of the country. When, therefore, jurisdiction passed from Mexico to the United States, Catarina Ruiz was invested with full ownership of the land. She had an absolute title in fee to the entire tract described and measured off in the proceedings giving her official possession of the property. Her interest in one undivided half of the premises having afterwards passed to Yorba and others, and in the other undivided half to the Murillos, and their claims having been presented to and confirmed by the board of land commissioners appointed by the United States to ascertain and settle private land claims in California, and their decrees of confirmation having become final by the dismissals of the appeals

therefrom by the attorney general, and the surveys of the lands confirmed having been approved, all controversy between those claimants and the United States respecting their title to those lands, and the extent and boundaries thereof, was closed. The decrees were conclusive as to the character of the title, not only against the United States, but also against all persons claiming under them by proceedings subsequent; and the patents of the United States issued thereon were a relinquishment of all claims or right in the lands or power over them, if any then existed. Only prior and superior rights of others remained unaffected. Unless, therefore, the defendants can show that by virtue of the concession made to the parties through whom they claim under the former government, or by virtue of the proceedings before the land commission, and of the patents of the United States issued upon its decree, they acquired a right and title to the demanded premises prior and superior to that conferred by the grant of Figueroa to Ruiz on the 22d day of May, 1834, the plaintiff must be adjudged entitled to recover. What, then, was the right or title, if any, acquired by those defendants under the former government? To answer this question we turn to the documents produced by them. The first of these is a petition of one Manuel Rodriguez, dated September 11, 1801, to Arrillaga, then governor of the territory, stating that in view of the repeated petitions through him to that officer in behalf of Lieut. Don Pablo Grijalva for a place upon which to put his stock and build a house and *corral*, and in view of the power by the governor conferred upon him of passing upon the petitions, he had pointed out to Grijalva the place Arroyo de Santiago, lying midway between the Missions San Juan Capistrano and San Gabriel, about nine leagues from each, stating that there was not within a great distance any rancheria of natives, and that neither of the missions claimed any right to it. The petitioner added that, should the governor make the concession desired, Grijalva might put upon the place a great number of cattle which he had in the immediate neighborhood of Manuel Nieto, and concluded with the expression of a hope that the governor would order a title to issue to Grijalva for the possession of the place within certain distances specified. To this petition the governor, on the 19th of October, 1801, replied, stating that Grijalva should apply to him (Rodriguez) for the place, setting forth its actual condition and the extent of land he desired, and that thereupon notice should be given to the adjoining proprietors to ascertain whether any damage would result to them by the concession asked; and that, this being done, and no objection to the concession being made, he could issue a decree setting forth the fact that there was no objection, and order him to be placed in possession, he forwarding everything to the government for its approval and the issue of a title, adding that this was the way this kind of business was done for those to whom royal lands were given, though he did not know whether the government had made any new provision on this subject. Grijalva, accordingly, on the 8th day of December, 1801, made application to Rodriguez for the place Arroyo de Santiago, in order to put his cattle and horses thereon, stating that the place was situated eight leagues from the Mission San Juan Capistrano,

and from nine to ten from the Mission of San Gabriel. He also stated the extent of the land he desired. On the 14th of December following, Rodriguez directed that notice of the application of Grijalva be given to the fathers of the Missions San Juan Capistrano and San Gabriel, and to Manuel Nieto, in order to ascertain whether they would be prejudiced by granting his petition. The priest of the Mission of San Juan Capistrano returned that, so long as the applicant did not go beyond the boundaries of the land he asked, the concession would not prejudice the mission. It does not appear that any response was obtained from the priests of the Mission of San Gabriel, or that any grant was made upon the petition, or that any further action was had upon it.

It appears, however, that in 1809 one Antonio Yorba claimed that he had been a partner with Grijalva, and was interested with him in his application for the place upon which to put stock and build a house. In November of that year he accordingly presented, through his son, a petition to the governor of the territory referring to the petition of Grijalva, and stating that he had heard that Grijalva, who had since died, had not inserted his name in the application, notwithstanding their partnership; that since Grijalva's death he had agreed with one Juan Peralta to live upon the place, and, with one of the sons of the petitioner, take care of the cattle and horses that were upon it, being about 300 head of each kind. In consideration of these facts, and the large family he had, he requested the governor to make a concession of the place of Santiago to him, that the neighbors of Peralta and himself might be profitable to both. This petition the governor forwarded to Lieut. Don Francisco Maria Ruiz, at San Diego, who, on the 20th day of April, 1810, reported that the petition of Grijalva could not be found in the archives of the presidio there, and that he had inquired for it without success of the widow of Grijalva; that she stated that she had heard her deceased husband say he had presented it in his own name; but, notwithstanding, it was her wish that Antonio Yorba, with his children and her nephew, one Pablo Peralta, should remain on the rancho, in order that they might take care of the stock and crops for the support of their families. On this report the governor made an order on the 1st day of July, 1810, in which he stated that there was no objection on his part to the concession solicited, upon the terms expressed by the petitioner, and for that purpose he directed that the commandant of the presidio of San Diego should take the necessary steps to notify the adjoining land-owners to ascertain whether or not the concession would be detrimental to them, and, in case no detriment would result to them, that the petitioner should be placed in possession. No further proceedings appear to have been had upon this application. It is not shown that any notification to the adjoining proprietors was made; or that any information was obtained of their opinion whether such a concession would be detrimental to them or not. So far as the evidence before us discloses, the efforts of the petitioner ended with this report, and no further action upon it was taken by the governor of the territory. It is too plain for argument that no title passed from the governor by virtue of the documents produced. It is true the

petitioner was subsequently in possession of the premises, but he does not produce, nor is there found anywhere in the archives, any documents showing that any authority was given for him to occupy them. But, even if the possession was taken by permission of the governor or other authorities, no inference of a grant of title can be drawn from it. Some formal proceedings were necessary under the Spanish government to pass title to any portion of the public domain out of the crown to the subject. The population at that time in the country was very sparse, and there were vast quantities of vacant land. Where one occupied such land for his cattle, very little complaint was likely to be made touching his authority; but, be that as it may, nothing is shown by the documents conferring even an equitable right upon the petitioner Yorba, or upon Peralta. It is plain, therefore, that neither of those parties, or any parties claiming through them, had any interest in the property in controversy under the former government which would have given them a standing in a court of justice to call in question the right of Catarina Ruiz by her grant of May 22, 1834. Their interest was, at best, only such an equity as arises in favor of parties who had long been in the occupation of public land, with the silent acquiescence of the government, from the possible improvement they may have made upon it. To such parties the government might well have extended a preference in the purchase or donation of the lands when it concluded to dispose of them. But mere possession of any portion of the public domain, under an instrument which did not purport to transfer the property, did not create, under the Spanish law, a title in the possessor which would enable him to hold the property against the crown; nor did such possession, however long continued, create any title against the Mexican government. *Nieto v. Carpenter*, 21 Cal. 455, 489. It follows that whatever title the heirs of Yorba and Peralta possessed in the lands in controversy, which passed to the defendants, was acquired by their proceedings before the board of land commissioners, and the patent of the United States issued upon its decree. The petition of the heirs to the board set forth that they claimed in fee-simple the tract of land known by the name of "Santiago," containing about 10 square leagues, by virtue of a concession to their ancestors by Arrillaga, governor of California, bearing date of July 1, 1810. The concession thus alleged was no other than the order of that date upon which we have already commented, and which did not, in itself, convey any interest in the lands solicited, and was not followed by any proceeding which purported to have that effect, even if it were clear that governors of the province under the Spanish crown possessed any authority to alienate portions of the public domain. The board of commissioners treated the document, however, as a grant of the land, or at least as creating, in connection with the possession of their ancestors, an equitable right to it, and accordingly, by its decree of July 10, 1855, confirmed their claim. An appeal to the district court of the United States was, on the 8th day of June, 1857, dismissed, the government suggesting that it did not intend to further prosecute it, and the decree of the board thus became final. The decree did not, however, change the character

of the title of the claimants; it simply determined that it was valid, and entitled to recognition and perfection by a survey and patent. When the latter was afterwards issued, on the 21st day of December, 1883, whatever title to the land was in the United States passed to the patentees; but, if no title was then in them, none, of course, passed. That none was in them at that date is clear from what has already been said with respect to the title of the Las Bolsas, claimed under the grant of Catarina Ruiz. The claim of Ramon Yorba and others to an undivided half of that rancho having been finally confirmed, the survey of that land having been made and approved, and a patent for such undivided half having been issued to the claimants on the 19th day of June, 1874, and the claim of the Murillos to the other undivided half also having been finally confirmed, and the same having also been approved, and a patent for that undivided half having been issued to the claimants on the 27th day of August, 1877, there was no interest or title in the premises surveyed and patented remaining in the United States which they could convey by any subsequent patent. However conclusive against the United States, and parties claiming under them by title subsequent, a patent may be, it in no respect impairs the right of a previous patentee to contest the title upon which the subsequent patent has been issued for the same premises. Every patent issued upon a confirmed claim under the act of March 3, 1851, in terms declares that it shall not affect the rights of third parties; that is, those who have a standing to contest the pretensions of the patentee had no patent been issued.

It follows that the question as to the correctness of the survey of the Bolsas tract, approved by the United States district court and by the officers of the land department, which was much discussed by counsel, is of no practical consequence in the case. The patents under which the plaintiff claims, covering the premises in controversy, passed all the title which the United States then possessed therein; and, until those patents are set aside, the subsequent patent under which the defendants claim can pass no title which can be considered in this action. The issues in the case will therefore be found for the plaintiff, and judgment for the possession of the demanded premises entered thereon, with costs.

FISHER *et al.* v. MOOG *et al.*¹

(Circuit Court, S. D. Alabama. August 28, 1889.)

1. FRAUDULENT CONVEYANCES—ACTIONS TO SET ASIDE—BURDEN OF PROOF.

Where the allegation of the complaint in a suit to set aside conveyances as in fraud of creditors, that the grantor is and was at the time of the conveyances indebted to complainants, is not denied, the burden of showing a consideration, not materially inadequate, is on the grantees.

2. SAME—TRANSACTIONS BETWEEN RELATIONS.

Where such grantees are the half-brother and the son-in-law of the grantor, a clearer, fuller measure of proof is required than if the transactions had been between strangers.

3. SAME.

In such case, where the only evidence on which defendants' witnesses are agreed is that the consideration mentioned in the deeds, *i. e.*, a precedent indebtedness, is the true one, and that the grantor has retained control of the property ever since the execution of the deeds, and the evidence as to when, where, and how the indebtedness was created is irreconcilably inconsistent and conflicting, it is insufficient to show that defendants were *bona fide* purchasers.

4. SAME—ESTOPPEL.

As defendants claim under a deed from the debtor, they are estopped to deny his title and to allege that complainants were thus not injured by the conveyances.

5. SAME—PLEADING—EQUITY.

The bill charged that a conveyance to one of the defendants for a recited consideration of a certain sum was made to defraud creditors; that the grantor did not owe such sum, or near it; and that the defendant held the property as security or for the benefit of the grantor, and prayed that the conveyance be set aside, the property sold, and out of the proceeds the defendant's claim be paid and the balance applied on complainants' debts, or, if the conveyance was voluntary, that it might be declared void and the entire proceeds applied to complainants' debts. *Held* that relief might be granted under either the special or general prayer, as, though such special prayer was in the alternative, it was certain in its terms.

6. EQUITY PLEADING—WAIVER OF OATH.

Where an original bill, by its foot-note, waives oath as to all defendants, and another defendant is brought in by amendment, and instead of a new foot-note the original foot-note is amended by naming him as defendant, his oath is waived.

In Equity.

Bill by Fisher, Parker & Co. and others to set aside two conveyances made by Bernard Moog, one to his half-brother Aaron Moog and one to his son-in-law Isadore Strauss, as made in fraud of creditors.

Overall & Bestor and Pillans, Torrey & Hanaw, for complainants.

G. L. & H. T. Smith, R. H. Clarke, and *G. B. Clark*, for sundry defendants.

TOULMIN, J. A conveyance of property as against the existing creditors of the grantor cannot be supported unless shown to have been founded on an adequate and valuable consideration, and when between

¹Reported by P. J. Hamilton, of the Mobile, Ala., bar.

the grantee and an existing creditor a controversy arises as to the validity of the conveyance, the *onus* of proving that it was founded on an adequate and valuable consideration is cast on the grantee. The recital of a consideration in the conveyance is not evidence against the creditor. *Hubbard v. Allen*, 59 Ala. 283; *Harrell v. Mitchell*, 61 Ala. 270; *Zelnicker v. Brigham*, 74 Ala. 598; *Buchanan v. Buchanan*, 72 Ala. 55; *Owens v. Hobbie*, 82 Ala. 466, 3 South. Rep. 145; *Wedgworth v. Wedgworth*, 84 Ala. 274, 4 South. Rep. 149; *Walton v. Atkinson*, 84 Ala. 592, 4 South. Rep. 681. The relationship of the grantor and grantee, the pendency or apprehension of suits on pecuniary debts or liabilities then existing, are circumstances from which unfavorable presumptions are drawn, and which call for evidence of a full and valuable consideration, and the burden rests on the grantee to repel these presumptions, and the sufficiency of the proof of a consideration must depend on the relations existing between the parties, the circumstances surrounding them when the transaction was entered into, and their subsequent conduct in reference to it. Clearer and more convincing proof will be required if these are calculated to excite a just suspicion of the fairness of the transaction. Say the courts:

"Transactions between parties nearly related by affinity or consanguinity are jealously watched in a court of equity, and should be closely scrutinized. Whenever such relationship exists, and the rights of creditors are involved, clearer, fuller proof must be given of an adequate and valuable consideration and of the good faith of the grantee than would be required of a stranger." Authorities cited *supra*, and *Bump, Fraud. Conv.* 54; *Lipscomb v. McClellan*, 72 Ala. 151; *Gordon v. McIlwain*, 82 Ala. 251, 2 South. Rep. 671; *Poltak v. Searcy*, 84 Ala. 259, 4 South. Rep. 137.

There is in this case no denial of the fact that Bernard Moog was and is indebted to the complainants, as is set out in the bill of complaint; nor is it denied that such indebtedness existed before and at the time he made the conveyances to his half-brother Aaron Moog and to his son-in-law Isadore Strauss, whose validity is assailed in the bill. It is shown, then, that the complainants are creditors who could be hindered or delayed by said conveyances. These undisputed facts place on said Aaron Moog and Isadore Strauss the burden of proving a consideration for their deeds, and not materially disproportionate to the value of the land conveyed to them, and, the conveyances being from the half-brother in the one instance and the father-in-law in the other, a clearer and fuller measure of proof is required than if the transactions had been between strangers. The consideration attempted to be proved in support of the conveyances in question is not the payment of money to the grantor, but the extinguishment of an indebtedness owing by him as surviving partner of A. & B. Moog to the grantees.

Counsel for defendant Aaron Moog contends that, as his answer which denies the allegations of the bill is sworn to, it is evidence, and can only be overcome by the testimony of two witnesses, or that of one witness with corroborating circumstances, and that as no such proof has been made by complainants the bill must be dismissed as to him. Aaron

Moog is made a defendant by an amendment to the original bill, and the contention is that there is no foot-note to the amendment waiving oath to his answer. The original bill, in its foot-note, waived oath as to all defendants, and in the amendment which brought in Aaron Moog, instead of a new foot-note, the foot-note to the original bill was amended by naming him as one of the defendants, and stating what part of the bill he was required to answer. So the amended foot-note covered him, and his answer is not evidence, oath thereto having been waived. An amendment of a bill, when properly allowed, takes effect as of the filing of the original bill, (*Jones v. McPhillips*, 82 Ala. 102, 2 South. Rep. 468; 1 Brick. Dig. p. 705, § 953;) and the foot-note is a part of the bill, and any alteration in or addition to such note after the bill is filed shall be treated as an amendment to the bill, (Amended Rules 41, 42, Equity Rules of United States Circuit Court.)

Again, it is contended in argument by counsel for defendants that the title to the property conveyed to Aaron Moog, and a part of that conveyed to Isadore Strauss by Bernard Moog, as appears from deeds attached to Strauss' deposition, stood in the name of A. & B. Moog, and some part of it in the name of A. Moog, and that as it does not appear from the evidence that the partnership debts of A. & B. Moog have been paid, such property is not subject to B. Moog's debts, and no injury, therefore, is shown by complainants; that fraud and injury must concur to entitle complainants to relief. It appears that A. & B. Moog was a partnership, which was dissolved by the death of A. Moog about a year before B. Moog failed in business, and made the conveyances to Aaron Moog and Isadore Strauss. The bill is filed to set aside these conveyances, on the alleged ground that they were made to hinder, delay, and defraud his creditors. The answers do not set up any want of title in B. Moog, or that there were any partnership debts of A. & B. Moog other than those of said Aaron Moog and Isadore Strauss. Can an issue be raised in argument that is not presented by the pleadings? There is, however, oral proof in the cause that B. Moog acquired the title of A. Moog to said property by will. It is true, it is not competent to prove wills in this way, but no objection was made to this oral proof, (testimony of Isadore Strauss.) But are not Aaron Moog and Isadore Strauss estopped from denying or raising any question as to B. Moog's title? It is under the deed of B. Moog and wife that they claim to hold the property. It is his title that they have. It is his title that complainants seek to subject to their debts, and to do so they ask that his conveyances be set aside. If the complainants have otherwise made out their case, they are, in my opinion, entitled to condemn, to the satisfaction of their debts, whatever of interest or title B. Moog had in the property so conveyed. Both conveyances were executed on January 10, 1885.

The defendants' counsel further contends that "on account of the nature of the special prayer" of the bill no relief can be granted against Isadore Strauss under it; that it is in the alternative and uncertain in its terms; and that under the general prayer no relief can be granted, because it would be repugnant to and inconsistent with the special prayer.

The special prayer is in the alternative, but it is, under the allegations of the bill, certain in its terms. But if it were so uncertain that no relief could be granted under it, I think the prayer for general relief is sufficient to entitle the complainants on the hearing to such relief as the facts of the case may require. 1 Brick. Dig. p. 704, § 928. It is true that under the general prayer no relief can be granted which is distinct from and independent of that specially prayed for, except when the bill is filed in a double aspect. 1 Brick. Dig. p. 704, §§ 938, 939. But it is certainly permissible for a complainant to aver in his bill that either one or the other of two alternative statements is true. *Shields v. Barrow*, 17 How. 130-144; *Story*, Eq. Pl. § 254; *Thomason v. Smithson*, 7 Port. (Ala.) 144; *Strange v. Watson*, 11 Ala. 324; *Simmons v. Williams*, 27 Ala. 507. The bill in this case contains such alternative statements. The bill charges that the conveyance to Isadore Strauss for the recited consideration of \$3,093 was fictitious and simulated, and was made to hinder, delay, and defraud the creditors of B. Moog. It also charges that Moog did not owe said sum, or anything near it, and that Strauss holds the property as a security for his debt, or for the benefit of Moog, having acquired it without consideration, and, whichever it may be, the special prayer is that the conveyance be set aside, and that the property be sold by decree of the court, and out of the proceeds to pay said Strauss anything which really may be due him, if anything, and the balance to be applied on the debts of complainants; or, if said conveyance be found entirely without consideration, but fictitious and simulated, that the same may be declared fraudulent and void, and the whole of the proceeds of said sale may be applied to the debts of complainants. My opinion is that relief may be granted complainants under either the special or general prayer.

1. Has Aaron Moog proved the consideration of the deed to him with that measure of proof which is required in such cases? His witnesses are himself, said Bernard Moog, and said Isadore Strauss. All of them testify that the consideration of the deed to him was an indebtedness of A. & B. Moog to him of \$7,500, with interest from January 5, 1883, which they say was evidenced by a due-bill of \$7,500 of that date, and which Aaron says he surrendered to Bernard at the time the deed was made to him. There are, however, many inconsistencies and irreconcilable statements and circumstances connected with Aaron Moog's claim. He testifies that the money was given to A. & B. Moog from time to time, and that he entered an account of the several sums so given them in his own ledger up to 1880, and that they were charged to his individual account in his firm (Moog & Weil) books; that they were doing a grocery business in Mobile at the time. He says he kept no account of moneys he let A. & B. Moog have after that time but what he kept in a pocket memorandum book, which he exhibits and offers in evidence; says he made each of the entries in it at the date he let them have the several sums of money. The books of Moog & Weil were not produced. But the memorandum book shows these entries written in pencil, and fresh in appearance, viz.:

1878.							
Dec. 3.	Cash,	-	-	-	-	-	425 00
3.	-	-	-	-	-	-	1,553 10
4.	-	-	-	-	-	-	360 69
4.	-	-	-	-	-	-	184 20
1879.							
Jan. 1.	-	-	-	-	-	-	949 00
10.	-	-	-	-	-	-	100 00
10.	-	-	-	-	-	-	125 00
Oct. 25.	-	-	-	-	-	-	125 00
Aug. 4-80.	-	-	-	-	-	-	665 19
Jan. 5-83.	Interest,	-	-	-	-	-	975 00
	Cash same day,	-	-	-	-	-	2,221 57
							7,500 00
Due-bill for it.							
Total,							

An addition of the several items of cash as shown by this book, with the interest as charged therein, aggregates \$7,684.35, and not \$7,500, and if interest was calculated on each item of cash from the date it is claimed to have been loaned it would, with the principal, amount to more than \$8,000. He says he had no arrangement about the interest A. & B. Moog were to pay. The deed recites the indebtedness paid thereby as a certain due-bill made by the former firm of A. & B. Moog on the 5th January, 1883, for \$7,500, with interest from date. Aaron says he knew B. Moog was sued in a number of cases at the time he got the deed. He further testifies that he was in business in Montgomery, Ala., and failed there in 1874 or 1875, and settled with his creditors at 40 cents on the dollar. He again went in business there, and continued for about a year; then came to Mobile in 1876, or 1877, and went in business with Weil in 1877 or 1878. They had a capital of \$3,000 to \$5,000. Yet he was able to take out of this business on his individual account, according to his statement, in December, 1878, and in January, 1879, as much as \$3,697.59, to loan to A. & B. Moog. It will be observed that there is but one item of cash charged on his memorandum book subsequent to August, 1880, and that was on January 5, 1883, and Aaron says the money came out of his business. Aaron further testifies that his brother Bernard has had control of the property and rented it; that Bernard collected the rent for him on a part of the property, and always turned it over to him and accounted for it; that he knew the property was insured, but did not know in what company it was insured, the amount of insurance, or the amount of premium paid; that Bernard paid the expenses and accounted to him for balance of rent. He could not say exactly when he received the last rent, or how much rent he had received altogether from the property. He never saw the notes the tenant gave for the rent. His brother got them, collected them, and settled with him. The other property covered by his deed was under a prior mortgage to the Mobile Savings Bank, and from this he got no rent. It was managed by the bank, and he had nothing to do with it. Bernard Moog testifies that he owed Aaron Moog on Janu-

ary 10, 1885, \$7,500, due-bill for money borrowed from him by A. & B. Moog in 1882 and 1883, as they would need it. He says that the conveyances to him and Isadore Strauss "were made by A. & B. Moog's books. We looked at A. & B. Moog's books." This is all of his testimony on that subject. He says, however, that Aaron Moog has never got any benefit from the property; that he (Bernard) collected some rent at one time. He was hard up and collected two months' rent, and gave it to his son; collected it for Aaron Moog, and Aaron allowed him to use it, and he gave it to his son. He says this was the property covered by the mortgage to the bank, and that he collected this rent with the consent of the bank. He says nothing about the other property included in the deed to Aaron. Isadore Strauss testifies that A. & B. Moog owed Aaron Moog \$7,500 money, which he deposited with them in 1883. He was book-keeper for A. & B. Moog at that time. He says Aaron brought the money with him from Montgomery.

2. Has Isadore Strauss proved the consideration of the deed to him by that clear and convincing proof required against creditors whose debts and rights are established? Bernard Moog testifies that the conveyance was to pay an indebtedness to Strauss of "thirty-one hundred and some odd dollars," which A. & B. Moog owed him and which arose in this way: That Strauss was their book-keeper, and got a salary of \$150 a month, and whenever he had money he would loan it to A. & B. Moog as they would need it; that when he would have \$100 he would let them have it and give himself credit for it; that it appears from A. & B. Moog's books of the property he conveyed to Strauss one piece was a brick house, and he believes he gave him two-fifths of this; that Strauss subsequently sold and conveyed this house to his (Bernard Moog's) wife; that she paid him mostly in cash, and gave him her note for \$530, which she paid last summer to her daughter, Strauss' wife. He further testifies that he has managed and controlled the property conveyed to Strauss; that the state and county taxes have not been paid on it, and the city taxes were only paid by him a short time ago. The house was partially burned a few months ago, and when he undertook to collect the insurance money a garnishment was levied on it for the city taxes, and he had to pay them before he could get any of the money. Isadore Strauss, in his answer, says that he loaned A. & B. Moog \$1,800 in December, 1875; that the interest to January 10, 1885, was \$1,310, and their indebtedness to him on that day was \$3,110, which was the consideration for the deed of that date; that they owed him about \$2,800 for unpaid salary for services for several years. But he claims nothing on account of salary so due him. In his deposition he says that they owed him \$3,114 for money loaned, including interest on same; that on December 10, 1875, he loaned them \$1,810, for which they agreed to pay him 8 per cent. interest per annum. This was the only cash loaned them. He testifies that A. & B. Moog owe him a small amount for salary, which was not settled by the conveyance. He does not exactly remember how much they owe him. He further testifies that he brought the money he loaned them with him from Montgomery, whence he came in 1875, and at the

time he was employed by them. He was then 18 years of age. He says he received a salary of \$100 a month, and latterly \$125 a month; that in 1881 he married Bernard Moog's daughter, rented a house at \$18 a month, and lived economically. Just after said Moog's failure in 1885 he removed from Mobile to Texas, where he now resides. He testifies that Bernard Moog has had charge and control of the property conveyed to him; collected the rents, paid the insurance and taxes out of the rents, and remitted the balance to him. He says the taxes were paid out of the rents. He further testifies that he sold the two-fifths interest in the brick house to the wife of Bernard Moog for \$1,200. The money was paid partly in cash and partly in board due her for his family; that no part of it was on time. Six hundred and twenty dollars was paid cash, and the balance was due for board. The books of A. & B. Moog having been produced on an order of the court, on examination of such parts of them as were introduced in evidence, they show no credits to Aaron Moog of the amounts or dates as testified to by either of the witnesses. They do show that at the time these witnesses say A. & B. Moog owed Aaron Moog a large amount of money the latter's firm of Moog & Weil were borrowing money from A. & B. Moog. So far as the books in evidence show, Aaron Moog's name appears but once in full on them, and that account shows debits and credits, including both cash and merchandise. Under date of April 2, 1880, it shows a balance due him of \$2,606.26. Subsequent to this we find many transactions with and loans to "A. Moog" and to "A. M." But Aaron says he was not the man; that there is another A. Moog, who lives in Montgomery, and it must have been him. The books produced, however, show no such transactions either with Aaron Moog or Isadore Strauss as the witnesses have testified to, although B. Moog says the conveyances were made by and out of A. & B. Moog's books. It will be observed that Aaron Moog claims to have loaned A. & B. Moog large sums of money at different times during a period of three or four years without any arrangement with them about paying interest, and without ever charging any interest on such loans until after the expiration of four years from the first loan and about two and a half years from the last, when it is claimed a due-bill was given for the amount. But it does not appear from what time the interest was calculated, or on what particular sum or sums, or the rate charged. It will be observed that at the time he claims to have been lending money to A. & B. Moog the latter were lending money to his firm of Moog & Weil, and also to "A. Moog" and to "A. M." (The last may have been the A. Moog at Montgomery.) It will further be observed that the evidence as to the time the money was loaned by Aaron to A. & B. Moog, and where he got it, and of the circumstances under which it was loaned, is inconsistent and conflicting. The same observations may be made in regard to the claim of Isadore Strauss. Among other things it appears that during the nine years A. & B. Moog had his money they never paid him any interest on it, and it does not appear that he was ever credited with it on their books, although he says they agreed to pay him 8 per cent. interest per annum.

There are two material facts in this case on which the witnesses for the defense are agreed, namely, that the consideration recited in the deeds is the true consideration for them, and that Bernard Moog has had charge and control of the property covered by the deeds ever since their execution. On all other material points there is a hopeless inconsistency in the testimony. The irreconcilable inconsistencies and conflicts which appear in the evidence "materially impair the weight of the evidence as to the existence and validity of the indebtedness" claimed by these defendants. As was said by the court in one of the Alabama cases cited:

"The money may have been really loaned; we will not say it was not, but, when the connection between the parties and all the circumstances are considered, the *bona fides* of the consideration of the sale should be shown by clearer and more convincing proof against creditors whose debts and rights are established."

The circumstances shown "intensify the equitable rule that in transactions such as these between near relations fuller and more convincing proof of consideration and good faith must be made than if it had been between strangers."

I think the evidence in this case too unsatisfactory to establish the fact of *bona fide* purchases. The motion to dismiss the bill is denied, and a decree will be rendered granting to the complainants the relief they pray,—to have the conveyances to defendants Aaron Moog and Isadore Strauss set aside as fraudulent and void, and to have the interest of Bernard Moog in the property therein described sold for the satisfaction of complainants' debts.

The clerk will take an account and report to the court the amounts due the complainants, respectively, with interest computed to the coming in of the report.

BROUGHTON v. MCGREW.

(Circuit Court, D. Indiana. June 9, 1889.)

1. LIBEL AND SLANDER—WORDS ACTIONABLE PER SE.

In order that a charge of drunkenness may be actionable it is necessary to couple it with some business in which drunkenness is a disqualification.

2. SAME—BURDEN OF PROOF.

In actions for slander the burden of proof is upon the plaintiff to show that the essential words were uttered as averred in the complaint.

3. SAME—PRESUMPTION.

Plaintiff need not, in the first instance, offer proof that the words, if uttered, were false, but may rely upon the presumption of his good character.

4. SAME—MALICE.

Where the words are shown to have been uttered without justification malice is inferred.

5. SAME—PRIVILEGED COMMUNICATIONS.

Statements made before a meeting of the stockholders of a railroad company by a member, attributing drunkenness and incapacity to one of the officials, are privileged if made in good faith.

6. SAME.

The fact that attorneys of the company, not stockholders, were present at the meeting, at the request of the president and some of the stockholders, does not take away the privilege.

7. SAME.

But if such words were spoken to the attorneys, or to other persons not entitled to hear them, and were not addressed to the stockholders' meeting, they are actionable.

8. SAME.

The question whether the charge was uttered to influence the election of directors is immaterial.

9. SAME—REPETITION OF SLANDER.

Words repeated to persons who have previously heard them under circumstances making them privileged are not actionable.

10. SAME—DAMAGES.

Compensatory damages only may be assessed unless there is such clear want of ground for uttering the words as warrants an inference of ill-will or hatred.

11. SAME.

The circumstances under which the words were spoken, the persons to whom spoken, the character of the person making the charge, and the injury to the character of the person assailed, together with the effect upon his business, are the elements to be considered in assessing damages.

At Law. Action for slander by Frederick Broughton against William McGrew.

James S. Frazer, Robert C. Bell, and Samuel L. Morris, for plaintiff.

R. S. Taylor, for defendant.

WOODS, J., (*charging jury.*) The action is by the plaintiff, Broughton, against the defendant, McGrew, for slander. It is charged in substance that the plaintiff was an employe of the Chicago & Atlantic Railroad, as general manager and assistant vice-president, and that the defendant, intending to injure him in that employment, maliciously uttered of him certain slanderous words. Omitting the explanatory phrases in the pleadings, and reading directly, it is charged that the defendant said of the plaintiff: "He has been drunk frequently, and you can't expect his subordinates to remain sober when he furnishes them such an example." That is one set of words. Another set: "He went over the road in his car, and there are people here who can tell you what condition he was in. I think the road-master was with him, but I am not sure. He was drunk, and staggered. He has been drunk in his office, and damning the patrons of the road." These are the words charged in the first paragraph of the complaint. In the second paragraph of the complaint, after reciting the employment of the plaintiff, it is charged that the defendant spoke of him these words: "It is generally reported that Broughton is under the influence of liquor half his time. I am reliably informed that he is unfit to do business." These last words, in themselves, contain nothing actionable. They have significance only in connection with the previous words, which are the gist of this paragraph of the complaint, namely, "that Broughton is under the influence of liquor half his time." That is the essence of the charge in this count.

Now, it is not actionable, or slanderous, in the sense of the law, to

charge a man generally with being drunk, or being in the habit of getting drunk, or having been drunk. In order that such a charge be actionable it is necessary to couple it with some business in which drunkenness is a disqualification, or tends to constitute incapacity; that is to say, some business in respect to which the charge of drunkenness would tend to injure the party.

The burden of proof is upon the plaintiff to make out his case as he has alleged it to be. He must show that the defendant spoke of him in relation to his employment in the management of the railroad the words, or a substantial and essential part of the words, charged, and as charged. It is not necessary that the proof shall show that every word in the sentence was uttered just as averred, but it must be shown that the essential words were uttered. The words necessary to convey the meaning alleged must be shown to have been uttered as charged. It is not enough to show that fragmentary parts of sentences or words taken from different sentences uttered by the defendant, if put together, would support the allegation. It must appear that the defendant used sentences containing substantially the same words as are charged in the complaint.

It is not necessary that the complainant shall, in the first instance, offer any proof bearing directly on his previous good character, or proof that the words, if uttered, were false. He can rely, in the first instance, upon the presumption of good character, without offering proof on the subject. When he has made proof that the words were uttered as charged, the jury will presume that they were false unless proof to the contrary is introduced. While the burden is upon the plaintiff to make out his case as charged, with proof, he is helped out in this respect by the presumption, and is under no necessity to offer direct proof upon the subject.

It is also alleged that the words were maliciously uttered. Malice, too, may be presumed without direct proof. If one has uttered slanderous words of another, and the proof shows that they were spoken on an unjustifiable occasion, malice may be inferred. Malice does not necessarily mean actual ill will or hate. The law presumes a wrongful intention where the words are shown to have been uttered without justification.

Now, in defense, the defendant has put upon paper a general denial of the complaint, denying that he uttered the words, and also two affirmative defenses, which, however, do not seem to be essentially different. In one it is alleged substantially that on the 3d day of September, 1885, there was a meeting of the stockholders of the railroad company on whose road the plaintiff was employed; that they met for the purpose of electing directors and for the doing of other business; that the president of the company and directors and stockholders were present, and that the words charged, if uttered at all, were spoken at that meeting, and were therefore privileged communications, and not actionable; that he had the right at the stockholders' meeting, in the presence of the stockholders and board of directors and the president of the road, to bring these matters to their attention. It is averred that he had been informed beforehand in respect to the subject in such way as to create in his mind a belief, and that in fact he did believe, that the plaintiff

was in the habit of getting drunk, and had ridden over the road in his car in a drunken condition; and that, if he did utter the words alleged, it was done on that occasion.

The second affirmative defense contains a further statement to the effect that Mr. Jewett, president of the road, was present, and made inquiries of the defendant in respect to his objections to the management of the road, and that what he said was in response to these inquiries by the president at this meeting of the board of directors, and was therefore privileged.

The question for you first to consider in logical order is, were the words uttered as charged, or any set of the words? There are three or four different sentences in the complaint which McGrew is charged with having spoken in relation to the plaintiff in connection with his office as manager of the railroad. Has it been proven to your satisfaction that McGrew did utter any one of those sentences substantially in the words stated in the complaint? If so, the plaintiff is entitled to recover, unless some matter of defense is established. Now, all questions of fact are for the jury, and this question of the utterance of words as much as any other. So, too, in respect to the credibility of witnesses, and the weight to be given to their testimony. I have noticed in the progress of the argument that counsel have given you their opinions; have told you about their acquaintance with the witnesses; and that they knew them to be good men or bad men, or the like. All this was out of the proper line of argument. Counsel have no more right in the course of argument to speak of things not proven in respect to the character of a witness in the case than they have to state any other fact not in evidence. It is for you to judge, in the light of all the circumstances, of the force of the testimony before you, whether in depositions or delivered orally. If the witness was before you, you have the benefit of having seen what kind of a man he is, and can make your estimate of him accordingly. I shall not attempt to review the evidence upon the question whether the speaking of any of the words, or any set of the words charged, has been sufficiently proven. If the preponderance of the evidence fairly satisfies you that the words were uttered as charged the plaintiff will be entitled to your verdict unless the words were privileged; and that leads to the inquiry whether the words, if spoken, were privileged or not. It is right under some circumstances to utter words which otherwise would be slanderous, the words being privileged by reason of the circumstances under which they are uttered. The particular privilege set up in this case is that the defendant himself was a stockholder in this railroad company; that there was a meeting of stockholders, and that at this meeting, if at all, he uttered the words charged. It appears in the evidence, without dispute, that the president of the road was present at the meeting and some of the directors at least and a number of attorneys. I believe it is shown that two of these attorneys were not stockholders. Whether they were in the room at the time the meeting was in progress, and when Mr. McGrew made whatever statements he did make in the course of the meeting, is a matter of fact for you. I will say, however,

that at such a meeting as that is shown to have been, McGrew, or any party interested in the railroad, had a right—it was his privilege—to communicate to the president of the road and to the directors and every stockholder present whatever he knew, or had reason to believe, and did in fact believe, in respect to the management of the road or the conduct of any of its employes; and if Mr. McGrew did use, in that meeting, the words charged, or any of them; and if upon information that he had received, either from others or by his own observation, or from both sources, he believed that the statement which he made was true,—then the fact that it was made in that meeting would constitute the communication one of privilege, and not actionable.

The suggestion is made that the presence of parties who were not stockholders destroys this privilege. So far as I have observed, the evidence does not reveal the presence of any who were not stockholders, except two or three attorneys who have been witnesses. The testimony shows that these gentlemen were present at the instance and request of the officers of the road,—of the president, at least, and possibly of some of the directors. There has been some criticism upon these attorneys for being present. I make no comment upon that. It is aside from anything I need instruct you about, and is left to your own judgment. I do say that these gentlemen, who were in the employment of the company as attorneys, being thus present at the request of the president of the road, their presence did not take away from Mr. McGrew, or any other director present, the right to make communications of the kind in question, directly to the board, or to the president or to the stockholders assembled there. Their presence in that manner did not affect the privilege or right of a stockholder to criticise the management of the road or the conduct of employes.

Something has been said to the effect that the election of directors was over when the words were spoken, and therefore they could not have been uttered with a view of affecting the election. The privilege, however, in such a case, does not depend upon the fact that the election had or had not been held. The president was there, and some of the directors, and the privilege might well and properly be exercised after the choice of the new board, in order to indicate what reforms ought to be accomplished in the management; and it is not material whether or not the defendant had tried to get a new board of directors. That fact would not affect the right of any officers remaining or coming in control to make the necessary investigation and correction, if there were such evils prevailing as stated in the words complained of; so that the question whether the election had taken place is not material to the determination of this question of privilege. If the utterance was to the people who had the management of the road, or some of them, and in the presence of others who were interested in it, and who were called to participate in that meeting, it was privileged, no matter to what stage the business had reached.

But a question arises which is somewhat different; that is, whether the meeting had not terminated, and whether the words were uttered to any who were not entitled to receive them as privileged communications. It

is claimed on behalf of the plaintiff, and I believe his counsel rest their case on that assertion, that the words were not uttered in the room where the meeting was held, but were spoken outside of the door to attorneys and to men who were not members of the board, or interested in the board directly. Now, whether the words were uttered outside of the door or inside does not determine necessarily whether they were privileged or not. There might be a meeting going on where the party would have the right to utter the words, if he chose to, to those who were interested in the subject, and there he might turn aside to some individual who was not interested, and utter the words to him without any justification for so doing; so that whether these men had passed the door or were still inside the room has little to do with the question. If the words were really addressed to an individual or individuals having no interest in the subject, and not to the meeting, nor to others who were concerned in the management of the road, they might be actionable or slanderous. Now, then, were the words uttered in the hall to Judge Slick and Mr. Johnson and Mr. Attlebury, and overheard by Mr. Peterson, slanderous? Strictly speaking, the words so uttered would not be privileged if then spoken for the first time; but if the same words had been uttered in the meeting, or words to the same effect, embodying the charge of drunkenness against Mr. Broughton, so that the accusation became known to all present, in a way to be privileged, and then, as the parties were leaving the room, there was a repetition of the matter by Mr. McGrew to men who were present and heard the words first uttered, I would say that no action ought to be maintained for the repetition of the words to those who had already heard them when it was proper to utter them. It was a matter from which it could not be said any damage could result, because the parties had already heard it; especially if the second utterance occurred in a discussion between the defendant and these attorneys, who were controverting his statement made in the meeting. In determining, therefore, whether or not the utterance of the words to these attorneys is an actionable or slanderous utterance it is important for you to determine whether substantially the same charge had first been made in the meeting, and to the meeting, in a way to be privileged. If the charge had not been made to the meeting, and this was a voluntary utterance by the defendant to these attorneys, then, in my judgment, the words ought not to be held privileged, and I so instruct you; and you would be entitled to find for the plaintiff on account of what was thus voluntarily said to the attorneys, whether done inside the door or outside the door. If the defendant got the attorneys aside, or happened to be aside with them, and brought up for the first time the charge against Mr. Broughton, it was a slanderous and unjustifiable charge, which would support the action; but if it was a mere repetition, growing out of a discussion in respect to what he had said in the meeting on the same subject, then I think the privilege ought to be considered as covering the repetition of the words, and so instruct you.

Many things have been said, gentlemen, about other questions,—whether the road was in good condition; whether McGrew had cause for

seeking a change of management; and whether he was acting in good faith in regard to the interests of the road. Much has been said about getting control of the corporation, or organizing it in the interest of a scheme. All these things are remote in their bearing. The question for you, first and mainly, is whether McGrew uttered these words about the plaintiff, and whether he uttered them without justification. He claims he did it justifiably in discharge of his duty to the board. The mere fact that he uttered them to the board would not necessarily be a justification. He must, of course, have done it in good faith. If he uttered the words to the board, and did not believe them to be true, there was for that, of course, no justification. If you find he did make the charge of drunkenness against Broughton as alleged, did he do it in good faith? He has testified, and much proof has been introduced in respect to the information that he had on the subject. If he had been told by creditable men of facts which fairly led him to believe, and entitled him to believe, there was something wrong in Broughton's conduct in this respect, he had the right to bring the matter up, and you may presume he did it in good faith unless the evidence shows the contrary. Of course, if the evidence convinces you that he did not have good cause to bring it forward, had not received information that would warrant a prudent man in bringing such a charge forward, you will say he did not act in good faith, and will not give him the benefit of the privilege to which otherwise he might be entitled. Every presumption is in favor of good faith if he had information on the subject that a reasonable man might have acted upon.

If you find for the plaintiff, then the question arises, what damages will be proper? The action, as I have already explained to you, proceeds upon the theory that the injury has affected the plaintiff in his business. The mere charge of drunkenness is not an actionable injury, and is significant in this case, because the injury that you will consider will have reference to the effect of the slander upon the complainant's business and his business prospects, not upon his character as an individual in a community, because in that respect all men are affected alike by an accusation of drunkenness, and the law does not recognize it as good cause for an action except when it affects the man in his business or prospects of business, and therefore the jury, in determining the amount of damages to be awarded, must revert to that phase of the subject. Damages may be compensatory, and they may be vindictive or punitive. Punitive or vindictive damages are assessed, if at all, on the ground of public policy, and not on the ground that the plaintiff has any right to the money. In order to prevent a repetition of a wrong the jury may assess vindictive damages, in the way of punishment, which will go to the plaintiff because assessed in his suit, but not on the theory of compensating him, so much as of punishing the wrong-doer. Punitive damages, however, are not to be assessed unless the words were not only wrongful, but were uttered with actual malice on the part of the defendant; so that, unless the evidence shows to you that the defendant uttered the words with actual malice, ill will, or hatred towards the

plaintiff, or with such clear want of ground for doing it as to warrant an inference of ill will or hatred, you will assess only compensatory damages. Compensatory damages are for the purpose of making whole the plaintiff for the injury done him, for the injury in respect to his business and business prospects that has actually arisen or is likely to arise, from the words uttered in the manner and at the time they were spoken. Of course, there is no fixed standard by which such damages can be measured. Characters have no price in the market. The extent of the injury must be determined from the evidence. The jury must exercise sound judgment and discretion. You have a right to consider all the circumstances in the case. If the slander was uttered under one set of circumstances it might have greater effect than if uttered under other circumstances, and when uttered to some persons it might do more harm than when uttered to others. In this case there is some evidence that there had been rumors of these things circulating in the community, rumors of charges of this kind, before McGrew uttered the words. If that is a fact, you have a right to take it into consideration. A man that starts a false report may be held to greater responsibility than a man who merely repeats or adds to the story. The fact that the defendant uttered the words on his own authority, or on the authority of others of whom he had heard the reports, may be taken into consideration. If he said these things on his own authority, claiming to know them himself, that would tend to give them greater weight and currency than if he professed merely to speak from rumors or information derived from others, indicating the source of his information. The character of the defendant himself, his standing in the community, is a matter which you may consider in determining the amount of damages. A man of high character, of known force and influence in the community, may injure another by talking about him more than a man of less character could do. So, on the other hand, the character of the party spoken about is a matter that may be taken into consideration. If he has a well-established character, that there is less likelihood of the slander hurting him, may be considered, whereas, if he was a new man starting in the effort to build up a reputation, the same slander might well cause more harm. You will consider the persons to whom the slanders were uttered, and the relation they occupied to the parties. These attorneys of the road were not in a position, as I have instructed you, to be treated as officers of the road, to whom such communications could be made as matter of privilege; yet, I think, if Mr. McGrew had gone to the attorneys of the road with the accusation against Mr. Broughton, and urged upon them to go to Mr. Jewett with the matter, I am not sure but that his action might have been privileged. It would certainly be a strong circumstance to rebut malice. Upon the circumstances as stated here, however, while I instruct you that if the words charged were uttered to these attorneys in the first instance, and not as a repetition of what was said in the meeting, they were not matters of strict privilege; yet the fact that these gentlemen were attorneys of this road, and had friendly relations to the officers, or to the plaintiff, you may consider in deter-

mining how much damage ought to be assessed. If these three gentlemen were the persons to whom these words were spoken, you can consider their relations to the plaintiff and the likelihood of words spoken to them concerning him reaching the public through their agency, and to what extent they would be likely to cause him injury. The plaintiff cannot claim damages for acts of his own or for the publicity given to the matter by the bringing of this suit, because that was brought of his own choice. It is for you, if you find for the plaintiff, to say upon all the facts and circumstances in proof what damages you think ought to be awarded, whether compensatory, or both compensatory and vindictive.

TILGHMAN v. WERK *et al.*

(Circuit Court, S. D. Ohio, W. D. August 30, 1889.)

1. PRACTICE IN CIVIL CASES—NUNC PRO TUNC ORDER.

An application by respondents for a *nunc pro tunc* order dismissing complainant's petition to vacate a decree made in 1878, and for a rehearing, the application being based on an alleged action or opinion taken or expressed by the circuit judge by whom the petition was heard in 1884, will be refused where there was no final decision or judgment rendered, and no official record on which to base such an order, and nothing but the recollection of witnesses as to what the judge said about the case when not presiding in the court where the cause was pending.

2. BILL OF REVIEW—GROUNDS.

An application for a bill of review will not be granted where no actual fraud is set up, and the affidavits on which the application is based show that no fraud in fact was practiced in obtaining the decree, and no error of law apparent on the face of the decree is either set up or relied on.

3. SAME—NEW MATTER.

A change by the supreme court of its ruling on a question of law and fact does not constitute such new matter as will sustain a bill of review to vacate a decree of the circuit court pronounced before such change was made.

4. SAME.

Neither will a bill of review be granted because the case was decided in the absence of counsel, where the means of knowledge as to the time of hearing was within reach of counsel, and no effort was made to deceive him by the opposite party, though the petitioner may have been misled by the negligence or misinformation received from his counsel, or of those to whom the counsel had intrusted the business.

5. SAME—LACHES.

An application for a bill of review, made in 1889, on facts known by petitioners in 1881, comes too late, even if the facts constituted a good ground for relief.

In Equity. Application for leave to file bill of review.

Francis T. Chambers and Perry & Jenny, for plaintiff.

Harmon, Colston, Goldsmith & Hoadly and Paxton & Warrington, for defendants.

JACKSON, J. The motions made herein by complainant and respondents should each be severally denied.

1. The motion of respondents for a *nunc pro tunc* order dismissing the complainant's application or petition to vacate the decree herein of April 9, 1878, and for a rehearing of the cause, based upon the alleged action or opinion taken or expressed by the circuit judge at Knoxville, Tenn., on the 29th day of July, 1884, when said petition was heard by him, should be refused, because that action or opinion of the circuit judge never assumed the form of the final decision or judgment of this court, wherein the cause was pending, because there is no official record or memoranda of this court on which to base or rest the *nunc pro tunc* order now applied for, and because it would be contrary to sound policy and destructive of that certainty and conclusiveness which should attend judicial action to base judgments and decrees upon the recollection of witnesses as to what the judge of a court may have said about a case when not presiding in the court where such cause is pending. Judicial action should not rest upon a foundation so unstable and insecure. The circuit judge may, undoubtedly, by consent of parties, hear a cause outside of the particular district in which it is pending, but the opinion or view he may express on such a hearing does not rise to the dignity or assume the force of a judgment of the court wherein the case is pending until some official notice or communication of the judge's opinion or decision is made or transmitted to the proper officer of such court, whose duty and function it is to enter or preserve some record of all judicial action taken or had therein. A judge's opinion when and while absent from the court over which he presides, in respect to matter or questions therein pending for decision, however called forth or expressed, falls short of being the judgment of such court. Judicial action is reached when the judge's opinion is expressed in, or conveyed in some authoritative manner to, the court wherein the controverted matter is pending. No judicial action such as will warrant the entry or granting of a *nunc pro tunc* order dismissing complainant's petition is shown in the present case. Furthermore, the parol testimony leaves some doubt as to what were the precise views and opinions of the circuit judge in respect to complainant's petition. Under such circumstances the respondents' motion could not be properly allowed. It is accordingly denied, with costs.

2. The complainant's petition filed July 27, 1881, to vacate the decree of April 9, 1878, and for a rehearing of the cause, should now be dismissed. This petition cannot be treated or regarded as an original bill in the nature of a bill of review, which lies only for fraud; and such fraud, as has been said by very eminent judicial authority in an English case, must be actual and positive, showing a *mala mens*,—a meditated and intentional contrivance to keep the opposite party and the court in ignorance of the real facts of the case, and thus obtain the decree. *Patch v. Ward*, L. R. 3 Ch. 203. No such fraud is set up or relied upon, and the affidavits in support of and against the petition clearly establish that no fraud in fact was practiced by respondents or their counsel in procuring said decree. Neither can this petition be treated as a bill of review to correct errors of law apparent on the face of said decree of April

9, 1878. No error of law apparent on the face of the decree or the record is either set up or relied upon in said petition. The petition to vacate said decree is filed after the term at which it was rendered, more than two years after the rendition of the decree. It is clear that the court has no authority or jurisdiction to set aside or vacate a decree under such circumstances and grant a rehearing, except for good cause shown, and in the absence of negligence on the part of the petitioners. The matters *dehors* the record which are relied upon as grounds for vacating the decree are—*First*, that there was an agreement or understanding between complainant's counsel and counsel for respondents that this suit should stand suspended and undisposed of until the suit of *Tilghman v. Proctor* (102 U. S. 707) should be decided by the supreme court of the United States, and that this understanding was without the knowledge and consent of complainant and his counsel, disregarded or ignored in taking said decree; and, *secondly*, that the decree of April 9, 1878, sought to be vacated, was based upon the decision of the supreme court of the United States in case of *Mitchell v. Tilghman*, 19 Wall. 287, holding the complainant's patent to be invalid, and that subsequently, in the case of *Tilghman v. Proctor*, the supreme court had changed its ruling on said patent, holding the same to be valid, and that the decision in *Mitchell v. Tilghman* was erroneous, etc. This last decision or holding of the supreme court, it is claimed for petitioner, constitutes new matter *in pais* occurring since the decree, and furnished a good ground for sustaining the petition as a bill of review. While the suits against respondents and against Proctor and Gamble were founded upon the same patent, it is not alleged in the petition that they had any connection with each other; they were separate and independent suits. Their only connection with each other rested in and upon the alleged agreement or understanding of counsel that *Tilghman v. Werk* should await the result of *Tilghman v. Proctor*. While the decision of the supreme court in *Mitchell v. Tilghman* may have been the real ground on which this court based its decree of April 9, 1878, that fact does not appear upon the face of the decree, and the question is presented whether a change of its ruling or decision by the supreme court on a question of law or fact, or upon a mixed question of law and fact, constitutes such new matter as will sustain a bill of review to vacate decrees of the circuit court pronounced before such change was made. We think, upon principle and authority, this proposition cannot be maintained. The cases cited and relied on by counsel for complainant do not, in our opinion, sustain his contention. Such a rule would prolong litigation greatly, and render judicial decisions unstable in the highest degree. The weight of authority, as shown in the cases cited by counsel for respondents, is against this position of complainant's counsel. As to the alleged agreement to suspend action in this suit until the case of *Tilghman v. Proctor* could or should be decided in the supreme court, the evidence introduced in support of and against said petition not only fails to establish such an understanding or agreement, but tends strongly to show affirmatively that no such agreement was made or concluded between counsel for the respective parties. The cor-

respondence between those counsel, commencing with the letter of Judge Coffin to Mr. George Harding, of date January 23, 1877, and including the letters of March 25 and 27, 1878, are inconsistent, and irreconcilable with the existence of the agreement alleged. If the counsel for complainant failed to receive or to be advised of the letters written him by counsel for respondents under date of March 30, 1878, and April 3, 1878, it was the fault or neglect of those he left in charge of his office and business. The letter of March 30, 1878, from Coffin, counsel for respondents, expressly declined to stipulate for any postponement of action in or suspension of this suit, as proposed by Harding, and the letter of April 3, 1878, notified him as to the day and date when respondents' counsel would take action, and move the court to dismiss complainant's bill. The alleged agreement is said to have been first made in 1874. Subsequently to that this court granted respondents' application for a rehearing, and the petition admits that in 1877 complainant and his counsel knew that such rehearing had been granted. It is the duty of litigants to be in court, either in person or by attorney, when their cases are called, and to see that proper steps are taken for the protection of their rights. It is no ground for a bill of review that a case is taken up and decided in the absence of counsel. It was so decided in *Quarrier v. Carter*, 4 Hen. & M. 242, and *Wiser v. Blachly*, 2 Johns. Ch. 490. The means of knowledge as to the steps being taken in the suit were within easy reach of complainant and his counsel. No effort was made or device resorted to on the part of respondents and their counsel to conceal the action of the court, or to keep the other side in ignorance thereof. The proposition that complainant may rely for relief upon the negligence of or misinformation received from his counsel, or of those to whom such counsel has intrusted the care and attention to his professional business, is not sound, and is not supported by authority. Petitioner has not in and by his petition shown that proper diligence was exercised to secure or preserve his remedy by appeal, and, aside from the evidence introduced, it is exceedingly doubtful whether the allegations of his petition are sufficient upon their face to sustain the same or entitle him to the relief sought. But, for the reasons above stated, his petition should not be granted. It is accordingly dismissed, with costs.

3. The application of complainant, made April 11, 1889, for leave to file bill of review herein should be refused. The only new or additional matter presented in the bill of review now asked to be filed is the alleged connection of respondent Werk with the suit against Proctor and Gamble. It is alleged that said Werk and his counsel, Collier, instigated that suit, or rather Proctor and Gamble's infringement of complainant's patent and the denial of his rights, and indemnified them in resisting complainant's claims. The affidavits of Werk and Collier, the parties implicated in said charge, fully met and explained the same, and show that the allegation is not well founded. But, aside from that, this connection of Werk and Collier with the Proctor and Gamble suit, and the defense thereof, was known to complainant as early as 1881. It is now too late for him to rely upon that alleged fact. He is repelled by his laches from invoking

ing any relief on that ground, even if it were otherwise a good ground. All other matters set out in the bill of review now sought to be filed are the same as those presented in and by the petition filed in 1881, and already noticed and disposed of. Leave to file said bill of review is accordingly denied, with costs of the motion.

COMMERCIAL NAT. BANK v. ARMSTRONG.

(Circuit Court, S. D. Ohio, W. D. August 30, 1889.,

1. PRINCIPAL AND AGENT—BANKS AND BANKING—COLLECTIONS.

The F. Bank offered to "collect at par" all paper sent it by complainant, "and remit" on specified dates." Complainant accepted the offer on a letter-head containing the printed words: "For collection, ———; for credit, ———." All paper sent under this agreement, was, at the suggestion of the F. Bank, indorsed, "Pay F Bank for collection ———, for" complainant. The F. Bank thereafter wrote to complainant that "we collect at par, and include in our remittances everything collected to date." All paper sent by complainant was charged on its books to the F. Bank, "cash items" on transmission, and "time items" on their collection by the F. Bank, on whose books like credit entries to complainant were made. While complainant's cashier testified that in making such charges he understood that the F. Bank became indebted to complainant, he also stated that it was not intended to transfer the paper to or open a deposit account with the F. Bank. *Held*, that the relation between the F. Bank and complainant as to paper sent by the latter was that of principal and agent, and not that of creditor and debtor.

2. SAME.

Such relation also continued as to proceeds of such paper collected by the F. Bank.

3. TRUSTS—IDENTIFICATION OF TRUST FUNDS.

Complainant can recover on the ground of a trust, from a receiver of the F. Bank, which has failed, such portion only of the proceeds of its paper sent to the F. Bank as it shows has passed into the receiver's hands either in its original or some substituted form.

In Equity.

Bill by the Commercial National Bank of Pennsylvania against David Armstrong, receiver of the Fidelity National Bank, to recover certain funds.

Harmon, Colston, Goldsmith & Hoadly, for complainants.

E. W. Kittredge, Jos. Wilby, and W. B. Burnet, for defendant.

JACKSON, J. The general object and purpose of the bill in this case is the recovery of certain funds, which the complainant claims are impressed with a trust character in its favor, and which it is alleged have come into the possession of the defendant as the receiver of the Fidelity National Bank of Cincinnati. The trust character of the fund claimed is disputed, and that constitutes the real controversy between the parties to the suit.

The material facts of the case, as established by the evidence on which the questions of law arise, and the right to the relief sought depends, are

the following, viz.: The Fidelity National Bank, desiring to open and establish business relations with the complainant, addressed to it, under date of February 12, 1887, the following circular letter and propositions:

"*Coml. Nat. Bnk., Philadelphia, Pa.*—GENTLEMEN: Inclosed herewith we hand you our last statement, showing us to be the second bank in Ohio in deposits in the tenth month of our existence. We should be pleased to serve you, and trust you will find it to your advantage to accept one of the following propositions:

"No. 1. We will collect all items at par, and allow $2\frac{1}{2}\%$ interest on daily balances, calculated monthly. We will remit any balance you have above \$2,000 in New York draft, as you direct, or ship currency at your cost for expressage.

"No. 2. Will collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month.

"No. 3. We will collect at par Ohio, Indiana, and Kentucky items, and remit balances every Monday by draft on New York. We do not charge for exchange on propositions No. 1, 2, and 3.

"No. 4. Will collect Cincinnati items, and remit daily at 40 cents per thousand, or 20 cents for \$500 or less. National banks not in a reserve city can count all they have with us as reserve. Your early reply will oblige."

To this communication the Commercial National Bank replied on February 18, 1887, accepting the second of the above propositions. This letter of acceptance was written upon one of the printed letter-heads which complainant was in the habit of using in its general business intercourse with correspondents, relating to paper received or transmitted for collection; the printed portions of the letter being in the following form:

"COMMERCIAL NATIONAL BANK OF PENNSYLVANIA.

"PHILADELPHIA, ——— 188—.

"To ——— *National Bank* ———.

"Yours of ——— inst. is received, with inclosures as stated.

"Respectfully,

—————,
"For Cashier.

"I inclose for collection, ———; for credit, ———."

Along with this letter of acceptance complainant transmitted certain sight drafts or checks to the amount of \$2,007.55, indorsed for collection for Commercial National Bank, which constituted the first dealings or transactions between the two banking associations. Upon the receipt of complainant's acceptance of its said second proposition the Fidelity National Bank caused to be prepared and forwarded to the Commercial National Bank a stamp to be used by it in indorsing paper transmitted for collection, under and in pursuance of the contract and agreement then entered into between the two banks. The impression or indorsement made by said stamp was this:

"Pay Fidelity Natl. Bank of Cincinnati, O., for collection for Commercial Natl. Bank of Philadelphia.
E. P. GRAHAM, Cashier."

Commencing with its letter of acceptance of said second proposition, complainant continued to forward to the Fidelity National Bank, for collection, commercial paper, consisting of checks, drafts, and promissory notes, payable in the designated territory either at sight or on demand, or at a certain time after date or after demand, until June 21, 1887,

when the Fidelity National Bank, having become insolvent, was closed by the comptroller of the currency, and soon thereafter defendant was appointed receiver of its assets, and its charter was forfeited. Upon all the paper which complainant transmitted to the Fidelity National Bank for collection under the contract formed by the acceptance of said second proposition, there was placed by the use of the stamp furnished by the Fidelity National Bank the above special indorsement:

"Pay Fidelity Natl. Bank of Cincinnati, O., for collection for Commercial Natl. Bank of Philadelphia. E. P. GRAHAM, Cashier."

At the date of its failure and suspension, the Fidelity National Bank had not accounted for paper so indorsed and transmitted by complainant between the 4th and 20th June, 1887, to the amount of \$16,000 or \$17,000. There is no dispute as to the items making up said amount, or as to the fact that each of said items were duly received by said Fidelity Bank, and have, upon each item or piece of paper, the special indorsement aforesaid. It was not understood or intended by either the transmitting or the receiving bank that the title to the paper sent forward for collection should pass to or be vested in the Fidelity Bank; on the contrary, the agreement and understanding between them contemplated (what was expressed by the proposition made and accepted, and the indorsement placed on the paper) that the title to all such paper should be and remain in the complainant, who neither opened or intended to open any deposit account with the Fidelity National Bank. Previous to this special arrangement entered into between them, they had had no business connection or transactions, and kept no accounts with each other. All the paper forwarded by complainant between the 4th and 20th June, the proceeds of which are involved in this controversy, was transmitted in letters having the printed form of letter-heads, as above indicated; and in conformity with the general usage and course of business between banks occupying towards each other such relation as the contract in question created, or sending and receiving commercial paper for collection, a distinction was made between such paper as was payable at sight or on demand, and such as was payable at a certain day, after date or after demand. The former were designated as "cash items," and the latter as "time paper." The course of business between the two banks, and the method of keeping their accounts with each other, were as follows: When "cash items" were transmitted by complainant to the Fidelity National Bank, including these embraced in the present controversy, they were entered as of the date of their transmission on the foreign cash item book of the former, and from said book such entries were posted into the general account of the Fidelity Bank on complainant's books, as of such date; and, when such "cash items" were received by the Fidelity National Bank, it credited the same on its books to the complainant as of the date received, and charged the same to its correspondents to whom such "cash items" were sent by it for actual collection. If such "cash items" were not paid on presentation, the Fidelity National Bank would charge them back to complainant, and re-

turn them, whereupon complainant would credit the Fidelity Bank with the same upon the account which it kept against the latter. When the complainant transmitted "time items," or papers including that covered by this suit, the same were entered on complainant's foreign collection register as of the date of transmission, and were not entered upon the general account of the Fidelity National Bank, upon the books of the Commercial National Bank, until advice was received from said Fidelity Bank that such time items had been collected. The Fidelity National Bank neither credited nor remitted complainant such time items until it had received advice from its correspondents of their payment. The books of the Fidelity National Bank show to whom it sent all the paper, both "cash" and "time items," for collection, and when the same was collected by its correspondents, with all or most of whom it had current accounts showing balances in favor of or against said Fidelity Bank from day to day, and at the time of its suspension. Up to June 4, 1887, the Fidelity National Bank, in pursuance of, and in compliance with, its contract and agreement, made remittances with complainant on the 1st, 11th, and 21st of each month of collections made up to the date of each remittance, accompanying the same with a statement of the several collections made and included in such remittance. Such statements designated and identified the separate items of paper which had been collected. Such remittances, together with any and all such cash items as were not paid on presentation, were, by the Fidelity Bank, charged back against the complainant on the books of the former, and were credited to the Fidelity on the books of the complainant. Under date of May 25, 1887, the complainant's cashier, E. P. Graham, wrote the cashier of the Fidelity Bank as follows:

"DEAR SIR: We do not wish to complain, but would like to understand why your remittances of May 21st only included items sent you up to May 14th, and received by you on the 16th. We have to explain these things to our depositors, and wish to act intelligently on the subject. Yours, etc.

"_____."

To this communication the Fidelity National Bank, through E. L. Harper, vice-president, returned the following reply:

"GENTLEMEN: We collect at par, and include in our remittances everything collected to date."

The complainant made no objection to this construction of its undertaking of the Fidelity National Bank, but acquiesced therein, and continued to transmit paper for collection under the contract as thus interpreted, such paper being charged and credited as already stated.

On the foregoing statement of facts three leading questions are presented for consideration and determination: *First*, what, under their contract and course of business, was the relation created between the two banks in respect to the commercial paper which complainant sent to the Fidelity Bank for collection? *Second*, what, if any, change or modification of that relation was made or effected as to the proceeds of such paper after actual collection thereof by the Fidelity National Bank, or its correspondents? And, *third*, how far, or to what extent, can complainant

follow and impress upon the proceeds of such paper a trust such as will entitle it to a recovery out of funds in the hands of the receiver?

For the complainant it is insisted that the relation established by the contract, and the indorsement placed upon the paper transmitted for collection, was only that of principal and agent; that the title to the paper and to the proceeds thereof never passed to the Fidelity National Bank, but remained in itself; and that the Fidelity National Bank having, as such agent, collected its paper, and failed to account for the proceeds, the amount thereof so received constituted a trust fund which complainant may rightfully follow, and recover in full out of the general assets of the Fidelity Bank which have or may come into the hands of the defendant as the receiver of the same. The defendant controverts those propositions, and claims that the agreement and course of dealings established between the two banks no other relation than that of creditor and debtor; that in respect to sight or demand paper, designated as "cash items," which complainant, at the date of its transmission, charged up to the Fidelity National Bank, and which the latter, on receipt thereof, credited to the complainant, such relation of creditor and debtor arose when such paper was received by the Fidelity Bank, and credited on its books to the complainant; that in respect to paper payable on a certain day after date or after demand, called "time paper," the creditor and debtor relation between them commenced upon the actual collection of such paper, and when the Fidelity National Bank gave complainant credit for the same. It is further claimed for the defendant that the proceeds of all such paper received and collected were so mingled and blended by said Fidelity National Bank with its own funds and credits as to be undistinguishable or incapable of identification, and that for the amount of its debt or claim complainant can only share *pro rata* with other creditors of the Fidelity National Bank in the distribution of its assets in defendant's hands.

The facts and circumstances specially relied on by counsel for defendant to support their contention of a creditor and debtor relation between the two banks are—*First*, the printed words, "For collection, ———; for credit," found in the letter-heads used by complainant in transmitting paper to the Fidelity Bank; *secondly*, the act of the parties in debiting and crediting the "cash items" at the dates of transmission and receipt; and, *thirdly*, the statement made by complainant's cashier, Mr. E. P. Graham, that in thus charging the Fidelity Bank with such "cash items" he understood or intended that the latter thereupon became indebted to his bank. It is true that Mr. Graham in his deposition makes such a statement, but his meaning, as subsequently explained, was obviously that the Fidelity National Bank was chargeable with such items, and would, upon the collection thereof, be liable to complainant for the same. He hardly meant to be understood that upon his bank's making such a charge as paper transmitted, the property in such paper thereupon vested in the Fidelity Bank; for in other portions of his testimony he clearly states that it was not intended to transfer the paper to the collecting bank, or to open any deposit account with it. On the other

hand, the Fidelity National Bank did not understand or so interpret the contract as to consider itself absolutely bound to the complainant for all such paper as so much money deposited with it, or that by crediting the complainant with the amount thereof it becomes the owner of the paper. This is clearly shown in its reply to complainant's letter of May 25, 1887, where it is said: "We collect at par, and include in our remittances everything collected to date," (of remittances.)

This contemporaneous construction placed upon its undertaking by the Fidelity Bank is inconsistent with the idea that an actual, present indebtedness arose upon its receipt of such paper for the amount thereof, so that it thereupon became the owner of the same. The parties in this contract made no distinction between "time paper" and "cash items." The same indorsement, "Pay Fidelity National Bank of Cincinnati, Ohio, for collection, ———, for Commercial National Bank of Philadelphia, Pa.," was placed upon both classes of paper alike. In keeping their account with each other "cash items" were charged and credited before, and "time paper" after, collection. This difference in time of making such entries cannot, when considered in connection with the express agreement of the parties, operate to split up their contract, so as to make one rule for "cash items" and another for "time paper." There was no such understanding. But, in connection with the mode adopted of charging and crediting "cash items" transmitted and received, it is said by counsel for defendant that the Fidelity National Bank in some instances remitted to complainant on the dates designated before actual collection; that "cash items" received, say on the 10th of May, would, in some cases, be remitted on the 11th of May, before the same was collected by the Fidelity Bank. If any such instances actually occurred, (which does not appear satisfactorily to be the fact,) the act of remitting was wholly gratuitous on the part of the Fidelity Bank,—was not in accordance with its own interpretation of its undertaking, and could not have the effect of annulling or modifying the real contract of the parties. Nor can the printed words, "For collection, ———; for credit," found in letter-heads which complainant generally used in forwarding paper to the Fidelity Bank, control the express written contract of the two banks. That contract is found in the proposition made by the one and accepted by the other. The offer was to "collect at par all points west of Pennsylvania, and remit the 1st, 11th, and 21st of each month." In accepting that proposition complainant did not intend by the use of printed letter-heads containing the words, "For collection, ———; for credit," to change or modify the offer made by the Fidelity Bank, or to suggest a different arrangement; neither did the Fidelity Bank so understand complainant's letter of acceptance. The printed words, "For collection, ———; for credit," cannot now be reverted to for the purpose of showing a different contract or arrangement from that embraced in the proposition made and accepted. Any such operation and effect given to these printed words would do manifest violence to the clear intention of the parties, and violate the well-settled rule that printed words, such as, "For collection, ———; for credit," must be con-

trolled by the written proposition made and accepted, if the latter is inconsistent with the former. Ordinarily, when a customer sends commercial paper to a bank to credit the proceeds, and such credit is given when the paper is collected, if nothing more appears, the relation thereby created between the parties is that of creditor and debtor. The bank becomes the customer's debtor for the amount so credited, subject to payment on demand, but is under no duty or obligation to remit. In the present case the arrangement proposed in and by the second proposition involved the performance by the Fidelity National Bank of two agency duties and functions, viz., the undertaking to collect all papers payable west of Pennsylvania, sent it by complainant, and the obligation to remit the proceeds at or upon designated dates. In addition to the agency services contemplated, the special or restrictive indorsement (the form of which was made and suggested by the Fidelity Bank) placed upon the paper transmitted by complainant, would, in and of itself, have created the relation of principal and agent between the two banks.

We think this is settled by the rule laid down in *White v. Bank*, 102 U. S. 660, 661, and by the decisions of this court in *Winters v. Armstrong*, 37 Fed. Rep. 508, and *Montgomery Nat. Bank v. Armstrong*, 36 Fed. Rep. 59. In the latter case the indorsement which the transmitting bank placed upon the draft forwarded to the Fidelity Bank, was, in all essential particulars, the same as that employed by complainant, and this court held that the relation thereby created between the two banks was that of principal and agent; and the Montgomery National Bank, having traced the proceeds of its paper into the receiver's possession, was allowed to recover the same as a trust fund. In the *Montgomery Bank Case* there was, besides the special indorsement, a direction, contained in the letter of transmission, to remit the proceeds of the collection, without any specification as to the time of remitting. Here the dates for making remittances are specified. In the *Montgomery Bank Case* the law fixed or prescribed "a reasonable time" from date of collection in which the remittance by the agent should be made. Here the parties have in advance agreed upon and designated the time or times for remitting. This difference is insufficient to distinguish the two cases. But the question is put beyond all doubt, if, as we may properly do, we read into the restrictive indorsement which complainant placed upon all the paper it transmitted the special contract of the parties, made by complainant's acceptance of said second proposition. It would then stand thus: "Pay to the Fidelity Natl. Bank for collection for Commercial Natl. Bank of Philadelphia, Pa. This paper is to be collected at par, and the proceeds remitted to the Commercial National Bank on either the 1st, 11th, or 21st days of the month next after day of collection, without exchange." That such an indorsement as this would make the receiving bank the agent of the transmitting bank admits of little or no debate. The contract of the parties, taken in connection with the special indorsement agreed upon by both, renders it clear, both upon principal and authority, that, so far as concerns the paper in question, the relation between complainant and the Fidelity

National Bank was not that of creditor and debtor, but that of principal and agent.

The next question presented is, did they occupy any other or different relation to each other as to the proceeds of such paper after actual collection thereof by the agent bank or by its subagent? The agency relation being established as to the paper, the money received thereon should stand upon the same footing, and be held in the same capacity, by the collecting bank. The relation of principal and agent as to the proceeds of such paper could not be changed to that of creditor and debtor without the consent or concurrence, express or implied, of both parties. The agent certainly could not, by an act of his own, divest himself of his fiduciary character in respect to the proceeds of paper he had collected as agent. His method of keeping his accounts with his principal would not terminate his agency relation, or convert him into a mere debtor, without the assent, express or implied, of his principal. In the present case there was no intention, express or fairly to be implied, that the parties considered the proceeds of the paper as standing upon a different footing from the paper itself. The accounts which they mutually kept of their business were properly principal and agency accounts, as distinguished from creditor and debtor accounts. They were kept in the usual way banks keep their collection accounts. It was not the understanding of either (certainly not of complainant) that any creditor or debtor relation as such was to be credited in respect to the proceeds of paper sent out for collection. The first proposition submitted by the Fidelity National Bank perhaps contemplated a creditor and debtor connection, but the second, third, and fourth upon their face did not. Aside from the contract embodied in the accepted proposition, the plain meaning of the special indorsement used is that the Fidelity National Bank was to collect the paper and receive the proceeds "for account" of the complainant, and such proceeds were to be remitted on certain days next after collection. We think it clear that the principal and agency relation created as to the paper continued as to the proceeds thereof. Such being the relations of the two banks, the remaining question is how far, or to what extent, can complainant follow and impress upon the proceeds of its paper a trust as against the funds in the hands of the defendant as receiver of the Fidelity National Bank's assets? When an agent, or one occupying a fiduciary position, converts trust property or moneys to his own use, or improperly invests the same in other credits or securities, two remedies are open to the principal. He may elect to treat such agent as his debtor for the amount, or he may follow his property or funds, so long as the same can be traced and identified, until they reach a *bona fide* holder thereof without notice of his right, and impress upon them, either in their original or substituted form, a trust. The complainant seeks the latter remedy, and, through its counsel, claims that a trust should be established in its favor against all the assets of the Fidelity Bank in the possession of defendant, without imposing upon it the duty of tracing its funds into the receiver's hands, because such funds, whether actually received by the defendant as receiver or not,

have gone to swell the estate or assets of said Fidelity National Bank. Some cases are cited which seem to support this position, but they are not sound in principle, nor in harmony with the decided weight of authority. In seeking to follow and impress a trust character upon funds which an agent has misapplied, it is incumbent upon the principal to clearly trace such funds into the hands of the party against whom the relief is sought; and, so long as the trust fund or property, in either its original or substituted form, can be traced and identified, it may be followed and recovered by the true owner, provided it has not come into the possession of some *bona fide* holder for value without notice. This right of the principal "only ceases when the means of ascertainment fails," or when his property or fund has reached a *bona fide* holder for value, and without notice of the trust.

It is not deemed necessary to review the numerous authorities on this question. The rule is now well settled by repeated decisions both of the state and federal courts, which have followed and applied the principle laid down by Lord ELLENBOROUGH in *Taylor v. Plumer*, 3 Maule & S. 562. The leading cases in this country are here simply referred to: *Overseers of the Poor v. Bank*, 2 Grat. 544; *Whitley v. Foy*, 6 Jones, Eq. 34; *Thompson v. Perkins*, 3 Mason, 232; *Kip v. Bank*, 10 Johns. 63; *Van Alen v. Bank*, 52 N. Y. 1; *Bank v. King*, 57 Pa. St. 202; *Cook v. Tullis*, 18 Wall. 332; *Schuler v. Bank*, 27 Fed. Rep. 424; *Bank v. Insurance Co.*, 104 U. S. 54; *Winters v. Armstrong*, and *Montgomery Nat. Bank v. Armstrong*, heretofore decided by this court. Those authorities impose upon complainant the duty of tracing the funds it seeks to have impressed with a trust character into the defendant's possession, either in their original or in some substituted form, and the burden of identification is imposed upon all owners seeking to follow their property or its proceeds. No well-considered case has gone to the extent of holding that, when an agent converts or misappropriates his principal's property or funds, and thereafter fails, his general estate will be impressed with a trust for the reimbursement of such principal, on the ground that such estate has been benefited, and to an equal amount, by the agent's breach of duty. Every creditor could rest a like claim to priority of satisfaction on the same ground. The right of the owner to follow and recover his property rests upon a principle altogether different. In the present case the complainant, upon the doctrine of the cases cited, can only recover from the defendant such portions of the proceeds of its paper as it can trace into the hands of the receiver, either in their original or in some substituted form. The Fidelity National Bank having debit and credit balances with its numerous subagents or correspondents, who made the actual collection of complainant's paper, this court, upon the preliminary hearing of the cause, directed a reference to a special master to ascertain and report what funds derived from complainant's paper had come into the defendant's possession as receiver. The special master made his first report in the premises, which showed that complainant's said funds were mostly collected by subagents of the Fidelity Bank; that such subagents, having mutual accounts with the Fidelity National

Bank, credited the latter with the amount of such collection, and that at the date of the Fidelity Bank's suspension it had credit balances with some and debit balances with other of such subagents. This still left the fact sought to be ascertained in some doubt, and the court thereupon directed the special master to make an amended and supplemental report, and show what portion of the paper transmitted by complainant to the Fidelity National Bank between the 4th and 20th June, inclusive, was collected by correspondents of said Fidelity Bank, and credited to the latter; and in what cases the accounts between said Fidelity Bank and said correspondents exhibited a continuous balance due the former from the latter down to the date of the Fidelity Bank's failure, as large or larger than the amount of the proceeds of complainant's said paper so collected and credited by said correspondents, respectively, to said Fidelity Bank, and in what instances, and to what amounts, such balances so due from said correspondents at the time of the Fidelity Bank's suspension were subsequently paid over to and received by the defendant. The special master filed his amended report on the 27th of May, 1889, showing that the defendant had, subsequent to the suspension of the Fidelity Bank, received from said correspondents the proceeds of complainant's said paper to the amount of \$7,209.59. Under the authorities the complainant could have reached and subjected those credits in the hands of said correspondents, which were made up by the proceeds of its paper. It can still follow the same in the hands of the defendant, to whose possession the funds belonging to complainant are thus clearly traced to the extent of \$7,209.59.

Various exceptions are taken to the master's original and amended reports. They need not be noticed or considered in detail. In the judgment of the court the findings and conclusions of the special master are clearly sustained by the evidence, and the exceptions are overruled, and said amended report of May 27, 1889, is found to be correct, and is confirmed. A decree will be accordingly entered for complainant, directing the defendant to pay over to it or its counsel of record said sum of \$7,209.59, and such dividend as he may hereafter receive on the sum of \$1,577.89, collected by the Fifth National Bank of St. Louis on complainant's said paper, and credited to the Fidelity Bank. Each party will pay half the costs herein, including the fee of the special master, which is fixed by the court at the sum of \$150.

MARTIN *v.* HOUSE *et al.*

(Circuit Court, E. D. Arkansas. June, 1888.)

UNITED STATES—PUBLIC LANDS—JURISDICTION.

Where land has been sold to the United States government, and jurisdiction over the same has been ceded to it by the state legislature, reserving the right to serve personal process thereon, no process issuing out of a state court upon a judgment lien to which the land was subject at the time of sale can affect the title thereto.

At Law. Action to recover land.

N. M. & G. B. Rose and *J. W. Martin*, for plaintiff.

J. W. House, for defendants.

BREWER, J. This is an action brought to recover possession of the south half of block 98, in the city of Little Rock, the same being the ground on which is situated the post-office building. Under the practice which obtains in this state, exceptions were filed to the deeds and other documentary evidence exhibited by plaintiff, and relied on as evidences of title. One matter only shall I notice, for that is fatal to plaintiff's right to recover.

On the 15th of May, 1874, one M. W. Benjamin, who had theretofore been the owner of the property, made a final conveyance to the United States. On the 4th of April, 1874, J. W. Martin recovered a judgment in the Pulaski circuit court against said Benjamin. Execution was issued on that judgment in March, 1875, this property levied on and sold to plaintiff. On June 7, 1872, the congress of the United States passed an act as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the secretary of the treasury be, and he is hereby, authorized and directed to purchase a site for, and cause to be constructed, a suitable building, with a fire-proof vault extending to each story, at the city of Little Rock, in the state of Arkansas, for the accommodation of the United States circuit and district courts, post-office, internal revenue, and other government offices, and for this purpose there is hereby appropriated out of any money in the treasury not otherwise appropriated the sum of one hundred thousand dollars, to be expended under the direction of the secretary of the treasury, who shall cause proper plans and estimates to be made, so that no expenditure shall be made or authorized for the full completion of said building and payment for the site thereof beyond the amount herein appropriated: provided, that no part of the sum herein appropriated shall be used or expended until a valid title to the site of said building shall be vested in the United States, and until the state of Arkansas shall duly release and relinquish its jurisdiction over the same, and its right to tax said site, and the property which may be thereon, during the time the United States shall be or remain the owner thereof. Approved June 7, 1872."

The legislature of Arkansas, on the 21st day of February, 1873, passed the following act, to-wit:

"The state of Arkansas hereby consents to the purchase by the United States of a site for public buildings, * * * and hereby cedes and grants

jurisdiction to the United States over any lot or lots, parcel, or block of ground within the corporate limits of the city of Little Rock, not exceeding in area three hundred (300) feet square, which shall or may be purchased by the United States as a site for a building for the accommodation of the United States circuit and district courts, post-office, internal revenue, and other government offices, under the act of congress approved June 7, 1872; and the said state hereby releases and relinquishes her right to tax said site, and all improvements which may be thereon, during the time the United States shall be and remain the owner thereof: provided, that this grant of jurisdiction shall not prevent the execution of any process of this state, civil or criminal, on any person who may be on said premises."

The effect of these two acts was to vest exclusive jurisdiction over this tract of ground in the United States government, and this by virtue of section 8, art. 1, of the United States constitution. Now, at the time the cession of jurisdiction became operative and final, to-wit, on May 15, 1874, the government received a good title, as well as exclusive jurisdiction. True, the property was subject to a judgment lien, and, if the property had remained in the territorial jurisdiction of the state of Arkansas, this judgment lien might have ripened, through proceedings in the state courts, into a perfect title; but after the cession of jurisdiction the power of the Arkansas state courts over the property ceased. No process could issue out of any state court to disturb the title or affect the property. I do not mean to say that the cession of jurisdiction would destroy the lien, but it did compel the enforcement of any rights which the judgment creditor had by proceedings in the federal courts. The reservation as to service of process is as expressed to process which is purely personal, and therefore, *ex vi termini*, excludes process, mesne or final, touching property, real or personal. This seems to be the general *consensus* of opinion, as expressed in the various cases cited by the learned district attorney in his brief. The most authoritative case cited by him is that of *Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. Rep. 995, from which I make this quotation:

"When the title is acquired by purchase, by consent of the legislatures of the states, the federal jurisdiction is exclusive of all state authority. This follows from the declaration of the constitution that congress shall have 'like authority' over such places as it has over the district which is the seat of government; that is, the power of 'exclusive legislation in all cases whatsoever.' Broader or clearer language could not be used to exclude all other authority than that of congress; and that no other authority can be exercised over them has been the uniform opinion of federal and state tribunals, and of the attorneys general. The reservation which has usually accompanied the consent of the states that civil and criminal process of the state courts may be served in the places purchased, is not considered as interfering in any respect with the supremacy of the United States over them, but is admitted to prevent them from becoming an asylum for fugitives from justice; and congress, by statute passed in 1795, declared that cessions from the states of the jurisdiction of places where light-houses, beacons, buoys, or public piers were or might be erected, with such reservations, should be deemed sufficient for the support and erection of such structures, and, if no such reservation had been made, or in future cessions for those purposes should be omitted, civil and criminal process, issued under the authority of the state or of the United States, might be served and executed within them. 1 St. 426, c. 40."

Several other cases are noticed by the court in subsequent portions of the opinion. In view of the decision of the supreme court in that case, further discussion by me would seem superfluous. The exceptions will be sustained.

UNITED STATES *v.* CUDDY.

(*District Court, S. D. California.* August 26, 1889.)

PERJURY—INDICTMENT.

An indictment for perjury which charges that defendant took an oath before Judge R. in the United States district court, in open court, which oath was administered by the duly-authorized clerk, who had authority to administer the oath, in a matter then pending, that he would tell the truth, and that he did willfully and corruptly swear to material matter which is set out in the indictment, is sufficient under Rev. St. U. S. § 5392, declaring such a person swearing to any material matter which he does not believe to be true to be guilty of perjury, and section 5396, providing that it shall be sufficient to set forth the substance of the offense charged, and by what court, and before whom the oath was taken, with proper averments to falsify the matter wherein the perjury is assigned.

On indictment for perjury.

A. W. Hutton, U. S. Atty.

Ross, J. The question in this case is as to the sufficiency of the indictment, which charges that defendant, at a certain time and place, within the jurisdiction of this court—

"After having taken an oath before the Honorable E. M. Ross, judge of said court,—which oath was administered to the said Cuddy in open court on said day by E. H. Owen, the duly-appointed, qualified, and acting clerk of said court, he, the said Owen, as such, being then and there a person having competent authority to administer said oath,—that in the matter then and there pending, entitled 'In the Matter of the Contempt of Thomas J. Cuddy,' he would tell the truth, the whole truth, and nothing but the truth, then and there willfully, falsely, corruptly, and contrary to such oath, did state certain material matter in his testimony then and there adduced, in open court as aforesaid, at the time and in the manner aforesaid, being in words and substance as follows, to-wit: 'I didn't know that Mr. McGarvin, or any other gentleman in particular, would be called on this occasion. (Meaning the trial of the case of the United States vs. W. More Young, which was a criminal cause pending against the said Young in the said court, and set for trial for February 12, 1889.) I never dreamed that he was to be a jurymen, and don't now. (Meaning a juror in the cause last-above named.) I didn't know Mr. McGarvin was a juror. Didn't know anything about it. Didn't give the matter a thought. (Meaning that he, the said Cuddy, didn't know that the said McGarvin was a petit, to-wit, a term-trial, juror in said court at the time and at the place first above named.) I had no idea that Mr. McGarvin was one of them at this time. I didn't know anything about it.' (Meaning, by the words 'one of them,' one of the term-trial jurors duly impaneled and sworn in the said court, as aforesaid.) Whereas, in truth and in fact, the said Thomas J. Cuddy did know that the said Robert McGarvin was a petit, to-wit, a term-

trial, juror duly impaneled and sworn in said court, at all the times hereinbefore recited; and so the jurors aforesaid, upon their oath aforesaid, do say that the said Thomas J. Cuddy, on the said 13th day of February, in the year of our Lord one thousand eight hundred and eighty-nine, in the said city of Los Angeles, county and state and district aforesaid, in the United States district court within and for the district of California, in open court as aforesaid, before the said E. H. Owen, being then and there a competent person to administer said oath, the laws of the United States authorizing said oath to be administered in said matter, by the said Thomas J. Cuddy's own act and consent, in manner and form as aforesaid, did commit willful and corrupt perjury."

The United States statute defining perjury is as follows:

"Every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished" in a prescribed way. Rev. St. § 5392.

And section 5396 of the Revised Statutes provides that—

"In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

The last section is in substance the same as the enactment of 23 Geo. II. c. 11, which was designed to do away with the needless prolixity and precision required by the statute of 5 Eliz. c. 9, which oftentimes resulted in the escape of those guilty of the crime of perjury. The averments in a case of this character are, as said by Mr. Bishop, necessarily of two classes,—those which disclose a foundation for the commission of the offense commonly called inducement, and those which charge the offense itself. The latter, being that whereof the defendant is accused, must be direct and specific; but the former may be charged in general terms. 2 Bish. Crim. Proc. § 901 *et seq.* But, while the matter of inducement may be generally stated, the allegations respecting it must be sufficient to show that the oath was taken before a competent tribunal, officer, or person, and in a case in which the laws of the United States authorizes the oath to be taken. Where, as in the present case, the false swearing is alleged to have been committed in a matter or proceeding in open court, the allegations must be sufficient to show that the matter or proceeding was one in which the court was competent to act. To hold otherwise would be to hold that false swearing, in a matter or proceeding of which the court had no jurisdiction, constitutes perjury, which cannot be affirmed. 2 Bish. Crim. Law, § 1020; 2 Whart. Crim. Law, § 1288

et seq.; 2 Bish. Crim. Proc. §§ 905, 910, and numerous cases cited in the note to the case of *State v. Shupe*, 85 Amer Dec. 485.

Now, looking at the indictment, it is seen that it charges that at a certain named time and place, within the jurisdiction of this court, the defendant took an oath in the United States district court—which oath was administered to him in open court by E. H. Owen, the duly-appointed, qualified, and acting clerk of said court, and who was then possessed of competent authority to administer it—that in the matter then pending in said court entitled “In the Matter of the Contempt of Thomas J. Cuddy,” he would tell the truth, the whole truth, and nothing but the truth, then and there willfully, falsely, corruptly, and contrary to such oath, did state certain material matter in his testimony then and there adduced, which is specifically set out in the indictment. The materiality of the testimony is sufficiently alleged, and the allegation falsifying the alleged material matter is also sufficient. I see no force in the suggestion that there is no allegation that defendant swore falsely to a material matter which he did not believe to be true. The allegation is that he willfully and corruptly swore to material matter which he knew to be false. He could not believe to be true that which he knew to be false. If there was nothing further in the indictment to show that the matter in which the alleged false swearing was committed, was one of which the court had jurisdiction, than the allegation that the alleged false testimony was given in a matter then pending in the district court, entitled “In the Matter of the Contempt of Thomas J. Cuddy,” I would be inclined to think the indictment fatally defective; but the indictment does further aver that the laws of the United States authorized said oath to be administered in said matter. Since all of this, as has been seen, is matter of inducement, and may be stated generally, and since the court must have jurisdiction over a matter pending therein in which the laws of the United States authorizes an oath to be administered, I am of opinion that the indictment does sufficiently show that the court had jurisdiction of the matter in which the perjury is alleged to have been committed. Demurrer overruled.

SUN VAPOR STREET LIGHT CO. *v.* CITY OF CEDAR RAPIDS.

(Circuit Court, N. D. Iowa, E. D. August 22, 1889.)

INFRINGEMENT OF PATENTS FOR INVENTIONS—PLEADING.

Complainant alleged that it was the owner of certain letters patent for improvements in supplying street lamps with oil, and that defendant city, in violation of these patents, was using street lamps with these improvements, and asked an injunction and accounting. Defendant in its answer, among other matters, set out an agreement with a third party to furnish the lamps, and to light and extinguish the same, for a fixed sum. *Heid.*, that this portion of the answer was pertinent to the issue, and, though it might not constitute a bar, should be considered in determining the relief to be granted.

In Equity. Bill to restrain infringement of letters patent.

Charles R. Miller, for complainant.

J. N. Whittam, for defendant.

SHIRAS, J. The bill filed in this cause charges that the complainant corporation is the owner, by assignment, of letters patent No. 222,856, issued to Henry S. Belden for an improvement in the "method and means of supplying street lamps with oil," and of letters patent No. 286,211, issued to Alfred L. Mack for an improvement in a "reservoir for burning fluids;" that the defendant corporation, in violation of complainant's rights, and in infringement of said letters patent, has caused to be made, and has in use upon the streets of said city of Cedar Rapids, a number of street lamps which in their construction embrace the improvements secured by said letters patent; that the defendant has been and is making, by the use of such lamps, large gains and profits, for which an accounting is prayed.

In the answer filed the defendant sets forth that there is in use upon its streets 175 gasoline lamps; that these lamps, and the posts upon which the lamps are placed, are owned by the Western Street Light Company; that by a written contract, set forth in full, between said defendant and said Western Street Light Company, the latter agrees to furnish said lamps and posts, to keep the same in good order, and to light and extinguish the same, for a certain sum per lamp, payable annually by the defendant. To so much of the answer as sets forth the agreement with the Western Street Light Company complainant excepts, upon the ground that the facts thus set forth do not meet the charge of infringement in the bill; that, if the lamps furnished under this written contract do in fact infringe upon the patents owned by complainants, the defendant is a participant in the wrong, and cannot evade responsibility for its acts by showing that the lamps are owned and furnished by another party.

Granting this to be true, still it does not follow that the exceptions should be sustained. The bill charges that the defendant has caused to be made, and is using upon its streets, a large number of lamps which infringe upon the patents owned by complainant, and that it is making large profits therefrom, of which discovery is prayed. In response to this demand the answer sets forth the facts touching the agreement with the Western Light Company, the ownership of the posts and lamps, and the price paid for the use thereof. In other words, discovery is made of the relation of the city to the lamps, of the interest of the city therein, and the price paid therefor. These are matters pertinent to the issues, and which must be considered in determining the relief to be granted, in case a decree goes for complainant. The fact that they may not constitute a bar to complainant's right of recovery does not render them immaterial, and they are properly set forth in the answer in response to complainant's demand for a discovery of the use made by defendant of lamps infringing upon the patents declared on, and of the profits derived therefrom. Exceptions are overruled.

BALL & SOCKET FASTENER CO. v. KRAETZER.

(Circuit Court, D. Massachusetts September 18, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—GLOVE-FASTENERS.

In letters patent No. 325,068, issued September 8, 1885, to Albert G. Mead for a metallic glove-fastener, the button-hole member of the device consists of "a hollow socket in combination with a rivet and button-head, whereby it is centrally attached to the fabric," the spring action being secured in the expansive socket. The button-head and socket features were known in the art, prior to the patent. *Held*, that such invention was confined to the form of the socket combined with an imperforated button-head, and was not infringed by letters patent issued to Edwin J. Kraetzer, the button-hole member of whose device consists of a socket with a tubular extension passing through the fabric and attached on the other side with a button-head, and a spring in the form of a split wire, capable of expansion and resting loosely in such socket.

2. SAME—CONSTRUCTION.

A patent cannot be held to embrace a device which was not mentioned by the patentee as a part of his invention, and which is not clearly shown to be a novelty and a substantial improvement.

In Equity. Bill for infringement of patents.

T. W. Clarke and F. P. Fish, for complainant.

J. R. Bennett and W. B. H. Dowse, for defendant.

COLT, J. This bill, as originally filed, alleged that the defendant infringed six letters patent. Five of these patents were granted to William S. Richardson, and numbered, respectively, 260,050, 300,508, 300,509, 300,510, 325,699, and one to Albert G. Mead, September 8, 1885, and numbered 325,688. Subsequently the complainant discontinued his suit as to Richardson's patents Nos. 260,050 and 325,699. The devices shown in these patents relate to metallic glove-fasteners, the general features of which consist in a button member attached to one flap of the garment, and a resilient button-hole member attached to the other flap. The defendant's fastener is called the "Kraetzer Fastener," and is made under certain patents issued to him. In the present suit we are only concerned with the button-hole member of the fastener. The spring which engages the button member of the Kraetzer fastener is a ring of wire split on one side so as to be capable of expansion. This spring ring is held loosely in a chamber composed of two pieces of metal, united around their edges, one of which has a tubular extension which passes through the fabric, and is engaged with the cap or button-head on the other side of the fabric. The spring chamber is on the under side of the fabric and the button-head or cap on the upper side, and the two are fastened together so as to hold the fabric between them by the upsetting of the tubular neck of the spring chamber on the upper side of the central opening of the cap. It is contended that when the spring action of the button-hole member is the socket itself, it is easily impaired, whereas the spring ring of the Kraetzer fastener rests loosely in the chamber, and that this enables it to be made of the best elastic material. I do not find the Kraetzer device in any of

the Richardson patents relied upon by the complainant. Indeed, from the admission of complainant's counsel, it may be said that the only serious question in this case relates to the Mead patent. It is strongly urged that the Kraetzer fastener infringes claims 6 and 7 of the Mead patent, which are as follows:

"(6) A member of a fastening device consisting of a hollow socket in combination with a rivet and button-head, whereby it is centrally attached to the fabric, substantially as set forth. (7) A member of a fastening device composed of a hollow socket, D, centrally attached to an eyelet, L, the latter resting upon and within an annular depression, G, formed in a concave collet or disk, E, substantially for purposes herein set forth."

In his specification Mead says:

"I consider my present invention embraces, first, the method of centrally securing the socket portion of the fastening to the article, whereby the open part or socket of said member is disposed upon the under side of the flap and secured by a rivet extending through the fabric. Thus, in permanently securing it to the latter, a suitable button-head or cap is employed upon the upper surface of the flap, and can be so formed and constructed as to form a button finish, a result much desired, since it gives the article an appearance exactly similar to an ordinary button, which is the most neat and tasty finish that can be employed in the class of articles of apparel to which such fastenings are usually attached; but, further, the whole device is thereby concealed and prevented from becoming caught and broken."

The socket of Mead is composed of a cup-shaped washer with curved wings. It is applied to the interior of the glove-flap, and it is secured to the exterior washer or button-head by a central rivet passing through a hole in the glove-flap. I do not understand that it is contended that either the cap or cup-shaped socket of Mead is new, or that an elastic mouth situated upon the under side of the flap, and secured by a button-head at the other side of the flap, was not known in the art prior to the Mead patent. The invention of Mead, it seems to me, must be limited to his form of socket combined with an imperforated button-head. The Kraetzer device does not contain the Mead socket, and therefore does not infringe the Mead patent.

The complainant seeks to extend what appears to me to be the legitimate scope of the Mead patent upon the theory that the spring-mouthed socket of Mead presses the leather upward into the button, and squeezes the leather against the inner surface of the button; that this feature, in connection with the fact that the hole in the flap need not be any larger than the diameter of the rivet, introduces an important element of strength which is found for the first time in the Mead device. There are several reasons why this theory does not impress me with the importance with which it does the complainant. In the first place, I am not satisfied upon the evidence that there is any great advantage in pressing the fabric up into the button head; in the second place, I think this feature was present in the prior Dowler English patent, although it is not exhibited in the drawings; and, thirdly, Mead himself does not seem to consider this feature of sufficient consequence to claim it as a part of his invention. Before the court should give such a broad construction to the Mead patent

as to include something not mentioned by the patentee as a part of his invention it should certainly clearly appear that the improvement was a substantial one, and that it is not found in any prior device. In this case I do not think the complainant has made out the charge of infringement, and it follows that the bill should be dismissed. Bill dismissed.

SIMONDS COUNTER MACHINERY CO. v. KNOX *et al.*

(Circuit Court, D. Massachusetts. August 31, 1889.)

1. JUDGMENT—RES ADJUDICATA.

In a third suit on letters patent, which have been assailed as invalid on account of prior public use, and have been twice sustained by the courts, the former decision will be followed where no new facts of a controlling character are introduced.

2. PATENTS FOR INVENTIONS—INFRINGEMENT.

Letters patent No. 147,288, dated February 10, 1874, and granted to Simonds and Emery for improvements in machinery for moulding counters for boots and shoes, claimed a combination of a divided mould and cams, which moulded the heel-counter by a pressure nearly at right angles to the surface of the leather. *Held* infringed by a machine made under a patent granted November 6, 1888, to G. A. Knox, by which the counter is pressed into shape by pressure nearly at right angles, by a spring-mould which is not divided, but is substantially the same as that of Simonds and Emery.

In Equity. Bill to enjoin infringement of patent.

W. A. Macleod, for complainant.

Livermore, Fish & Richardson, for defendants.

COLT, J. This suit is brought on letters patent No. 147,288, dated February 10, 1874, granted to Simonds and Emery for improvements in machinery for moulding counters for boots and shoes. The present hearing was upon motion for a preliminary injunction. The patent has been twice passed upon by the circuit court. In the suit of *Emery v. Cavanagh*, 17 Fed. Rep. 242, 27 Fed. Rep. 511, Judge SHIPMAN held that the patent was valid. The main ground of attack in that case was public use for more than two years prior to the application for a patent, and the court, upon examination of the evidence, found that the prior use of the machine was experimental. Subsequently suit was brought in this circuit by the present complainant against Lewis B. Russell, raising the same issues as in the *Cavanagh Case*, and Judge LOWELL, after hearing the arguments of counsel, and upon consideration of the case, granted an injunction *nisi*. In the present case, and for the third time, it is sought to invalidate this patent on the same ground of prior public use. The question raised under this issue is one of fact, and consequently the evidence is conflicting; and, where the circuit court has twice found for the patentees on this issue, the court should hesitate to reverse such finding, unless upon new evidence of a decisive and con-

trolling character. The evidence before the court in the prior suits is made a part of the present record, and, while the defendants have called several additional witnesses to this point, still, taking the evidence as a whole, it is substantially the same as in the other suits; at least no new facts of a controlling character have been brought forward by the defendants. I shall therefore follow the prior decisions of the court, and hold the patent valid.

It is suggested by defendants' counsel, in a careful review of the authorities, that the law on the question of what constitutes "public use" has been modified by the supreme court in the recent case of *Smith & Griggs Manuf'g Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122, and that under the rule there laid down the patent in suit is shown to be invalid. I do not understand, however, that the *Smith & Griggs Case* changed the doctrine of the law with reference to prior public use, or that it is in conflict with the former decisions of the same court on this point.

The second and remaining defense is non-infringement. Simonds and Emery appear to have been the first persons to set a heel-counter or stiffener for boots and shoes firmly into shape. In prior devices the moulding pressure at the open ends of the counter was exerted by the female die sliding along the leather. Simonds and Emery were the first to mould this part of the counter by a pressure nearly at right angles to the surface of the leather, by means of a divided die whose open ends approach each other and set the leather into the proper shape. The alleged infringing machine is made under a patent granted to George A. Knox, November 6, 1888. In this machine there is a spring-mould so formed that its open ends approach each other by means of cams, and compress the counter at nearly right angles to its surface. The Knox spring-mould is not divided, but in structure and operation it seems to me substantially the same, or the equivalent, of the Simonds and Emery, with the exception of the flange-turning device which is found in the latter. In the Knox machine the turning of the flange of the counter is performed by other mechanism. I am of opinion that there is found in the Knox machine the combinations described in claims 1 and 4 of the Simonds and Emery patent. These claims are as follows:

"(1) The combination of the divided mould, *i, i*, and form, *n*, substantially as described and shown."

"(4) In combination with mould, *i, i*, the cams, *a', a'*, substantially as described and shown."

In view of the advance made in the art by Simonds and Emery, and of prior adjudications, these claims should receive a fairly liberal construction. The prior patents upon machines for making horseshoes do not, I think, anticipate this invention. Motion granted.

PRINCE STEAM-SHIPING CO. v. LEHMAN *et al.*¹

(District Court, S. D. New York. September 4, 1889.)

1. SHIPPING—CHARTER-PARTY—PUBLIC POLICY.

A stipulation in a charter-party that "all disputes * * * arising on this charter-party, or on bills of lading signed thereunder, shall be settled at port of discharge only," is contrary to public policy, and void.

2. ADMIRALTY—PLEADING.

A hearing on an exception to a libel must be determined on the pleadings, and an affidavit on behalf of respondents cannot be considered.

In Admiralty. On exceptions to libel.

Butler, Stillman & Hubbard, for libellant.

R. D. Benedict, for respondents.

BENEDICT, J. This case comes before the court upon an exception to the libel. The suit is brought *in personam* against the respondents upon a charter-party, to recover freight money. A copy of the charter-party is annexed to the libel. The respondents served a general notice of appearance, and then excepted to the libel. The exception raises but one question, and that is whether this court has jurisdiction to entertain the action in view of a provision in the charter-party, set forth in the libel, which is as follows:

"It is further agreed that all disputes, if any, whether arising before or after shipment of cargo, and whether arising on this charter-party or on bills of lading signed thereunder, shall be settled at port of discharge only."

The libel shows Philadelphia to be the port of discharge.

The provision in the charter-party, upon which the respondents rely, is in legal effect an agreement ousting the jurisdiction of all courts, except those in the port of Philadelphia. Such agreements have repeatedly been held to be against public policy, and void. The provision being void, it makes no difference which party seeks to take advantage of it; being void, it is of no avail to either party. The exceptions must therefore be overruled.

An affidavit submitted on behalf of the respondents cannot be regarded. This is not the hearing of a motion to decline jurisdiction, addressed to the discretion of the court, but the hearing of an exception to the libel, and must be decided on the pleadings. Moreover, a motion to decline jurisdiction, addressed to the discretion of the court, based upon such a stipulation, could not prevail.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

SEXTON v. SEELYE *et al.*

(Circuit Court, E. D. Missouri, E. D. September 25, 1889.)

REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

A petition showed that plaintiff was the owner of certain bonds, of which the defendant S. had wrongfully obtained possession; that S. had recovered a judgment for their amount, and collected a portion of it; he assigned it to C., who obtained a judgment for the amount still unpaid, with an order charging it on certain lands; that the assignment from S. to C. was made with the intent to defraud the creditors of S., and that C. recovered the judgment in trust for S.; and prayed that the title of the second judgment might be divested out of S. and C. and vested in plaintiff, and for an accounting for the sums collected on the two judgments. *Held*, that the petition disclosed but a single cause of action against both defendants, and that the cause was not removable on the ground of a separable controversy.

On Motion to Remand.

Lee & Ellis, for complainant.

George H. Shields and *Eleneious Smith*, for defendants.

THAYER, J. This case was removed from the state court by defendant Chouteau, on the ground that as between himself and Sexton, the plaintiff, there is a separate controversy which is wholly between citizens of different states, and there is a motion by plaintiff to remand. It is settled by repeated adjudications of the supreme court that a right to remove a cause on the ground of a separable controversy therein only exists in that class of cases where the complaint discloses two or more separate causes of action; that the right of removal is to be tested by the case made by the plaintiff in his complaint, and, if that discloses only a single indivisible cause of action, the suit is not removable. *Telegraph Co. v. Brown*, 32 Fed. Rep. 338, and cases cited. It has also been held that separate defenses interposed by different defendants to a bill or petition, disclosing but a single cause of action, do not create separable controversies, within the meaning of the removal act; and that, when several defendants are sued jointly on a cause of action,—that is, either joint or several at the election of the pleader,—one of the defendants so sued cannot elect to treat the cause of action as severable as to him and remove it to the federal court. *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. Rep. 730; *Railroad Co. v. Ide*, 114 U. S. 52, 5 Sup. Ct. Rep. 735.

It is sufficient to say that the proposition so often decided by the supreme court, that a case must disclose two or more separable controversies to warrant its removal to the federal court on the ground on which this removal was taken, of necessity compels us to remand this case to the state court. The petition in the case shows that Sexton, the plaintiff, at one time was the owner of certain bonds, and being such owner that defendant Seelye wrongfully came into possession of the same and brought suit thereon in his own name, and obtained judgment in such suit on May 16, 1880, for a large amount, which judgment he, on the

same day, assigned to his co-defendant Chouteau; that Chouteau, after collecting about \$100,000 on the judgment, brought a second suit to enforce the payment of the residue of the judgment (amounting to some \$40,000) out of certain lands, on which the bonds then merged in the judgment had been, and were, a lien, and in such second suit recovered a second judgment for the unpaid portion of the first judgment, together with an order charging the second judgment as a lien on said lands, and directing their sale. It is averred in substance that the assignment of the first judgment by Seelye was to hinder, delay, and defraud his creditors, and was without consideration, and that the agreement between Seelye and Chouteau when the assignment was made, was that Chouteau should collect the judgment for Seelye's benefit, and turn over the proceeds to him. It is also averred that Chouteau knew that Seelye was not the owner of the bonds on which the judgment was obtained when the same was assigned to him, and further, that he knew that Seelye's purpose in assigning the judgment was to defraud the owner of the bonds out of his property; and that Chouteau has always held the original judgment as trustee for Seelye; and that Seelye has always directed what should be done in the way of collecting the judgment, etc. The prayer is that the title of Seelye and Chouteau to the second judgment may be divested out of them, and vested in the plaintiff, and that Chouteau and Seelye may be compelled to account for all sums collected on the two judgments. We think it is a proposition that admits of no controversy, that the complaint discloses but a single cause of action, and, that being so, the case is not removable.

The wrong complained of is that Seelye obtained possession of bonds belonging to plaintiff, and has undertaken to collect them, and appropriate the proceeds to his own use; and that the other defendant, with full knowledge of the scheme, has undertaken to aid, assist, and abet him in carrying it out, thereby making himself a joint wrong-doer. It would be difficult to make it appear in a stronger light than is done by the bill,—that both of the defendants are jointly and severally liable for the alleged wrong, and that they are jointly and severally liable to account for all that has been collected on the bonds, whether the collections were under the first judgment or the second. That being so, and plaintiff having elected to sue them jointly, the case does not disclose a separable controversy within the terms of the removal act. It is a single cause of action existing against two defendants jointly, which the bill discloses, and neither defendant can be permitted to remove the case on the ground that he might have been sued alone for the alleged wrong, as the plaintiff has not elected to so sue him. *Pirie v. Tvedt*, 115 U. S. 43, 5 Sup. Ct. Rep. 1034, 1161.

The motion to remand is sustained.

POLLITZ v. FARMERS' LOAN & TRUST CO. *et al.**(Circuit Court, S. D. New York. February 18, 1889.)*

FEDERAL COURTS—SERVICE ON NON-RESIDENT DEFENDANTS.

Act Cong. 1875, § 8, provides that when in any suit, commenced in any federal circuit court, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon, the title to real or personal property within the district where such suit is brought, one or more defendants are non-residents or cannot be found therein, or do not voluntarily appear, the court may make an order directing the absent defendants to appear, etc. Act 1887, amending the act of 1875, provides that "nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right * * * mentioned in section eight of the act * * * of which this act is an amendment." *Held*, that an action by an alien bondholder of a railroad company to restrain the trustee in a mortgage securing the bonds from paying over to the company, in fraud of plaintiff's rights, the proceeds of the sale of land which by the mortgage was set apart to create a sinking fund for the redemption of the bonds, was within the saving clause of the act of 1887, and when the action was commenced within the district of which the trustee was an inhabitant, and in which it had the fund, an order might issue to the company, a non-resident corporation, to appear and plead, etc.

In Equity. On motion to set aside order of service of summons.

Action by Carl Pollitz against the Farmers' Loan & Trust Company, the Oregon & California Railroad Company, and others, for an injunction. The plaintiff is an alien bondholder of bonds of the railroad company bearing date July 1, 1881, and payable 40 years after date, with interest payable semi-annually. The trust company, a New York corporation, is sole trustee in a mortgage of even date with the bonds, and made by the railroad company to secure them upon all its franchises and property, including land granted by the United States. Provision was made in the mortgage for a sinking fund for the redemption of the bonds, and for this purpose the proceeds of the land sales were pledged to the trustee. A part of the proceeds realized had been used for redeeming the bonds. The trust still has in its possession, within the district of New York, over \$175,000 unappropriated, and upwards of \$275,000 are due from the railroad company to the sinking fund. The railroad company, in 1885, defaulted in the payment of interest on the bonds, and no further payment of interest has been made. The bill asks to restrain the trust company from paying over to the railroad company, as it threatens to do, and thus putting beyond the court's jurisdiction, the amount it has on hand. Defendant railroad company, a non-resident of the district, moves to set aside the order for service on it.

Melville Eggleston, for complainant.

Chas. H. Tweed, (*James C. Curter*, of counsel,) for the railroad company.

LACOMBE, J. The authorities cited by the complainant sustain his contention that, at least as to so much of the bill as seeks to prevent the defendants from putting out of the jurisdiction of the court the fund and property now within it, the suit is within the saving clause of section 5

of the act of 1887. Upon the argument the statement was made that service of process was made in this district upon the vice-president of the Oregon & California Railroad Company. The moving papers, however, contain no such statement, and set forth no facts tending to show that the railroad corporation was not in fact "found" within the district. The motion is therefore denied, with leave to renew.

(June 12, 1889.)

LACOMBE, J. Two applications in this suit are now pending,—one to settle the terms of an injunction order restraining the Farmers' Loan & Trust Company from paying over certain moneys; and the other to set aside an order for a substituted service of the process upon the defendant the Oregon & California Railroad Company. As to the latter motion, it was decided in the memorandum of opinion filed February 18, 1889, that, "as to so much of the bill as seeks to prevent the defendants from putting out of the jurisdiction of the court funds and property now within it, the suit is within the saving clause of section 5 of the act of 1887." Further examination of the authorities leads me to adhere to the opinion then expressed. The authorities cited by the complainant in the argument on the present motion abundantly sustain the proposition that, although the language used in the section cited is permissive in form, it is in fact peremptory. The elaborate argument, therefore, which has been presented on behalf of the defendant as an appeal to the discretion of the court, cannot properly be considered on this motion, which must be denied. The application for a preliminary injunction having been made before the real party defendant in interest was brought into the case, and no one having been heard upon such application except the complainant and the Farmers' Loan & Trust Company, which latter corporation appeared as a mere stakeholder, the terms of such order will not be settled, nor the order handed down, until the defendant the Oregon & California Railroad shall have had a reasonable opportunity to be heard in opposition.

GREGORY v. SWIFT *et al.*

(Circuit Court, D. Massachusetts. September 20, 1889.)

1. NECESSARY PARTIES—BAILMENT.

In a suit for the proceeds of a note, alleged to have been disposed of by one of the defendants in violation of a contract, by which he had agreed to hold it "subject to the joint order and direction" of the named attorneys of the adverse claimants of the note, the contract having been made on abandonment of an arbitrator's award respecting the ownership of the note, such adverse claimants, and their respective attorneys, are necessary parties.

2. SAME.

In such case the rights of one of such adverse claimants, who is beyond the jurisdiction of the court, are involved to such a degree that equity rule 47 and Rev. St. U. S. § 737, providing that where persons, otherwise necessary

or proper parties, are beyond the jurisdiction of the court, the court may proceed to a decree not prejudicing the rights of such persons, without making them parties, are inapplicable, and no decree can be rendered until such adverse claimant is made a party.

In Equity. On demurrer to bill.

Bill by Charles A. Gregory against William C. N. Swift and John G. Stetson, to recover the proceeds of a note.

Equity rule No. 47 provides that—

"In all cases where * * * persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, * * * the court may in their discretion proceed in the cause without making such persons parties, and in such cases the decree shall be without prejudice to the rights of the absent parties."

Rev. St. U. S. § 737, provides that—

"Where there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district, * * * the court may entertain jurisdiction * * * of the suit between the parties who are properly before it; but the judgment or decree * * * shall not conclude or prejudice other parties; * * * and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit."

Francis A. Brooks, for complainant.

Russell Gray, for defendant Swift.

John G. Stetson, pro se.

COLT, J. The bill in this case is directed mainly against defendant Stetson, (the counsel for plaintiff admitting that defendant Swift was not made a party for the purpose of charging him with any liability to the plaintiff,) and it charges Stetson with having violated the following contract of bailment, with respect to the \$15,000 note mentioned therein:

"BOSTON, Dec. 24, 1886.

"Received of Thomas H. Talbot, Esq., as attorney for Mary H. Pike, executrix of Frederic A. Pike, and of Francis A. Brooks, Esq., as attorney of Charles A. Gregory, two notes of hand made or signed by W. C. N. Swift, of New Bedford, dated April 20, 1883,—one for \$15,000, on two years' time, and one for \$20,334.60, three years' time, payable to Charles F. Jones. Said notes are to be held by me, subject to the joint order and direction of the said Talbot and Brooks, and dealt with as they may jointly direct.

"JOHN G. STETSON."

The bill alleges that defendant Stetson, under certain orders of court which were irregular and contrary to law, parted with the possession of said note and filed it in an action at law of *Jones v. Swift*, pending in this court; that thereupon judgment was entered in said action at law, and the amount of said note or judgment was paid by said Swift to the clerk of the court, Stetson, who now claims to hold the same subject to the rights of the parties in the old equity cause, No. 2,170, of this complainant against Frederic A. Pike and others, originally pending in this

court, but which the bill alleges became abated, before the passage of the order referred to, by reason of the death of said Frederic A. Pike. The bill also alleges that on or before July 9, 1887, the complainant became the lawful owner of said \$15,000 note.

In the present bill there is incorporated a part of a certain bill brought in this court by this complainant against these defendants and Thomas H. Talbot, January 10, 1887. In that bill it is alleged that the matters in controversy between this complainant and Frederic A. Pike, respecting the ownership of these notes, were submitted to the Honorable E. R. Hoar as arbitrator; that, pending the submission, the said Pike died, having appointed his wife, Mary H. Pike, of Calais, Me., executrix of his will and residuary legatee of all his estate; that Mrs. Pike appeared before the arbitrator at the hearings by her counsel, Talbot; that the arbitrator, on November 30, 1886, delivered an award in writing which was favorable to the complainant. The bill further alleges as follows:

"That on the twenty-fourth day of December last, he [the complainant] was informed by the said Mary H. Pike, through her attorney and counselor, the said E. B. Harvey, that she had through him and by a letter addressed to the arbitrator undertaken to revoke the power of said arbitrator under said submission, and to thereby annul or vacate the award made by him as aforesaid; and immediately upon receiving such information he waited upon the said arbitrator through F. A. Brooks, his attorney, in company with Thomas H. Talbot, the attorney of the said Mary H. Pike, and the said Brooks received back from said arbitrator the award made by him as aforesaid, on the twentieth day of December, and the said Brooks and Talbot together received of said arbitrator the said two Swift notes and carried the same to John G. Stetson, Esq., to whom they intrusted the same, taking therefor his receipt in their joint names. That on the fourth of January current, in order to entitle himself to the sole and exclusive possession of said Swift notes, under the said award, he paid the note of \$2,437.50 running to C. H. Eaton, of Calais, in said award mentioned, to the said Thomas H. Talbot, and took and received from said Talbot the said Eaton note and now holds the same, by reason of which and of the award of the said arbitrator your orator became entitled to receive from the said Stetson the said Swift notes, and the said Mary H. Pike, executrix and residuary legatee under the will of the said F. A. Pike, deceased, and the said Talbot, as her agent or attorney, ceased to have any right to or in said Swift notes, or either of them, or any right to demand or receive the possession thereof from the said Stetson, under the terms of the receipt of said Stetson therefor given on the twenty-fourth day of December last."

The prayer of the bill as amended is as follows:

"And your orator prays that the money so paid by the defendant Swift into the hands of the defendant Stetson, as clerk of this court, in satisfaction of the said \$15,000 note, may be remanded to the custody of said Stetson in his individual capacity, as if no such orders, as above recited, had been passed, and in the place and stead of the said \$15,000 note, so surrendered by him, and filed with the papers in equity suit No. 2,170, in violation of the terms and provisions of the contract entered into by him with your orator as aforesaid, on the twenty-fourth day of December, 1886; and that the said Stetson may be ordered and decreed to pay over the proceeds of said note to your orator; and your orator prays for such other and further relief as he may be entitled to in the premises."

There is also a further prayer that, if the relief sought against Stetson be not granted, the defendant Swift may be ordered to pay the amount due on the said \$15,000 note.

The defendants demur to the bill on several grounds; I shall only consider one of them, namely, defect of parties. Under the contract of bailment, it appears that the real parties in interest were the plaintiff and Mary H. Pike, executrix, and that the notes were to be held by Stetson subject to the joint order or direction of their attorneys, Talbot and Brooks, and dealt with as they may jointly direct. Admitting the allegations of fact stated in the bill to be true, but not the conclusions of law drawn therefrom, as I am bound to do by the demurrer, I am satisfied that the bill is fatally defective for want of necessary parties. These allegations do not make out a case which entitles a party claiming under the contract of bailment to dispense with the other parties interested therein. The contract with Stetson was not entered into until after the proceedings before the arbitrator had terminated, as appears by the bill, and the facts alleged respecting the arbitration show the necessity of making Mrs. Pike a party to any proceeding respecting the Stetson receipt now sued upon. The receipt itself shows the necessity of making all those interested in any way parties to the bill. The defendant, according to the terms of this receipt, is liable to said Pike and Gregory jointly. By this bill Gregory claims certain rights under this receipt adverse to his co-obligee, and it follows that the co-obligee is a necessary party thereto. Again, by the terms of this receipt, the notes are held subject to the joint order of said Talbot and Brooks, and to be dealt with as they jointly direct. Under these circumstances, Stetson, as maker of this receipt, cannot recognize any claim to said notes which may be made by either Pike or Gregory, or both of them; but he holds the notes subject to the joint order and direction of both Talbot and Brooks. It seems to me that neither Gregory nor any other person can in equity set up and establish any claim by virtue of this receipt without making Brooks and Talbot parties. In other words, Gregory, Mrs. Pike, Talbot, Brooks, and Stetson are necessary parties to any bill brought on the receipt setting up any claim of ownership or control over these notes.

The point is raised by the complainant that Mrs. Pike being a non-resident it is impossible to make her a party, and that, therefore, under equity rule 47 and section 737 of the Revised Statutes, the court may proceed to an adjudication between the parties properly before it. It seems to me, however, that the above-mentioned parties to the agreement are so far necessary parties that rule 47 and section 737, as construed by the supreme court, cannot apply to this case.

In *Mallow v. Hinde*, 12 Wheat. 193, quoting from *Elmendorf v. Taylor*, 10 Wheat. 167, the court says:

"The rule which requires that all persons concerned in interest, however remotely, should be made parties to the suit, though applicable to most cases in the courts of the United States, is not applicable to all. In the exercise of its discretion, the court will require the plaintiff to do all in his power to bring every person concerned in interest before the court. But, if the case

may be completely decided as between the litigant parties, the circumstance that an interest exists in some other person whom the process of the court cannot reach, as if such party be the resident of some other state, ought not to prevent a decree upon its merits."

In *Shields v. Barrow*, 17 How. 139, the court points out three classes of parties to a bill in equity:

"They are: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."

The court further says:

"It remains true, notwithstanding the act of congress and the 47th rule, that a circuit court can make no decree affecting the rights of an absent person, and can make no decree between the parties before it, which so far involves or depends upon the rights of an absent person that complete and final justice cannot be done between the parties to the suit without affecting those rights."

In *Coiron v. Millaudon*, 19 How. 113, it is held that the fact that such persons are beyond the jurisdiction of the court is not a sufficient reason for omitting to make them parties, because neither the act of congress nor the 47th equity rule enables the circuit court to make a decree in a suit in the absence of a party whose rights must necessarily be affected by such decree. See, also, *Barney v. Baltimore City*, 6 Wall. 280. Demurrers sustained.

UNITED STATES EXP. CO. v. ALLEN, Comptroller, *et al.*

(Circuit Court, E. D. Tennessee. September 21, 1889.)

1. FEDERAL COURTS—JURISDICTION—TAXATION.

The federal courts have jurisdiction of suits involving the validity of a tax imposed by a state, alleged to be in violation of the United States constitution, without regard to the citizenship of the parties thereto.

2. SAME—UNCONSTITUTIONAL TAX—REMEDY.

The law of Tennessee providing that, in case of taxes alleged to be illegal, the remedy shall be to pay such taxes under protest, and then bring suit therefor, does not apply where the tax is alleged to be unconstitutional, as such a tax is void.

3. SAME.

Under act Cong. March 3, 1887, providing that no civil suit shall be brought in either the district or circuit court against any person by any original process in any other district than that whereof he is an inhabitant, except when jurisdiction is founded only on the fact that the action is between citizens of

different states, a suit to enjoin collection of a tax, on the ground that it violates the United States constitution, must be dismissed as to such defendants as are non-residents of the district in which it is brought.

4. CONSTITUTIONAL LAW—TAXATION—INTERSTATE COMMERCE.

Act Tenn. March 29, 1887, imposing a license tax upon express companies, is unconstitutional, as invading the exclusive power of congress to regulate interstate commerce, as against an express company engaged in interstate transportation.

5. SAME.

Act Tenn. April 8, 1889, providing that such tax shall be paid for transporting one or more packages between points within the state, the amount of such tax being regulated by the length of the company's lines, is, in effect, a tax on interstate business, and is unconstitutional.

In Equity. On bill for injunction.

Tracy, McFarland, Platt & Boardman, John M. Bright, R. L. Bright, and Russell & Daniels, for complainant.

W. G. M. Thomas and Joel Fort, for defendants.

KEY, J. The bill is filed in this case to enjoin the collection of a tax imposed upon complainant by the state, by the acts of 1887 and 1889, upon the ground that the tax is in violation of the constitution of the United States. At the threshold we are met with a motion by defendants to dismiss the suit for various reasons. It is insisted that there is not such diverse citizenship as to give this court jurisdiction. Diverse citizenship is one ground of jurisdiction in a federal court, but not the sole ground, by any means. Controversies as to the constitution and laws of the United States are of federal judicial cognizance as well, and the question in this case arises out of this branch of the court's jurisdiction, to which defendants' motion does not apply.

Another reason for the motion to dismiss is because the state of Tennessee has, by law, provided that the remedy in such cases as the one under consideration is to pay the taxes assessed under protest, and then bring suit to recover the same. This act of the legislature is constitutional unquestionably, but the case of *Poindexter v. Greenhow*, 114 U. S. 270, 5 Sup. Ct. Rep. 903, is decisive of the point made. Virginia had a law of like provisions with the Tennessee law, and objection was made that the money had not been paid and suit brought therefor. But the court held substantially that as Virginia had enacted a law making certain coupons receivable for taxes, and as these coupons had been tendered and refused, the provisions of the federal constitution against legislation impairing the obligations of contracts had been violated, and no payment of the tax could be required as a condition of bringing suit. An unconstitutional tax is a void tax, and no right or duty can inhere in or depend upon it. There was no prepayment of the tax, and suit thereafter in the Virginia case. It is true coupons had been tendered, but this was done not as compliance with the Virginia statute, or under its provisions, but it was done so that the tax-payer might comply with the terms of his contract with the state, and if the state refused to stand by its bargain, that he might find protection under the federal constitution. If, in the case in hand, the tax is unconstitutional, it is void. It confers

no right, imposes no duty, supports no obligation. Nothing can be predicated upon it.

The only other branch of defendant's motion that it is necessary to consider is that the suit should be dismissed as to defendant Allen, because the face of the bill shows that he is not a resident of this district. As to this the motion must be sustained. The act of congress, approved August 13, 1888, correcting the enrollment of the act of March 3, 1887, provides in section 1:

"No civil suit shall be brought before either of said courts [the district or circuit] against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant." 25 St. at Large, 434.

This suit is not founded on diverse citizenship, and does not fall under the last category of the clause quoted, but it does fall under the first, and the language is positive and peremptory. This leaves the case here as to the sheriff and his deputy, to whom the process for the collection of the tax came, and by whom it was levied, and whom it sought to enjoin.

The bill seeks to enjoin the collection of two taxes, or a tax imposed in two years, each for \$3,000. The legislature of Tennessee, by an act approved March 29, 1887, provided that the following taxes should be paid by express companies:

"In lieu of all other taxes, except *ad valorem* tax, if the lines are less than 100 miles long, per annum \$1,000. If the lines are over 100 miles long, per annum \$3,000."

The same authority, by an act approved April 8, 1889, provided that express companies should pay a tax, "in lieu of all other taxes except *ad valorem* tax, if the lines are less than 100 miles long, for one or more packages taken up at one point in this state and transported to another point in this state, per annum \$1,000. If the lines are more than 100 miles long, for one or more packages taken up at one point in this state and transported to another point in this state, per annum \$3,000." By this act it is made a misdemeanor, punishable by a fine and imprisonment, to conduct the express business without prepayment of the tax. In a case entitled *Com. v. Express Co.*, under an act of Kentucky similar in its provisions to the Tennessee law of 1887, the Louisville law and equity court, in an ably written opinion, held the act void because the tax was an infraction of the provision of the federal constitution in regard to interstate commerce. And the circuit court of the United States for the southern district of Mississippi, in *Express Co. v. Hemmingway*, ante, 60, takes a similar view in regard to a Mississippi statute of like import. The cases decided by the supreme court of the United States which favor or support a different view of this tax are *Osborne v. Mobile*, 16 Wall. 479, and *Wiggins Ferry Co. v. St. Louis*, 107 U. S. 365, 2 Sup. Ct. Rep. 257. But in *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. Rep. 1380, the supreme court overrules, substantially at least, these decisions. It says: "In view of the course of decisions which have been

made since that time, (1872,) it is very certain that such an ordinance would now be regarded as repugnant to the power conferred upon congress to regulate commerce among the several states." *Leloup v. Mobile*, *supra*, 647. This, though said of the *Osborne Case*, must in principle apply with equal force to the *Wiggins Ferry Case*. It seems to me that, under the line of decisions of our supreme court, the tax imposed upon the complainant by or under the act of 1887 was void, as repugnant to the constitutional authority given congress to regulate commerce between the states. It is, in no sense, a property or *ad valorem* tax. It is essentially a license, or privilege tax. There is no description of or limitation of the business. It makes no difference whether it be interstate or intrastate. If it be an express company, it is taxed. If it be a hundred miles long it must pay \$1,000. If more, it must pay \$3,000. Complainant is an instrumentality of interstate transportation. It does business through and between states, as well as within them, and cannot be so taxed.

The act of 1889, however, attempts to avoid the difficulty in which the act of 1887 is involved. It provides that the company may be taxed when it carries one or more packages from one point in the state to another point in the state. This is meant to be considered as a tax for the privilege of doing business within the state, and to escape being regarded as a tax on business between states. The tax may be avoided should no packages be borne from one point to another in this state. This tax, carried to its logical results, bears as hardly on the company as the other. If it confine its operations to an interstate business, it must still have its agents and offices at the various stations on its lines to receive and deliver its packages, so that the interstate business would be burdened with charges which otherwise would be divided between the two classes of business. The fact that the interstate business may be thus burdened does not necessarily invalidate the tax, perhaps. But is not this provision of the statute a mere device to fasten the tax upon the company? It is no exercise of the police power of the state. If the tax be paid, it makes not the slightest difference whether the packages taken up and carried and delivered between and at points in the state be one or a million. It is not a tax regulated by the amount of business. It is as much if one package be carried as if ten millions go. A package of a dime in value, carried five miles, may involve a license fee of \$1,000 or \$3,000, depending altogether on the length of the line of transportation used by the company. The length of the line used is the measure of the tax. This cannot be the standard. *Steamship Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. Rep. 1118. The supreme court says in *Leloup v. Mobile*, 127 U. S. 645, 8 Sup. Ct. Rep. 1380:

"Ordinary occupations are taxed in various ways, and, in most cases, legitimately taxed, but we fail to see how a state can tax a business occupation when it cannot tax the business itself. Of course, the exaction of a license tax as a condition of doing any particular business is a tax on the occupation; and the tax on the occupation of doing a business is surely a tax on the business."

And again at 648, in the same case, the court says:

"In our opinion such a construction of the constitution leads to the conclusion that no state has the right to lay a tax on interstate commerce in any form whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to congress."

So, under the tax law of the state of 1889, although the tax purports on its face to be for carrying on the express business within the state, yet, as already shown, the burden of the tax falls upon the interstate business, and amounts to a collection of the tax from that source to a great extent at least.

It follows from the views announced that an injunction may issue as prayed for, on complainant executing bond, with sufficient surety in the penalty of \$10,000, to satisfy such decree as may be finally rendered against it in the cause.

UNITED STATES *v.* AMERICAN BELL TEL. CO. *et al.*

(*Circuit Court, D. Massachusetts.* September 9, 1889.)

EQUITY—PLEADING—AMENDMENTS.

Under Rev. St. U. S. § 954, giving the federal courts power to permit parties to amend pleadings at any time, on such conditions as they may prescribe, a motion by one defendant in equity to withdraw an answer and file the same plea as is filed by its co-defendant, will be granted when not made for the purpose of setting up a merely technical defense, nor after evidence has been taken, and it is probable that it will be more convenient to try the issue raised by the plea first, and where a replication has been filed to the co-defendant's plea.

In Equity. On motion for leave to amend.

Charles S. Whitman, George A. Jenks, and Owen A. Galvin, for complainant.

Chauncey Smith, Elias Merwin, and James J. Storrow, for defendant American Bell Telephone Company.

COLT, J. In this case the defendant company has filed a general answer to the bill, and the defendant Bell has filed a plea and answer in support thereof. The defendant company now asks leave to withdraw its answer, and to file the same plea and answer in support thereof which has been filed by Bell.

By section 954 of the Revised Statutes, the courts of the United States may, at any time, permit either of the parties to amend any defect in the process or pleadings, upon such conditions as they may in their discretion or by rule prescribe. The plenary power of the courts of the United States with respect to amendment of pleadings, under the acts of

congress, is recognized in *Eberly v. Moore*, 24 How. 147. In *Hardin v. Boyd*, 113 U. S. 756, 5 Sup. Ct. Rep. 771, the supreme court states the rule as follows:

"In reference to amendments of equity pleadings the courts have found it impracticable to lay down a rule that would cover all cases. This allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. Undoubtedly, great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side. And an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs."

It thus appears that the allowance of amendments of equity pleadings is a question of judicial discretion, depending largely on the special circumstances of each case. The present motion is not open to the objection of introducing a new defense on a new state of facts, or of changing the substance of the case made by the bill. It is not made for the purpose of setting up a merely technical defense; nor after the litigation has continued, and evidence has been taken; nor does it seem to me that granting it would cause inconvenience or expense to the other side. Upon this last point it is urged by the defendants that it will be more convenient and less expensive to first try the question of fraud which is raised by the plea, and which may dispose of the case. The counsel for the defendants further say that the general answer was filed on behalf of the Bell Company under the misapprehension that the equity rules of this court were the same as prevail in the Massachusetts state court, and that, but for this misapprehension, the same plea and answer in support thereof would have been filed on behalf of the defendant company as was filed by the defendant Bell.

Although the question of priority of invention is raised by the bill, the defendants insist that, when this case was before the supreme court on demurrer (128 U. S. 315, 9 Sup. Ct. Rep. 90,) that court first directed its attention to the question whether the bill contained sufficient allegations of fraud, and that the court refused to go a step beyond the position that the government had the power to bring suit to annul a patent in the event that it was obtained by fraud. In view of this opinion of the supreme court it is urged that the issue of fraud should be first tried as to both of the defendants. With the decision of the supreme court before me, I think there are strong equitable grounds for granting this motion. Limiting the case to the question of fraud may confine the testimony within comparatively narrow bounds, whereas the question of priority alone involves a laborious and extensive examination. If there is an issue in the case which may dispose of it without going into that elaborate investigation, it seems to me that the discretion of the court should be exercised in favor of such a limitation.

Again, so far as the defendant Bell is concerned, this issue must be

first tried, because the plaintiff has filed a replication to Bell's plea. While it must be admitted that a motion to withdraw an answer and substitute a plea is rare in equity causes, still, taking into consideration all the circumstances as presented in this case, I am of opinion that the justice and convenience of the case will be best promoted by having the issues proceed *pari passu* as to each defendant, and that, therefore, the motion should be granted. Motion granted.

PARKER v. TOWN OF CONCORD *et al.*

Circuit Court, N. D. Illinois. July 22, 1889.

EQUITY—ANSWER—DISMISSAL.

Where an answer to a bill in equity completely denies all its equities, and complainant has not met these denials with any proof, nor made any issue by replication, the bill will be dismissed.

In Equity. Bill for relief.

Bailey & Sedgwick, for complainant.

Bisbee, Ahrens & Decker, for defendants.

BLODGETT, J., (*orally*.) This is a bill filed by the complainant, as a holder of the bonds of the town of Concord, for relief against the town and the railroad company. The allegations are, substantially, that in 1869 the town of Concord voted \$25,000 to aid in the construction of the Chicago, Danville & Vincennes Railroad, and subsequently issued bonds in payment of this subscription; that the complainant has become the holder of 20 of these bonds for \$1,000 each by purchase for value in the market, and that the courts have held these bonds void. The complainant, as such bondholder, now seeks to be subrogated to the place of the railroad company as the payee of the subscription, with the averment that the issue of void bonds did not pay the indebtedness created by the subscription, it being averred that the railroad was completed according to the terms of the subscription, and that, as the complainant now stands in the position by virtue of being the owner in good faith of the bonds from the town, he is entitled to relief against the town by a decree requiring the town to pay him the amount of the 20 bonds which he holds in satisfaction of the subscription. The case is brought to hearing on bill and answer.

The answer denies many of the substantial allegations in the bill, such as the completion of the railroad according to the terms of the subscription; and the fact that the railroad was located as was required by the terms of the subscription; and generally that the railroad company has failed to perform the conditions upon which the subscription was voted. It seems to me, without considering any other question, that as the answer completely denies the equities of the bill, and the complainant has

not met those denials with any proof, or even made an issue thereon by replication, the bill must be dismissed for want of equity. A decree will be entered accordingly.

HEWITT v. STOREY *et al.*

(Circuit Court, S. D. California. September 23, 1889.)

CORPORATIONS—ACTIONS BY AND AGAINST.

Code Civil Proc. Cal. § 388, provides that "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name." *Held*, that a bill to enjoin interference by defendants with complainant's alleged right to divert water from a stream, against the "South Fork & Sunnyside Division of the Santa Ana River," which, it appears, is an association formed and existing pursuant to the laws of California, is sufficient, without making the owners and stockholders thereof parties.

In Equity. On bill and answer.

Rowell & Rowell and *John Albright*, (*A. W. Thompson* and *Brousseau & Hatch*, of counsel,) for complainant.

Curtis & Otis and *Byron Waters*, (*R. E. Houghton*, of counsel,) for defendants.

Ross, J. Certain of the defendants to this suit having by amended answers objected to the amended bill of complaint that it is defective for want of parties, the cause was, on motion of complainant, set down for argument on those objections, pursuant to equity rule 52, and the objections, having been argued by the respective parties, are now to be determined. The purpose of the suit on complainant's part is to establish as against the defendants his alleged right to 333½ inches of the water of the Santa Ana river, measured under a 4-inch pressure, diverted at a certain specified point by means of a certain ditch, called the "Berry Roberts Ditch," and to obtain an injunction enjoining defendants from interfering therewith. To the original as well as the amended bill a large number of persons are made defendants, as also certain corporations, among them the North Fork Water Company, and a certain association, styled the "South Fork & Sunnyside Division of the Santa Ana River," which is sued as, and alleged to be, an association formed and existing pursuant to the laws of the state of California, and "composed of some or all of the aforesaid defendants and other persons unknown to your orator," and transacting business under that name in San Bernardino county, in which county the water in dispute is situated. The bill, as amended, alleges that on and after March 10, 1869, certain named persons, under and by virtue of the laws of the state of California, acquired by appropriation 500 inches of the water of the Santa Ana river, measured under a 4-inch pressure, which they diverted at a certain

named point by means of a certain ditch, known as the "Berry Roberts Ditch," and that the complainant subsequently acquired from those appropriators 333 $\frac{1}{4}$ inches of said water, measured under a like pressure, with the right to divert the same at the same point through the same ditch. The bill, as amended, further alleges that at the time of the construction of the Berry Roberts ditch, and of the appropriation under which the complainant claims, the defendant corporation, the North Fork Water Company, or its predecessors in interest or grantors, and the defendant association, the South Fork & Sunnyside Division of the Santa Ana River, or its predecessors in interest or grantors, were the owners of two certain other ditches commencing in said river and conveying water therefrom, and were the only persons who had acquired any right to the use of the water of the Santa Ana river prior to the right of complainant and of those under whom he claims; that the rights of the said named defendants were acquired by them, or by their predecessors in interest, by prior appropriation, under and in pursuance of the same laws of the state of California, and extended only to the amount of 200 inches of water, measured under a 4-inch pressure, for each of the last-named ditches. It is further alleged in said amended bill that the Santa Ana river is an unnavigable stream of running water, flowing through sundry wild canons or ravines in the San Bernardino mountains, and emerging therefrom into the San Bernardino valley through the mouth of a steep ravine at or near its eastern boundary; that from time immemorial the waters of the said river have been, and are now, for many miles above and below the head of the Berry Roberts ditch, held and owned exclusively by right of appropriation, and used generally for the purpose of irrigation; that the land of the complainant lies in the said valley, and, in common with certain lands of the defendants, is incapable of cultivation without water; that at certain dry seasons of the year the said river contains at and between the head of the Berry Roberts ditch and the mouth of the ravine aforesaid little more than sufficient water to supply the above-mentioned prior appropriators and complainant with the quantity of water to which they are respectively entitled, but does at all times contain sufficient to supply the said prior appropriators and complainant to the extent of their respective rights.

The amended answers, referred to herein, among other things, deny that the North Fork Water Company and the South Fork & Sunnyside Division of the Santa Ana River are only entitled to 200 inches each of the water of the Santa Ana river, but, on the contrary, aver the said named company and association to be entitled to the entire flow of the water of the river, measured at a point about two miles above the head of the Berry Roberts ditch, and which water, it is averred, is owned by said company and association in equal proportions, and is in the aggregate greatly in excess of 1,000 inches, measured under a 4-inch pressure. And the said amended answers further aver that the amended bill is defective for want of proper parties defendant in this: that certain named persons and corporations, who now are, and at the time the original bill was filed were, owners and shareholders in the South Fork & Sunnyside

Division of the Santa Ana River, are not made parties defendant to said amended bill, and that certain other named persons, who were made parties defendant to the original bill, and who were owners and shareholders in said South Fork & Sunnyside Division of the Santa Ana River, have died since said original bill was filed, and that their legal representatives, who now are owners and shareholders in said South Fork & Sunnyside Division of the Santa Ana River, are not made parties defendant to the amended bill.

This statement embraces such portions of the pleadings as are necessary to be stated for the determination of the point now made. The question is whether all of the owners and shareholders in the South Fork & Sunnyside Division of the Santa Ana River—which is alleged in the bill and admitted by the answers to be an association formed and existing pursuant to the laws of California, and transacting business under that name in the county of San Bernardino, where it has its place of business—are necessary parties to the suit. The circumstance that some of the persons made defendants are alleged to be shareholders in the association does not affect the question. The complainant, by his bill, does not seek to avail himself of the rule that applies where the parties are too numerous to be brought before the court or where the question is one of common or general interest of many persons. The allegation that certain of the defendants are shareholders in the association may be disregarded if it be true, as contended by complainant, that all of the shareholders are suable by the common name under which it is alleged and admitted they associated themselves and are doing business. In controversies concerning the title to real property the federal court always administers the law as if it was sitting as a local court of the state. *Olcott v. Bynum*, 17 Wall. 57; *Slaughter v. Glenn*, 98 U. S. 244. The nature of the property in controversy here is such as to make the same rule applicable. Now, by section 388 of the Code of Civil Procedure of California it is provided that "when two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates in the same manner as if all had been named defendants and had been sued upon their joint liability." In this case the association in question was sued by its common name, the South Fork & Sunnyside Division of the Santa Ana River, and as such appeared and answered, putting in issue the averments of the bill respecting its alleged interference with the complainant's rights, and respecting the quantity of the water of the Santa Ana river to which it is entitled. It is the acts of the association, as such, of which the complainant, among other things, complains, and it is the rights of the association, as such, that are, among other things, put in issue by the pleadings. A decree favorable to the association would inure to the benefit of all of its members, and one adverse to it would, in my judgment, bind all of them. Objections disallowed.

SNYDER v. MARTIN *et ux.*

(Circuit Court, N. D. Illinois. July 22, 1889.)

FRAUDULENT CONVEYANCES—CONSIDERATION.

The wife of the manager of a corporation borrowed \$600 from a stockholder, and bought half of the capital stock. This was all the money ever put into the business by her or her husband. From the earnings of the business, conducted entirely by the husband, real estate was bought, and title taken in the wife's name. *Held*, that the land, being acquired entirely by the labor of the husband, was liable for his debts existing at that time.

In Equity. Creditor's bill.

G. F. Westover, for complainant.

Bisbee, Ahrens & Decker, for defendants.

BLODGETT, J., (*orally*.) This is a creditor's bill by which the complainant seeks to recover the amount of a judgment rendered in favor of the firm of which the complainant is the surviving partner against the firm of Lawrence & Martin on property, the title to which stands in the name of the defendant Carrie E. Martin, the wife of the defendant Morris T. Martin. It appears from the proof in the case that the defendant Carrie E. Martin holds the title to the real estate in question, and that all the said real estate was paid for with money earned in the business of the Phoenix Grain & Stock Exchange, a "bucket-shop" concern in this city, of which the defendant Morris T. Martin was the manager.

Mrs. Martin never invested any money in this corporation. She became a subscriber to one-half the capital stock of the company at the time it was formed. She borrowed, as the proof shows, from one of the stockholders the sum of \$600, which was all the money that was ever put into the business, as far as the Martins were concerned. From the earnings of this business—the business which was conducted by Martin as its manager—the \$600-note was paid and the real estate in question was bought and paid for, the title simply being taken in the name of Mrs. Martin. The defendant Morris T. Martin being in debt to the complainant at this time, I do not think he could secrete his earnings in the name of his wife to the delay or in fraud of his creditors. This is property that has not been earned or acquired by any effort or instrumentality of Mrs. Martin, nor is it the outcome of any investment by her; but it has been accumulated solely by the shrewd conduct and business ability of Morris Martin himself. There will be a decree in favor of the complainant.

UNION STEAM-BOAT CO. *et al.* v. CITY OF CHICAGO *et al.**(Circuit Court, N. D. Illinois. August 16, 1889.)*

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—INJUNCTION.

Where the action of a city in executing a public work is within the scope of its authority, and free from fraud and corruption, it will not be enjoined, though the methods adopted result in special damage to complainant.

In Equity. On motion for injunction.

Schwuyler & Kremer and Sidney Smith, for complainants.

FULLER, Chief Justice. I assume for the purposes of this motion that the complainants sustain by reason of the acts complained of peculiar damages of a different kind from those sustained by the general public. The test is not one of degree but of kind, and many averments of the bill present only the case of an alleged obstruction of a public and common right, resulting in injuries to the complainants and the public, the same in kind. But it is not necessary to rule upon objection in this regard, in the view that I take in the premises.

The public work in question is being carried on by the authority of the city of Chicago, in pursuance of power to that end vested in the municipality. In *Escanaba Co. v. Chicago*, 107 U. S. 678, 2 Sup. Ct. Rep. 185, it was held that "until congress acts on the subject, the power of the state over bridges across its navigable streams is plenary;" and the leading cases, *Willson v. Marsh Co.*, 2 Pet. 245, and *Gilman v. Philadelphia*, 3 Wall. 713, together with others, were cited and approved. In these and numerous other decisions of the supreme court, building bridges and the like are assigned to that class of subjects which can be best regulated by rules and provisions suggested by the varying circumstances of different localities, and limited in their operation to such localities respectively. The nature of the subject is not such as to require the exclusive legislation of congress. The *Escanaba Case* involved an ordinance of the city of Chicago, and Mr. Justice FIELD, in delivering the opinion, says that "nowhere could the power to control the bridges in that city, their construction, form, and strength, and the size of their draws, and the manner and times of using them, be better vested than with the state, or the authorities of the city upon whom it has devolved that duty." This extract is quoted by the supreme court of Illinois in *McCartney v. Railroad Co.*, 112 Ill. 611-635, and that court thus proceeds:

"The city we look upon as the representative of the state, with respect to the control of streets, and highways, and bridges, within the city limits. * * * The state itself, no doubt, might construct the bridge. It might, as the legislature has here done, vest the local government of the city with authority to build the bridge. But it is claimed that the authority is reposed only in the city itself to build bridges, and is a power which is incapable of being delegated by the city to another. We do not consider that there is any delegation of the power in the case. The city, through the corporation, does build the bridge. It matters little by what hand the bridge is built, or who lets the contract for

the construction. The essential thing is determining whether the public interest calls for a bridge, and where and in what manner it shall be built, and this is done by the city authorities."

It is not contended that the city has proceeded or is proceeding in excess of its powers, but it is insisted that the work ought to have been authorized or directed at a different season of the year, or commenced earlier, and prosecuted with greater dispatch, and that the obstruction at this time is such as to render the city's action so unreasonable as to justify the interposition of the court to arrest it. But the power to make the improvement necessarily implies the right to determine upon the plan and method of doing it; and the general rule forbids interference by judicial authority with such determination, when exercised in good faith, within the scope of the power conferred.

I do not think it can be reasonably claimed that the record before me makes out fraud, corruption, or unfair dealing amounting to fraud, and, in my judgment, the case does not fall within any exception which might be held to justify the interference applied for. The motion for an injunction must therefore be denied.

GILLESPIE *et al.* v. CAMPBELL.

(Circuit Court, N. D. Illinois. September 9, 1889.)

1. NEGOTIABLE PAPER—LIABILITY BETWEEN ACCOMMODATION PARTIES.

An accommodation indorser of a bill of exchange, meeting the debt when legally charged with its payment, becomes a holder for value of the bill, and may recover thereon against an accommodation acceptor the full amount paid, notwithstanding he knew at the time of indorsement that the acceptance was for accommodation.

2. CONTRIBUTION—BETWEEN ACCOMMODATION PARTIES.

An accommodation acceptor of a bill of exchange has no claim for contribution against subsequent accommodation indorsers, though the indorsers knew the acceptance to be without consideration.

3. NEGOTIABLE PAPER—ACTIONS—DEFENSES.

In an action by two accommodation indorsers of a bill of exchange against a prior accommodation acceptor, it is no defense to the claim of plaintiffs for payment of the bill that the proceeds of the bill when discounted were applied by the drawer to the payment of paper on which one of the plaintiffs was an indorser.

At Law. On motion for new trial.

J. A. Sleeper, for plaintiffs.

A. & C. B. McCoy, for defendant.

JENKINS, J. The defendant moves to set aside the verdict for the plaintiffs, and for a new trial, mainly upon the ground that upon the proofs disclosed a recovery is not sanctioned by the law. The action is by the plaintiffs as indorsers against the defendant as acceptor of a certain inland bill of exchange, dated April 1, 1886, for \$3,000, at 90 days, drawn by

one R. G. Buchanan, of Franklin, Tenn. The bill was to the order of the plaintiff Gillespie, was indorsed by him and the plaintiff Winsted, and at its maturity was held by the National Bank of Franklin. This bill was in renewal of one for a like amount dated December 31, 1885, at 90 days, drawn, accepted, and indorsed by the same parties. On the 26th of December, 1885, Buchanan forwarded the original bill by mail to the defendant at Chicago, requesting its acceptance for the personal accommodation of the drawer. It was not at that time indorsed by either of the plaintiffs. The bill was thus accepted by the defendant, and returned to the drawer, who procured the plaintiffs severally to indorse it for his accommodation, that he might procure discount thereof at the bank at Franklin. He states that he notified the plaintiffs at the time that the acceptance by the defendant was purely an accommodation acceptance. This assertion is disputed by the plaintiffs, but the fact is assumed to be as stated by Buchanan. The plaintiffs thereupon severally indorsed the bill without consideration, and returned it to Buchanan, who procured it to be discounted at the National Bank of Franklin, the proceeds being passed to his credit in account, and subsequently drawn out upon his checks. There was no communication between the accommodation parties to the bill respecting the liability *inter se* to be assumed by either, nor any agreement in regard thereto other than that implied by the law, nor did the acceptor know that there was to be any accommodation indorsement of the bill. The renewal bill was protested at maturity, and the indorsers charged with its payment. The plaintiffs thereafter, on July 19, 1886, paid to the bank the amount, in equal portions. The bill was thereupon surrendered by the bank, and the plaintiffs seek to recover thereon against the acceptor of the bill.

It is urged for the defendant that the parties litigant, being all accommodation parties to the bill, were co-sureties for the drawer; that therefore the plaintiffs can maintain no action on the bill as such, and may only recover in separate actions, and upon the equitable principle of contribution, such an amount as each has paid in excess of the one-third part of the bill.

With respect to business paper, the parties thereto are liable to each other in succession, as their names appear. The acceptor of a bill is the principal debtor. As between successive indorsers, the writing imports a several and successive, not a joint, obligation. In this respect there is no distinction between accommodation and other paper. They are both governed by the same rules. 3 Kent, Comm. *86. It is competent for the accommodation parties to a bill, as between themselves, to contract for a liability different from that evidenced by the paper itself, and parol evidence thereof is receivable. *Phillips v. Preston*, 5 How. 278. But, wanting such independent agreement, the several successive parties to accommodation paper are bound to those succeeding them, who have been compelled to meet the obligation. In such case parties are not bound to contribution. The principle upon which the rule is founded, is this: The indorser has incurred a contingent liability upon the faith of the antecedent names to the paper, and by payment becomes

entitled to all the rights of an indorser for value, with remedy over for the whole amount paid against the prior parties. The obligation of the one is primary; of the other, secondary. It is of no moment that the accommodation indorser knew that the acceptance was without consideration. He has incurred and met his obligation upon the faith of the acceptance, and stands in the light of a holder for value. The principle was established by the supreme court in 1830, in the case of *McDonald v. Magruder*, 3 Pet. 470, the opinion of the court being delivered by Chief Justice MARSHALL. There the first accommodation indorser sought to recover contribution of a second accommodation indorser of a note. The court held that, to authorize contribution, the undertaking must be joint, not separate and successive; that the second indorser, incurring liability upon the faith of the first indorser, as well as of the maker, and meeting that liability, stands as a holder for value, and the contract as between him and his immediate indorser cannot be said to be without consideration. This ruling was followed and approved in *Phillips v. Preston*, 5 How. 278, and in *McCarty v. Roots*, 21 How. 437, 441. The principle established has never since been questioned in the federal courts. If these cases stood alone, and in antagonism to the general current of authority, they would of course be binding upon this court. The doctrine of these decisions has, however, been sustained in most courts of the states of the Union speaking to the question. *Smith v. Morrill*, 54 Me. 48; *Coolidge v. Wiggin*, 62 Me. 568; *Johnson v. Crane*, 16 N. H. 68; *Church v. Barlow*, 9 Pick. 547; *Clapp v. Rice*, 13 Gray, 403; *Woodward v. Severance*, 7 Allen, 340; *Shaw v. Knox*, 98 Mass. 214; *Kirschner v. Conklin*, 40 Conn. 77; *Brown v. Mott*, 7 Johns. 361; *Suydam v. Westfall*, 2 Denio, 205; *Kelly v. Burroughs*, 102 N. Y. 93, 6 N. E. Rep. 109; *Youngs v. Ball*, 9 Watts, 141; *Ross v. Espy*, 66 Pa. St. 481; *Wood v. Repold*, 3 Har. & J. 125; *Pomeroy v. Clark*, 1 MacArthur, 606; *Bank v. Beirne*, 1 Grat. 234, 265; *Hogue v. Davis*, 8 Grat. 4; *Bank v. Vanmeter*, 4 Rand. (Va.) 553; *Marr v. Johnson*, 9 Yerg. 1; *Brahan v. Ragland*, 3 Stew. (Ala.) 247; *Spence v. Barclay*, 8 Ala. 581; *Moody v. Findley*, 43 Ala. 167; *Cathcart v. Gibson*, 1 Rich. Law, 10; *Aiken v. Barkley*, 2 Spear, 747; *Weir v. Cox*, 9 Mart. (La.) 573; *Connely v. Bourg*, 16 La. Ann. 108; *Stiles v. Eastman*, 1 Ga. 205; *Hixon v. Reed*, 2 Litt. (Ky.) 176; *McNeilly v. Patchin*, 23 Mo. 40; *McCune v. Belt*, 45 Mo. 174; *Stillwell v. How*, 46 Mo. 589; *Druhe v. Christy*, 10 Mo. App. 566; *Wilson v. Stanton*, 6 Blackf. 507; *Woodworth v. Bowes*, 5 Ind. 277; *Core v. Wilson*, 40 Ind. 204; *McGurk v. Huggett*, 56 Mich. 187, 22 N. W. Rep. 308. But two American cases were cited to the contrary, and these may be readily disposed of. The case of *Douglas v. Waddle*, 1 Ohio, 413, arose upon a note, and, if there be no distinction in this respect between a note and a bill, (and I can conceive of none,) sustains the defendant's position. The authority of this case is denied in *McDonald v. Magruder*, *supra*. In *Williams v. Bosson*, 11 Ohio, 62, the case of *Douglas v. Waddle* is said to have been founded upon and to recognize and establish as law a local usage or understanding that accommodation indorsers of notes were joint sureties, and not liable to each other in the order of their coming on the note. Without directly over-

ruling the case, the court refused to extend the rule to bills of exchange, and held that accommodation indorsers of such paper are not joint sureties, but are separately liable to each other in their order. This decision is approved in *Kelley v. Few*, 18 Ohio, 441. The case relied upon is consequently without weight. The case of *Paulin v. Kaighn*, 27 N. J. Law, 503, was one for contribution between two co-obligors on a joint bond. The right of contribution in such case is not doubted. Nor is it disputed that the obligation to contribute arises, not from mutual engagement, but from principles of equity and morality.

In addition to the foregoing, I have fallen upon decisions in two other states sustaining the contention of the defendant, which it may be well to notice. *Flint v. Day*, 9 Vt. 345, and *Pitkin v. Flanagan*, 23 Vt. 160, 166, both sustain the theory of the defense, but they are doubted in *Keith v. Goodwin*, 31 Vt. 268, 276, and would seem to be of no present, or at least of doubtful, authority in that state. In *Daniel v. McRae*, 2 Hawks, 590, by a divided court, accommodation parties to commercial paper are held to be co-sureties in whatever order or character they are placed upon the paper. The doctrine declared came for review before the supreme court of North Carolina in *Richards v. Simms*, 1 Dev. & B. 48, 51. The court states that the rule in that state had been so generally acquiesced in that, upon the principle of *stare decisis*, it felt bound to follow it as established law; but the judges unanimously declared that, were the question *res integra*, the principle could not be sanctioned; and they "should say, as has been said by the rest of the mercantile world, that the parties to accommodation paper were to be governed by the same rules as parties are governed whose names are on other or business paper." It may therefore fairly be said that the few decisions in this country upholding the contention of the defendant have been repudiated and shorn of their authority within their respective jurisdictions, and that the courts of the states, so far as they have spoken, approve and follow the decisions of the supreme federal tribunal.

The case of *Reynolds v. Wheeler*, 10 C. B. (N. S.) 561, undoubtedly sustains the defense here. It sanctions the right of an accommodation acceptor to contribution from an accommodation indorser. The decision is based upon general principles of suretyship, overlooking the presumption of the mercantile law that subsequent accommodation parties signed in reliance upon the responsibility of the prior accommodation parties. The case was decided in 1861, and appears not to have been reviewed in any court. It would seem to be opposed to the principle upon which *Fentum v. Pocock*, 5 Taunt. 192, was decided, wherein Lord Chief Justice MANSFIELD remarked: "And I never before knew that there was any difference between an acceptance given for accommodation, and an acceptance for value." I am referred to and can find no other case in England directly to the question. The absence of other authority in that country is somewhat remarkable. The case stands alone; citing no authority to sustain, in opposition to the general current of authority, and in antagonism to the ruling in *McDonald v. Magruder*, which may not be disregarded in this court.

In *Dering v. Earl of Winchelsea*, 1 Cox, Ch. 318, 2 Bos. & P. 270, 1 White & T. Lead. Cas. Eq. *60, contribution was enforced between sureties on different bonds for the same debt. But in *Coope v. Thynnam*, 1 Turn. & R. 426, the lord chancellor stated that that decision had been doubted at Westminster Hall, and that contribution was dependent upon whether the transaction was separate and distinct, or the same transaction split into different parts. The case, however, received the approval of the supreme court in *McDonald v. Magruder*, *supra*, and was distinguished for the reason that in the one case the parties stood in the same relation to the obligee of the bond and to each other; while in the other the relation of the parties is dissimilar, the indorser giving his name on the faith of the precedent parties to the bill. In Mr. Hare's notes to this case (1 Lead. Cas. Eq. 3d Amer. from 2 London Ed. 157) he asserts that "where successive indorsers all indorse for accommodation of the maker, though at different times, and without communication or mutual understanding, they are in equity co-sureties, subject to common contribution; and evidence is admissible to show that successive indorsers sign for accommodation, and thus to render them subject to contribution." The author cites to sustain the statement *Daniel v. McRae*, 2 Hawks, 590, which, as shown *supra*, has been repudiated as authority by the court in which it was decided. The statement by the author is contrary to established law.

It may not be denied that there is an engaging, persuasive equity in the principle that all sureties should share equally the burden assumed; and that in general is the law. "Equality is equity." But in the case of commercial paper a superior equity intervenes, in that liability has been assumed upon the faith of prior engagement, and that without respect to knowledge of the accommodation character of precedent stipulation. And, after all, the distinction between the two classes of authorities is more apparent than real; or is perhaps one resting in the burden of proof. The one assumes the contract to be as appears upon the face of the paper, construed by the mercantile law, permitting and enforcing all agreements for a different liability *inter se*. The other declines to assume that the one party has become bound upon faith of the other's precedent engagement, and treats all accommodation parties, however they may appear upon the paper, as co-sureties and equally bound for the debt, and so liable to contribute; but likewise recognizing and enforcing any different engagement between the parties. Whichever rule may seem the more equitable and to be preferred, the former is too firmly established to be disturbed. Individual notion of right must now yield to the wiser judgment of the law.

It is also insisted for the defendant that the court erred in failing to submit to the consideration of the jury the question whether the proceeds of the original draft were applied by Buchanan in whole or in part towards the payment of other paper upon which the plaintiffs or one of them were indorsers. On January 1, 1886, the bank held four pieces of Buchanan's paper, severally indorsed for accommodation by one or the other of the plaintiffs, but no one piece indorsed by both. Three

of such notes were renewed at maturity, and, if ever paid, were not paid by the proceeds of the Campbell acceptance. The only one to which the objection can apply is the note for \$5,000, indorsed by Winsted, one of the plaintiffs, maturing January 12-15, 1886. That note was paid prior to April 3, 1886, but when prior does not appear. The Campbell acceptance of \$3,000 was discounted by the bank, January 5, 1886, and the proceeds passed to the credit of Buchanan on account. The cashier of the bank asserts that the amount was disbursed by sundry checks of Buchanan's on the bank. His account with the bank is not produced. Whether in point of fact the proceeds of the Campbell acceptance were applied towards the payment of the \$5,000 note, maturing some 10 days after the discount of that acceptance, is therefore left in doubt. The production of the bank account would have relieved the doubt, and established the truth. Neither Buchanan nor the cashier could from recollection and without reference to the bank account testify to the fact. In the absence of testimony of other transactions with the bank, the jury might fairly infer that the proceeds of the acceptance went towards the payment of the note. If, therefore, the fact is material, the question should have been submitted.

Buchanan requested the acceptance of Campbell to enable him to raise money "to run his business." The defendant accepted the bill, and returned it to the drawer, with a view to its use for that general purpose. There was no restriction upon its use for the needs of the drawer in his business. If the proceeds were applied by Buchanan towards the discharge of his debt, that was one of the uses contemplated. That was no fraud upon the defendant. If with the proceeds Buchanan discharged in part a debt for which Winsted, one of the plaintiffs, was holden as an accommodation indorser, that is not an availing defense. It was none the less the debt of Buchanan, which he was obliged to discharge, and could rightfully discharge with the proceeds of the Campbell acceptance. It is of the first importance in any business that one should pay maturing obligations, and that object must be deemed to have been within the contemplation of the defendant in accepting this bill. It was a legitimate use of the credit loaned by him. But, if otherwise, it was the act of Buchanan, and not of the plaintiff Winsted. He is not shown to have had any connection with or knowledge of the transaction. If known to him, it is not perceived that the fact would avail to discharge the liability of the defendant upon his acceptance. It is true that thereby Winsted was relieved of his contingent liability upon that note, or, rather, that his contingent liability for that debt was transferred to the bill in suit. The debt, however, was the debt of Buchanan, which he was primarily obligated to discharge. The defendant's credit was loaned that means might be obtained by Buchanan to meet his obligations. It was wholly immaterial in this connection whether the proceeds of the credit loaned were used for future speculation, or to enable Buchanan to meet past obligations, and to continue his business. And, again, the plaintiffs sue as joint owners of the bill. The defense asserted, if otherwise availing, cannot advantage the defendant here. It could only be well pleaded

against the plaintiff Winsted alone. It could not affect the plaintiff Gillespie, who was neither a party to the note paid nor to the payment of it. The plaintiffs stand in the shoes of the bank, as *bona fide* holders for value, and as joint owners of the bill. Any defense, to avail, must affect both, and not one only, of the joint owners of the bill. The motion for a new trial will be overruled, and judgment ordered upon the verdict.

CASE v. TOFTUS.

(Circuit Court, D. Oregon. August 26, 1889.)

1. PUBLIC LANDS—SHORE LANDS.

On the admission of a new state into the Union, the "shore" or tide lands therein, not disposed of by the United States prior thereto, become the property of the state.

2. SAME—RIPARIAN RIGHTS—WHARVES.

The owner of land abutting on the "shore" or tide lands in this state, and not disposed of by the United States or the state, has a right of access from his land to the water, and may erect and maintain a private wharf there for his own convenience, so long as he does not materially interfere with the rights of the general public, and subject to the power of the legislature to regulate such use.

(Syllabus by the Court.)

In Equity. On motion for injunction.

James F. Watson, for plaintiff.

Lewis L. McArthur, for defendant.

DEADY, J. This suit is brought to have the defendant enjoined from constructing a tramway along the northern shore of Yaquina bay, near its mouth, in front of certain property belonging to the plaintiff, whereby access to the bay from said property is hindered and prevented.

It is alleged in the bill that the plaintiff is the owner of a tract of land in Benton county, Or., known as the "Ocean House Property," and worth \$15,000, with a tavern on it, which cost \$6,000; that said property abuts on the northern shore of said bay, into which the plaintiff has constructed a private wharf, to and from which goods and passengers are transported across said shore, between said bay and tavern; that Yaquina bay is navigable for all ordinary vessels, and is within the ebb and flow of the ordinary tides of the Pacific ocean, whereby said shore is daily covered and uncovered for an average distance of 100 feet; that the defendant is wrongfully and unlawfully engaged in constructing a wooden tramway over and along said shore in front of said property, with intent to maintain the same there for at least three years, which will completely cut off and prevent access from said bay or wharf to said tavern, and *vice versa*, to the great damage of the plaintiff.

The suit was brought in the circuit court of the state for the county

of Benton, and removed here on the ground that the defense to the same arises under the laws of the United States.

Here a general demurrer was filed to the bill. On the argument, the following points were made in support of the demurrer:

(1) The "shore" in question is tide-land, and therefore presumably belongs to the state of Oregon.

(2) The statutes of the state (Comp. 1887, § 3599 *et seq.*) provide for the acquisition of tide-lands by the owner of the abutting tract, but the plaintiff does not show any right thereunder.

(3) The right to build or maintain the wharf by the plaintiff depends on the statute of the state, the common law, or common usage; and neither the statute nor the common law confers any such right.

(4) There is no usage in Oregon by which the plaintiff can construct or maintain this wharf.

(5) A comparison of the maps in the surveyor general's office will show that the tide-land in question is within the corporate limits of the town of Newport, as defined by the act of February 21, 1887, which gives the town the exclusive power to regulate the erection of private wharves thereon; which power is also given to the town by virtue of sections 4227, 4228, of the Compilation of 1887.

By the statute of the state (Comp. 1887, § 3599) the commissioners for the sale of school lands are "authorized and required to sell * * * tide and overflowed lands on the sea-coast, owned by the state," as therein provided. This statute was passed on October 18, 1878. It gave the owner of land "abutting or fronting" on "the shore" of the Pacific ocean, or of any bay, the preference as a purchaser of such shore or tide land for one year from the passage of the act.

This act was passed on the assumption that upon the admission of the state into the Union—February 14, 1859—the title to the lands covered by the tide, then undisposed of by the United States, passed by operation of law to the state. How or why this is so, except to bolster up some fanciful notion of state sovereignty, I never could perceive. But on the authority of *Pollard v. Hagan*, 3 How. 212, and *Weber v. Commissioners*, 18 Wall. 57, this court must recognize it as the law of the land.

In his dissenting opinion in *Pollard v. Hagan*, *supra*, 231, Mr. Justice CATRON says a doctrine has lately sprung up in the courts of Alabama (*tempus*, 1844) "which assumes that all lands temporarily flowed with tide-water were part of the eminent domain, and a sovereign right in the old states; and that the new ones, when admitted into the Union, coming in with equal sovereign rights, took the lands thus flowed by implication as an incident of state sovereignty, and thereby defeated the title of the United States. * * * Although the assumption was new in the courts, it was not entirely so in the political discussions of the country. There it had been asserted that the new states coming in, with equal rights appertaining to the old ones, took the high-lands as well as the low, by the same implication now successfully asserted here, in regard to the low-lands; and, indeed, it is difficult to see where the dis-

tion lies. That the United States acquired, in a corporate capacity, the right of soil under water, as well as of the high-lands, by the treaty with France, cannot be doubted; nor that the right of soil was retained, and subject to grant up to the time Alabama was admitted as a state."

In *Hinman v. Warren*, 6 Or. 408, the court went further, and held that the United States cannot dispose of the tide-lands, even in a territory. This decision is also based on the dogma of state sovereignty,—that is, the sovereignty of a state *in futuro*, which is yet, so to speak, *in utero*, or the womb of time, and may never be born.

The proposition is supported by the assertion "that the United States government has no constitutional or statutory authority to so act towards a territory, or so dispose of the lands within a territory, as to make it impossible to admit such territory upon an equal footing with the other states of the Union."

In *Gould on Waters* (section 40) it is said this is the only adjudication on the subject of the power of the national government, "while holding the title to the soil of the tide-waters," to make a valid conveyance of the same.

The author adds: "The decisions of the supreme court of the United States have been thought to lead to the conclusion reached in *Hinman v. Warren*, but it would seem that there is no very direct expression of such a view in the opinions of that court."

The doctrine that new states must be admitted into the Union on an "equal footing" with the old ones does not rest on any express provision of the constitution, which simply declares (article 4, § 3) "new states may be admitted by congress into this Union," but on what is considered and has been held by the supreme court to be the general character and purpose of the union of the states, as established by the constitution,—a union of political equals. *Pollard v. Hagan*, 3 How. 233; *Permoli v. New Orleans*, Id. 609; *Strader v. Graham*, 10 How. 92.

But certainly this equality does not require that the new state shall be admitted to any right in the soil thereof considered as property. The ante-Revolution states acquired no property in the soil thereof by entering into the Union. The lands that had not passed into private hands they already owned and held, as the political successors of the British crown.

The true constitutional equality between the states only extends to the right of each, under the constitution, to have and enjoy the same measure of local or self government, and to be admitted to an equal participation in the maintenance, administration, and conduct of the common or national government.

The pride of the new state may be touched at the thought of being the owner of the tide, swamp, and overflowed lands within its borders, and the tax-payer may flatter himself that the proceeds of their sale will lighten the burdens of taxation, but observation and experience in the new state tell a different tale. If aid is to be given to the new state out of the public lands within its borders, let congress provide that it shall have a liberal percentage of all the sales of such land.

The soil of Oregon was acquired by the national government by means

of the discoveries, explorations, and occupation of the citizens of the United States; and it was so acquired for the benefit of all, and not a part. In *Johnson v. McIntosh*, 8 Wheat. 595, Mr. Chief Justice MARSHALL, in considering the effect of a discovery of an uninhabited country by persons who acknowledge some existing government, says:

"The discovery is made for the benefit of the whole nation; and the vacant soil is to be disposed of by that organ of the government which has the constitutional power to dispose of the national dominions."

And in *Martin v. Waddell*, 16 Pet. 409, Mr. Chief Justice TANEY cites this language, and relies on this authority, in a case involving the right to the soil under the navigable waters of New Jersey. Congress is the organ of the national government that has the power to dispose of the territory and other property of the United States. Const. art. 4, § 3.

In the territories the national government is both the sovereign and proprietor. Congress has the power to govern them, and in so doing exercises the combined power of the national and state governments. *Insurance Co. v. Canter*, 1 Pet. 542. And as such sovereign and proprietor it may dispose absolutely of all the public land in the territory, whether high or low, wet or dry. For the time being, as sovereign, it has the *jus publicum*, or right of jurisdiction and control, of the shores for the benefit of the public, as in the case of a public highway over private land; while as proprietor it has the *jus privatum*, or right of private property, subject to the *jus publicum*. Gould, Waters, § 17.

This *jus publicum*, whether held by the national government during the territorial period or the state thereafter, may be sold or disposed of by the legislature of either, who represent the public. *Lansing v. Smith*, 4 Wend. 20; *Gould v. Railway Co.*, 6 N. Y. 538; Gould, Waters, § 32.

On the admission of the territory into the Union, the state, as the local sovereign or authority, succeeds to the *jus publicum*, except so far as may be necessary to enable the national government to make and maintain regulations of commerce. But it rests with congress to say when a territory shall be admitted into the Union as a state. Can any one say when, if ever, Alaska will be admitted into the Union, on an equal footing with Ohio, Pennsylvania, and New York? For aught that appears, it will ever be but very sparsely populated. Its commercial value is principally as a splendid preserve for fish and fur; while, as a summer touring ground, and a place to get "far from the madding crowd," it is original and unequaled. Can it be possible that in the mean time the United States may not dispose of the private property in any of the "shore" of Alaska, which it purchased from Russia, but must hold it, willing or not, as trustee for some possible state or local sovereign that may arise or rule there in the far future? As well ask, it seems to me, if any grant or disposition of the shore in England by the crown, prior to *magna charta*, is binding on the succeeding sovereigns of the house of Hanover.

Assuming, as we must, in the present state of the decisions on the subject, that the "shore" or lands in Oregon periodically covered by the tides, and not disposed of by the United States while it was a territory,

are the property of the state, what, on the showing here made, is the condition of the "shore" in question, or the rights of the parties to this suit in relation thereto? There is nothing to show that it ever has been disposed of by either the state or the United States. By the act of 1887, *supra*, the state has authorized its sale. So far as appears, this sale may be made without qualification or reservation,—a sale of both the *jus publicum* and the *jus privatum*,—in which case the vendee would acquire the private property in the land, and the right of the public to the use of the same for the purpose of navigation or fishing.

Whether any reservation of the *jus publicum* has been made in the deeds executed by the commissioners to vendees under the act I am not advised.

The plaintiff is the owner of land abutting on the "shore" of Yaquina bay. How he acquired it does not appear, and it may not be material. But the title must be derived from the United States, under some of the acts of congress providing for the disposition of the public lands in Oregon. Be this as it may, as a littoral proprietor he has a right of access from his premises to the water, and to erect and maintain a private wharf there, at which to land and embark, so long as he does not materially interfere with the rights of the public, and subject to the power of the legislature to regulate such use or privilege. *Dutton v. Strong*, 1 Black, 25; *Railway Co. v. Schurmeir*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Commissioners*, 18 Wall. 57; Gould, Waters, §§ 124, 149, 151, 154.

The defendant has no special right in the "shore," or to the use of it, beyond that of the general public, which does not include the right to construct or maintain a tramway or other structure upon or over it, that would prevent or substantially impair the littoral proprietor's right or privilege of access to and from the water.

It does not appear from the bill that this tramway is in fact such a structure, or whether the rail or track is laid level with the sand or earth or not. Presumably it is so. But it was admitted on the argument that it is 12 or 15 inches above the surface of the ground, and therefore cannot be crossed by a wheeled vehicle, unless it is bridged.

Prima facie, then, the tramway is a nuisance, which works a special injury to the plaintiff, and the defendant ought not to be allowed to maintain it; and an injunction is the proper remedy for the wrong. 1 Pom. Eq. Jur. § 252; Gould, Waters, § 21.

The point made under the act of 1887 cannot now be considered. The facts on which it rests are not in the record, nor are they such as the court can take judicial notice of. It does not appear from the bill that the "shore" in question is within the corporate limits of Newport, or that the land of the plaintiff is.

In this opinion some possible aspects of this case are considered that are not absolutely necessary to the decision on this demurrer. But they were seriously propounded by the learned counsel for the parties, and the consideration of them invoked.

The demurrer is overruled.

IVISON *et al.* v. BOARD OF SCHOOL COMMISSIONERS.

(Circuit Court, D. Indiana. September 5, 1889.)

1. SCHOOLS AND SCHOOL-DISTRICTS—TEXT-BOOKS—EVIDENCE—PAROL, TO EXPLAIN WRITING.

A proposition by complainants to the school board of a city, that if certain text-books should be adopted by the latter complainants would furnish them on certain terms, and a resolution of acceptance of such proposition by the board, neither of which stipulates for any length of time for which the books shall be used, creates a contract free from ambiguity, and evidence *abundante* is not admissible to show that a certain time was intended.

2. SAME.

Nor is such intention shown by the requirement of Rev. St. Ind. § 4436, that no text-book adopted by the county board shall be changed within six years from its adoption, as such requirement does not apply to cities; and as the statute also provides that such changes may be made by the unanimous consent of the board.

3. SAME.

The facts that by its by-laws the board can make no changes in books except at certain sessions, and that at another session it is about to exclude complainants' books and introduce others, in accordance with an act of the legislature, does not, on bill to enjoin such action, bring in question the validity of the act, where the board's by-laws also provide that changes may be made at any time by a two-thirds vote.

In Equity. On bill for injunction.

A. C. Harris, for complainants.

Duncan, Smith & Wilson, for defendant.

WOODS, J. The bill of the complainants is to the effect that in May, 1888, the board of school commissioners of the city of Indianapolis entered into a contract with the complainants, whereby, on terms stated, Swinton's geographies were adopted for use in the schools of the city for the term of six years; that the complainants have fully complied with the contract on their part, but that the commissioners, supposing themselves bound in law to such action, are about to adopt and introduce, to the exclusion of complainants' books, books to be supplied by contractors under a certain act of the legislature of Indiana of date of March 2, 1889, (Acts 1889, p. 74;) that said act, besides being in violation of the constitution of the state for reasons stated, is invalid in respect to the contract of the complainants and the board of school commissioners, aforesaid, and in violation of the constitution of the United States, because, if upheld, it would impair the obligation of that contract.

In respect to the making and terms of that contract, the bill shows that at the regular session of the board on May 4, 1888, a resolution was passed that Swinton's geographies be adopted, provided satisfactory terms could be obtained with the publishers; and that, after conferring with the board, the complainants signed and submitted to the board, at its session held on the 18th day of May, 1888, the following proposition:

"MAY 4, 1888.

"This paper is to certify that, if Swinton's geographies be adopted by the school board of Indianapolis, Ivison, Blakeman, Taylor & Co., as publishers

of said books, will furnish them to the pupils of the public schools of Indianapolis in accordance with the following conditions: (1) Swinton's Introductory Geography to be given in even exchange for all Guyot's Elementary Geographies presented for such exchange upon an agreed date acceptable to both parties to this agreement. (2) The same of Swinton's Grammar School Geography for Guyot's Intermediate Geography. (3) A Swinton's Grammar School Geography to be given for a copy of Guyot's Elementary and thirty-five cents, if presented at date mentioned above. (4) A donation of 250 copies of each book, Swinton's Introductory, and Swinton's Grammar School, to be made to the school board. (5) The publishers to furnish teacher's desk, in every case, with a copy of the book used in her grade. (6) Introduction rates of 40 cts. for Introductory, and 90 cts. for Grammar School; to continue for one year. (7) Regular prices after one year to be regular wholesale prices, subject to any deductions that may for any reason be made in said books by the publishers. The prices are in no case to be increased during the term of use of such books in Indianapolis.

[Signed]

"IVISON, BLAKEMAN, TAYLOR & Co.

"By W. F. FRY, General Agent for Indiana & Michigan."

And that thereupon at said meeting it was moved by a member of the board that said proposition be adopted by said board and the agreement concurred in, which was then and there done, as fully appears upon the files and records of the board.

In respect to the powers of the school commissioners of the city to adopt books and make contracts for their supply, the statutory provisions are as follows:

Rev. St. 1881: "Sec. 4436. *County Board of Education*. (8) The county superintendent, and the trustees of the townships, and the chairman of the school trustees of each town and city of the county, shall constitute a county board of education. * * * Said board shall consider the general wants and needs of the schools and school property of which they have charge, and all matters relating to the purchase of school furniture, books, maps, charts, etc. The change of text-books, except in cities, and the care and management of township libraries, shall be determined by such board, and each township shall conform as nearly as practicable to its action; but no text-book hereafter adopted by the county board shall be changed within six years from the date of such adoption, except by unanimous vote of all the members of such board: provided, that any text-book heretofore adopted by the county board of education shall not be changed within three years from the date of its adoption."

"Sec. 4460. *Duties and Powers*. (4) Such board of school commissioners is hereby authorized: * * * *Seventh*. To establish and enforce regulations for the grading of, and course of instruction in, the schools of the city, and for the government and discipline of such schools."

The by-law of the board on the subject is as follows:

"Sec. 7. *Text-Books and Course of Instruction*. It shall be the duty of this committee, annually, at the first regular meeting of the board in April, to make a report embracing such facts and suggestions in regard to text-books and course of instruction as it may think advisable to present. At this meeting any member may propose changes in text-books. All propositions for changes in text-books shall lie over for one month, when they may be acted upon. It shall not be in order for any commissioner at any other time to propose changes in text-books used in the schools, except by a vote of at least two-thirds of all the members of the board. * * * All changes in text-books

shall take effect only at the commencement of the fall term of the schools, unless it be otherwise ordered by a vote of two-thirds of all the members of the board."

At the threshold, manifestly, is the inquiry whether the complainants have the contract right which they assert. If not, they have no cause of complaint against the respondent, and no right, in this court certainly, to bring into question the validity or scope of the act of the legislature of the state, under which, it is alleged, the respondent is about to take action in hostility to complainants' interest.

By the seventh clause of section 4460, *supra*, the board of school commissioners are empowered "to establish and enforce regulations for the grading of and course of instructions in the schools of the city." In this clause, helped out possibly by implication from section 4436, *supra*, must be found whatever authority there is for making such a contract as the one in question; and, considering the principle that grants of power to municipal corporations are to be construed strictly, it is not clear that the board had power to bind itself by a stipulation that the books adopted should continue in use for a stated period of years. This power to select or adopt books was given, mainly, at least, for the benefit of the public, to be used as occasion should require; and it is not consistent with this design that, in a single exercise of it, the board should abrogate or exhaust it by stipulating that it should not for a term stated be exercised again. If this could be done for six years, it could for sixty. See *Conley v. School Directors*, 32 Pa. St. 194; *Clark v. School Directors*, 78 Ill. 474; *Bancroft v. Thayer*, 5 Sawy. 502. But, whatever the power of the board in this respect may have been, the proposition submitted by the complainant and the resolution of acceptance by the board, constituting whatever contract there is between them, do not show an agreement that complainants' books shall be used for the term of six years, or for any definite time. Indeed, I am not clear that by this transaction the board can be deemed to have come under any obligation to the complainants whatever. It seems rather to have simply exercised its authority to adopt, and, as a condition of its action, to have exacted of the complainants a promise to furnish the books at the prices stated, "during the term of use of such books in Indianapolis;" that is to say, "so long as the books should be used in Indianapolis." That the understanding at the time was that the board was doing and binding itself to do nothing beyond the adoption of the books, is indicated in the first sentence of complainants' proposition: "This paper is to certify that if Swinton's geographies be adopted by the school board of Indianapolis, Ivison, Blakemore, Taylor & Co., as publishers of said books, will furnish them," etc.; and in the entire document, and in the resolutions adopted by the board, there is no suggestion of a condition, covenant, or promise that there should be, after the adoption, any further action or liability on the part of the board. Practically, the action taken was simply a grant by the board to the complainants of the exclusive privilege or right to furnish to the pupils and patrons of the city schools the books specified, upon the terms stated, until other books instead should be adopted,—

that is to say, during the pleasure of the board; and in this view the doctrine is perhaps applicable that "grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public." *Turnpike Co. v. Illinois*, 96 U. S. 63; *Slidell v. Grandjean*, 111 U. S. 412, 4 Sup. Ct. Rep. 475; *Navigation Co. v. Railway Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409.

But aside from this doctrine, and conceding that the complainants have a contract which should be interpreted by the ordinary rules, there is in it no such ambiguity or incompleteness as to admit of extraneous evidence to explain its meaning, or to enlarge its scope. The affidavits, therefore, introduced on the proposition of complainants that the parties intended a contract for six years, must be rejected, and the intention must be deduced from the written proposition of complainants, and the resolution of acceptance by the board; and from these, as already stated, it does not appear that any term of use was stipulated.

The requirement in section 4436, that no text-book adopted by the county board shall be changed within six years from the date of adoption, in no manner helps out the claim of the complainants for a contract or privilege for six years, because that provision has no application to cities; and even if applicable, it could lend no force to the contract, because, by the unanimous consent of the county board, changes could be made at any time. It is suggested, however, that by its by-laws the board can make no change of text-books except at its April session, and consequently there can be no action upon the subject now, except it be under the act of the legislature referred to, and therefore the validity of that act is in issue, even if plaintiffs' contract be for no definite term of use. The sufficient answer to this is that, by the terms of the by-law, changes may be made at any time by a two-thirds vote of the members of the board. It follows that the application for a temporary restraining order must be denied; and it is so ordered.

FARRINGTON *et al.* v. TOURTELOTT.

(Circuit Court, W. D. Missouri, W. D. September 2, 1889.)

1. SPECIFIC PERFORMANCE—CONTRACT—INCUMBRANCES.

Plaintiffs filed a bill for the specific performance of a contract to purchase certain land on delivery to the defendant of an abstract of title showing the property to be free from all incumbrances, and alleged performance on their part. Defendant alleged that a railway had a right of way over the land for 20 years. Plaintiffs filed an amended complaint, alleging that defendant knew of such fact at the time the contract was made, and that the right of way enhanced the value of the property within the knowledge of both parties to the contract. *Held*, that a demurrer to the amended bill must be sustained on the ground that plaintiffs have sought therein to contradict and vary a written contract.

2. SAME.

Such right of way is an incumbrance on the property.

In Equity. Bill for specific performance.
Crittenden, McDougal & Stiles, for plaintiffs.
Pratt, McCrary, Ferry & Hageman, for defendant.

PHILIPS, J. This is a bill for specific performance of a contract respecting the sale of certain real estate situated in the west bottoms of Kansas City, Mo. The contract provides, among other things, that—

“The sellers are to furnish, within five days from the date hereof, a complete abstract of title to said property from United States government, and such usual certificates as may be required by the buyer as to judgments and mechanics' liens; * * * and the buyer to have twenty days for the examination thereof. * * * If, upon examination, it is found that the sellers have a good title in fee to said property, they are to execute and deliver to the buyer, or order, a general warranty deed thereto, properly executed, and free and clear of all liens and incumbrances whatsoever, except only such as are to be assumed by the buyer.”

To the original bill filed herein the respondent interposed as a defense that at the time of the making of the contract there was, and now is, an incumbrance on the real estate in the form of an easement in favor of the Missouri Pacific Railway Company, as assignee of one George Fowler, for laying down and maintaining a railroad track thereon for a period of 20 years, which said track has been built, and is now in use thereon. To avoid this allegation of the answer the complainants have filed an amended bill, in which, among other things, it is alleged, in avoidance of said alleged incumbrance, that during the negotiations for the purchase of said premises the complainants and respondent went upon said property, and made a personal examination and inspection of the same; that said respondent saw and understood that said strip was being used for said railroad right of way; that he was informed of the length of time said easement was to exist; and that respondent understood and regarded said railroad track for switching purposes to be a valuable privilege, greatly enhancing the market value of said premises; and that said fact, so known to the purchaser, was the inducement which finally led him to the agreement; and that it was the chief consideration of the purchase thereof at the agreed price; and that in drawing the written contract no mention was made of said grant or right of way for the reason that it was well known and understood at the time by all the parties to greatly enhance the value of said premises. To this amended bill the defendant demurs, for the reason that in it complainants have undertaken to contradict and vary the terms of a written contract, and for other general grounds.

If the controlling question raised by this demurrer were *res novo*, the conclusion which my sense of right and justice would reach would probably conflict with what seems to be the current American authority. Accepting as true the allegations of the amended bill, the respondent (vendee) contracted for the property after personal inspection of the premises. He saw the railroad track through it, and bought the property because in his opinion this railroad switch enhanced the value of the purchase. To the common sense of mankind it would therefore seem to be a solecism—a contradiction in terms—to say that the purchaser could be heard

to assert that that was an incumbrance—a burden—in diminution of the value of the thing bought, which was regarded by both parties as an inducement to the purchase. The best recognized definition, perhaps, of the term “incumbrance” is that given by PARSONS, C. J., in *Prescott v. True-man*, 4 Mass. 630: “Every right to or interest in the land granted to the diminution of the value of the land, but consistent with the passing of the fee of it by the conveyance.” The diminution of the value of the land being the crucial test, it would seem not unreasonable that where, in the opinion of the purchaser when he bought, and where the real fact confirmed his judgment, the physical condition complained of does not lessen the value of the property, either in the market or its use, it should logically follow that there was no incumbrance to become the subject of an action. And if, on the other hand, it be said that the written contract must be its own interpreter, without the aid of extrinsic facts, and that presumptively such easement is really an injury, it is answered with much force that the further presumption just as reasonably arises that such injury was in the contemplation of the parties when they made the contract after inspection; and that the purchaser paid, or agreed to pay, a correspondingly less price. Nothing is more natural or usual than that two parties negotiating respecting the price of a piece of property in full view, with obvious physical conditions, calculate the price based on the advantages or disadvantages supposed to arise on such apparent facts. From the opposite doctrine it might result that the purchaser would secure a double compensation for an injury resulting from such incumbrance—*First*, in taking it into consideration when he closed the contract; and, *second*, where the deed is executed, by recovering in an action for breach of covenant against incumbrances. The following adjudications support what may be deemed the minority view of this controversy: *Whitbeck v. Cook*, 15 Johns. 483; *Hymes v. Esty*, 36 Hun, 147; *Patterson v. Arthurs*, 9 Watts, 152; *Memmert v. McKeen*, 112 Pa. St. 315–320, 4 Atl. Rep. 542; *Kutz v. McCune*, 22 Wis. 628; *Smith v. Hughes*, 50 Wis. 627, 7 N. W. Rep. 653; *Lallande v. Wentz*, 18 La. Ann. 290.

It is impressive evidence of the fact that the foregoing views are rooted in the popular conviction of justice and right between man and man in such transactions that the legislatures of some of the states, whose courts have held the contrary view, have declared by statute against public roads and the like constituting an incumbrance. Rawle, Cov. (5th Ed.) § 82. The weight of authority, it must be conceded, is the other way; follow the early case of *Kellogg v. Ingersoll*, 2 Mass. 97, in which it was held that a public road over the land conveyed constitutes an incumbrance. The authorities on this subject are collected in the case of *Burk v. Hill*, 48 Ind. 52. See Rawle, Cov. (5th Ed.) § 82. This doctrine has been extended to an easement like the one in question of a railroad running over the land. The argument in support of this theory proceeds on the assumption that such easement diminishes the value of the land, or that the term “incumbrance” is to have a broader meaning than that given by Chief Justice PARSONS. It contends that where the property is free from such servitude the purchaser may apply it to such uses and pur-

poses as he will; but when it is subject to such servitude the portion occupied is not subject to his exclusive dominion, nor can he use and enjoy the whole and every part thereof as should be the incident of an absolute fee. And in respect to a purchase with actual knowledge of the physical condition of the property at the time of the execution of the contract it is said in *Beach v. Miller*, 51 Ill. 206:

"A person may warrant an article to be sound when both buyer and seller know it is unsound. So the seller may warrant the quantity or quality of an article he sells, when both parties know that it is not of the quality, or does not contain the quantity warranted. In fact the reason the purchaser insists upon covenants for title, or a warranty of quality or quantity, is because he either knows or fears that the title is not good, or that the article lacks in quantity or quality. If he were perfectly assured on those questions, he would seldom be tenacious in obtaining a covenant or warranty."

The doctrine of this case was followed in a most elaborate discussion in *Kellogg v. Malin*, 50 Mo. 496, since which the doctrine of that case has been the recognized rule in the courts of this state. To attempt, in this case, to establish in this jurisdiction a different rule, would tend to confusion and uncertainty in the law respecting such contracts. The rights of the citizen under such contracts might be made to depend upon which of the jurisdictions, state or federal, he was drawn into to litigate them. In the absence of a rule established by the highest court in the federal jurisdiction it is a conservative and wise rule to follow the one longest established governing the question in the state court. It follows that the demurrer to the amended bill is sustained. Judgment will go accordingly.

SCHLESINGER *et al.* v. KANSAS CITY & S. RY. CO. *et al.*

(Circuit Court, W. D. Missouri, W. D. September 24, 1889.)

1. VENDOR AND VENDEE—CONVEYANCE OF RAILROAD—CONTRACT.

Whatever may be the effect of an instrument purporting to convey property consisting of the road-bed, etc., of a railroad, where the grantor receives a consideration and abandons the property of which the grantee takes possession, enters into a new contract with the parties to whom the grantee's title is forfeitable, and completes the road, the title no longer remains in the grantor.

2. FRAUDULENT CONVEYANCES—RIGHTS OF CREDITORS.

Property, to which the grantor's title was subject to speedy forfeiture, consisting of the road-bed, etc., of an incompleted railroad, which had been uncared for for four years, was conveyed in consideration of \$100,000 of income railroad bonds, which had a purely speculative value. *Held*, that a claim against the grantor for damages for breach of contract to purchase materials could not be charged upon such property, as having been conveyed without consideration and in fraud of claimants' rights, where the grantor had never received anything under the contract, though it had paid part of the price, and the conveyance was made nine months before either party thereto had any notice of claimants' intention to make any further claim.

In Equity. Bill to enforce a judgment.

Pratt, McCrary, Ferry & Hagerman, for complainants.
John O'Grady and C. O. Tichenor, for defendants.

BREWER, J. This is a suit in equity, brought to charge certain property in the hands of the defendant railway company with the payment of a judgment in favor of complainants and against the defendant construction company. The property sought to be charged is the right of way, road-bed, masonry, etc., formerly belonging to the Kansas City, Memphis & Mobile Railway Company, and now in the possession and use of the defendant railway company. In the early part of 1876 the Kansas City, Memphis & Mobile Railway Company, which had constructed and then owned the property in question, was thrown into bankruptcy, and the property conveyed to assignees in bankruptcy. At that time several miles of road had been graded, and many thousand dollars expended in masonry and culverts. On April 25, 1877, the assignees in bankruptcy, in pursuance of orders of the court, sold and conveyed the property to John D. Bancroft for \$15,025. The purchase was made for the benefit of a few gentlemen, merchants, and having business interests in Kansas City, who purchased, not with a view of completing the road themselves, or of speculation in the purchase, but to secure its construction and control in the interests of Kansas City. On the 27th day of April, 1877, Bancroft conveyed the property to Thomas K. Hanna, Benjamin McLean, and John D. Bancroft, as trustees for the parties interested in the purchase. These gentlemen held the title until January 13, 1880, when they conveyed it to James I. Brooks for the cash consideration of \$19,156.87, and upon certain terms and conditions. Mr. Brooks purchased for the defendant construction company, to which in a few days he conveyed the property. The conditions of the conveyance from the trustees, and through which defendant construction company received title, are these:

"Subject, however, to the following conditions: Said party of the second part is to build said railroad from Kansas City to Harrisonville or Belton, as said second party may elect, on or before January 1, 1881, so as to be ready for use as a railroad, and also to complete said railroad to the coal fields of Bates county, to a point south of Butler, on or before July 1, 1881, so as to be ready for like use as aforesaid; and, if said second party shall fail to build said railroad to said coal fields as aforesaid, then the property so to be sold as aforesaid shall revert to said first party, and reinvest in them the same as they now hold the same: provided, however, that as soon as said second party shall expend the sum of fifty thousand dollars in the construction of a road-bed for said railroad, commencing at Kansas City, and running southwardly, then the said provision shall become null and void and of no effect whatever; and, upon said expenditure being made in the building of said railroad, as aforesaid, by said second party, of said sum of fifty thousand dollars, then said trustees are to execute to said second party, or its assigns, an instrument in writing acknowledging the waiver and extinguishment of said forfeiture."

On September 18, 1880, a conveyance of the property was executed in the name of the defendant construction company to the defendant railway company, which deed, though attested by the secretary and seal

of the company, was signed only by one Henry D. Ashley as agent of the construction company. The consideration expressed in this deed was \$250,000. On December 15, 1880, this instrument was executed by the trustees and beneficiaries to the railway company:

"Whereas, the Kansas City, Memphis & Mobile Railroad, with all its road-bed, rights of way, appurtenances, and property and rights of property, whatsoever, connected with said railroad, with all the franchises of the Kansas City, Memphis & Mobile Railroad Company, were, by deed dated January 13, 1880, sold and conveyed by the undersigned trustees to one J. I. Brooks, on certain conditions expressed and contained in said deed; and whereas the title to said property, subject to the said conditions, has, by sundry mesne conveyances, passed to and vested in, and is now owned and held by, the Kansas City & Southern Railway Company; and whereas said last-named Co. has not been able to comply with and perform said conditions within the time specified in said first-named deed for their performance, but is now willing to deposit, and has deposited, with said trustees the sum of \$25,000 as a guaranty by said last-named company of the good faith of its purpose to build a railroad south-eastwardly from Kansas City, Mo., through the coal fields of Henry county, Mo., and the iron fields of St. Clair county, Mo., the receipt of which sum of \$25,000 by said trustees is hereby acknowledged; and whereas, since the making of said deed to said J. I. Brooks, various sums of money have been expended for rights of way, engineering, and other necessary expenses connected with the enterprise of building said railroad, in addition to the purchase price paid to said trustees on the execution of said first-named deed by them, and whereas the owners of more than two-thirds of the money and shares furnished by the persons and firm named in the deed of said property to said trustees, dated April 27, 1877, have directed the undersigned trustees to execute and deliver this instrument to said Kansas City & Southern Railway Co.,—now, therefore, in consideration of the premises, and of the sum of one dollar to said trustees by said Kansas City & Southern Railway Co. in hand paid, the receipt whereof is hereby acknowledged, it is agreed, stipulated, and covenanted by and between said trustees, for themselves and their said beneficiaries and said K. C. & S. Railway Co., as follows: (1) The conditions provided and expressed in said deed of said trustees to said J. I. Brooks are hereby annulled, rescinded, and extinguished, and the said K. C. & S. Railway Company are hereby released and forever discharged from the performance of the same, or any part thereof, and in lieu thereof the following conditions are hereby provided,—that is to say: Said trustees, or a majority of them, shall, as said railroad from Kansas City, south-eastwardly through the coal fields of Henry county, Mo., and the iron fields of St. Clair county, Mo., shall be constructed, pay out said \$25,000 in the estimates and orders made and given in the building of said railroad by the chief engineer of said K. C. & S. Railway Co., and as soon as said \$25,000 is so paid out, and the additional sum of \$15,000 is expended by said last-named Co. in the building of said railroad, then said last-named Co. shall hold said property so conveyed free from any and all claims of whatsoever kind on the part of said trustees or their beneficiaries or any of them. (2) It is further provided and covenanted that, if said last-named Co. shall not expend the full sum of \$25,000 in the building of said railroad before July 1, 1881, then so much of said \$25,000 so deposited as shall, on the day last aforesaid, be unexpended, shall be forfeited to and become the money and property of said trustees for the benefit of their beneficiaries. (3) It is further provided and covenanted that, as soon as said \$25,000 so deposited shall be paid out, and as soon as the chief engineer of said last-named Co. shall make his certificate of expenditure by said last-named Co. of said additional \$15,000 in the building of said railroad,

which sum of \$15,000 shall be expended before October 1, 1881, then said trustees shall deliver to said last-named Co. an instrument of writing, duly executed and acknowledged, evidencing the full compliance of all the conditions herein contained by said last-named Co., and, if the sum of \$40,000 shall not, as above provided, be expended by said Co. before October 1, 1881, then said property shall revert to said trustees as by said deed to said Brooks is provided."

After this the defendant railway company took possession of the property, and has completed and in operation the line of railroad. On March 2, 1880, after the purchase by the defendant construction company, it contracted with complainants for the purchase of 5,000 tons of steel rails at \$51 per ton, on which contract it paid complainants \$50,000. Little more than two months thereafter, on May 10, 1880, finding itself unable to complete the contract, the construction company authorized the complainants to sell the rails for its account, without in any way prejudicing their claim for damages against the company. No rails were ever in fact delivered to or received by the construction company, but, the price of rails having depreciated quite rapidly, the complainants sold them much below \$51, and presented a claim for damages above the \$50,000 received, in the neighborhood of \$40,000. Suit was commenced on this claim on October 7, 1881, writs of attachment issued and levied upon the property in question, and on February 1, 1886, complainants recovered judgment against the construction company for \$35,901.39, and it is to enforce that judgment that this suit is brought.

The contention of complainants is that the deed signed by Henry D. Ashley was ineffectual to pass the title away from the defendant construction company, and therefore it still remains in the construction company, and subject to this judgment. Or, if it be true that the construction company did part with its title, that it was a conveyance in fraud of the rights of these complainants as creditors, because it was a conveyance without consideration of all its property. As a matter of fact, this was all the property the construction company had, and the judgment rendered shows that it was in debt to complainants; so that in this respect the questions presented are whether the construction company has conveyed away its title, and, if so, whether the transaction is void as against the complainants.

That the construction company has parted with its title I have little doubt. Whatever may be said as to the legal effect of the instrument signed by Mr. Ashley, it is clear that the construction company abandoned the property, and the railway company took possession. The construction company held the title subject to speedy forfeiture, and, while there is dispute in the testimony as to whether there was ever the formality of a surrender, it is evident that all parties in interest understood that it had practically abandoned the property. It in fact received a consideration, the nature and value of which will be considered hereafter, and, with its knowledge, the railway company and the trustees entered into a new contract involving expenditures by the railway company, and with like knowledge the railway company proceeded to

complete the railroad. Under these circumstances it would be ignoring the substance of things to hold that the title still remained in the construction company.

But the difficult question is the other, and, in respect to this, I notice—*First*, that there are no especial equities in complainants' claim, either against the construction company or upon this property. Not a single rail was ever received by the company, or placed upon the road-bed. In other words, the property was in no manner improved, and the company never received anything. While the complainants' claim is undoubtedly a just debt, it is only a naked, barren, legal obligation, unattended with any equities as against the company or the property. *Secondly*, there is nothing in the conduct of either the construction or railroad company which indicates bad faith or an effort to avoid just liabilities. The construction company had about \$75,000, two-thirds of which went to complainants, the company receiving nothing therefor, \$19,000 of it to the trustees for the purchase of the property, and the balance was expended in surveys and kindred matters. Finding itself unable to complete its undertaking, it practically abandoned the work; and the contract in pursuance of which the railroad company paid out money and assumed liability was executed nine months before, by the commencement of suit, notice was given of any intention on the part of the complainants to make further claim against the construction company. *Thirdly*, there was a consideration. It appears that the construction company received \$100,000 in income bonds of the railway company. It is contended that they were worthless, and doubtless their only value was speculative; but what was the value of that which the construction company parted with? It would be grossly unfair to estimate its value by the money expended on the road-bed and masonry. Even when a railroad is completed, and in operation, the cost is a very uncertain test of value. The amount of business which the road does, the earnings which it makes, are far more certain tests of value than the cost of construction. As the cost is a poor test of value in a completed road, much more is it so in reference to the disconnected fragments of an incomplete road, and this when the owner has a perfect and indefeasible title. And here it must be borne in mind that the road-bed had been lying for over four years uncared for, and subject to all the waste and deterioration which come from rains and the changes of the seasons. But, beyond all this, the construction company had no indefeasible title. It had done no work during its possession, or practically none, and its title was subject to a speedy forfeiture. It was almost an impossibility for it, in the time left, to have performed the conditions necessary to prevent a forfeiture, so that practically it held title subject to the pleasure of the trustees, its vendors. Under these circumstances, what was the value of its interest? Certainly, most trifling; and, although from the testimony I cannot find that there was ever any formal surrender to the trustees, it is obvious that the parties treated the matter as though the forfeiture had been made,—as though the construction company had abandoned the work, and the way was opened for a new arrangement between

the railway company and the trustees. The value of the income bonds may have been and was purely problematical and speculative, but was that value any less than that of the interest of the construction company in the property? It is very difficult to believe that it was. Looking at all the circumstances surrounding these transactions, it seems to me that it would be grossly inequitable to permit the complainants to treat this property as then the absolute and indefeasible property of the construction company, and to charge it with their claim as having been sold and conveyed in fraud of their rights. The complainants may have lost some portion of the profits expected from their contract, but the construction company lost all that it had; and the railway company, while it received something, got no more than it might have easily obtained from the trustees directly after a forfeiture had been formally declared. Indeed, as I have before said, the parties seem to have acted as if the forfeiture had already been declared, and the interest of the construction company had ceased. The first stipulation in the contract between the railway company and the trustees recites that the conditions in the deed from the trustees to Brooks are annulled, rescinded, and extinguished, and, in lieu thereof, the conditions following are provided, implying plainly that there was a new transaction between new parties in lieu of that which had proved practically a failure.

For these reasons I think that the defendants are entitled to a decree dismissing the bill, and this without reference to the technical questions presented as to the effect of the attachments placed upon the road-bed and masonry. The bill will be dismissed at complainants' costs.

CRABTREE v. ST. PAUL OPERA-HOUSE Co.

(Circuit Court, D. Minnesota. September 30, 1889.)

1. CONTRACT—WANT OF MUTUALITY.

Where the agents of a corporation, without authority, enter into a contract containing several provisions forming an entirety, the passage of a resolution by the company ratifying the contract except as to one provision is a repudiation of the contract, and releases the other party from all obligations on his part to perform it.

2. SAME.

A corporation passed a resolution ratifying a contract made by its agent, except as to one provision, and the other party to the contract was notified. The latter refused to accept the modification, and two days later left the city where the terms were being settled. *Held*, that a resolution passed the day after her departure, ratifying the contract as first made, came too late.

3. SAME—FORFEITURE OF EARNEST MONEY.

The preliminary contract was for the purchase of property from the corporation, and \$5,000 was paid in cash. As to such payment the contract provided that "if, upon examination of the abstracts aforesaid, the title to the property is not good and marketable, or cannot be made so, * * * the party of the second part, at her option, may be released from this contract, and the five thousand dollars paid as aforesaid shall be refunded; but if the

title is good and marketable, and shall not be accepted by the party of the second part, the five thousand dollars, at the option of the party of the first part, shall be forfeited." *Held* that, the company having refused to ratify the contract, the other party was entitled to recover the cash payment.

At Law. Action to recover earnest money.

O. E. Holman, for plaintiff.

Williams & Goodenow and *C. E. Flandrau*, for defendant.

NELSON, J. A jury is waived by stipulation on file, and the case is tried by the court. I find the following facts, upon which a judgment is rendered:

1. On the 10th of September, A. D. 1888, the following contract was entered into between the St. Paul Opera-House Company and Lotta M. Crabtree, a citizen of the state of New York:

"CONTRACT.

"*Exhibit A.*

"This agreement, made this 10th day of September, A. D. 1888, by and between the St. Paul Opera-House Company, a corporation organized under the laws of the state of Minnesota, party of the first part, and Miss Lotta M. Crabtree, of New York city, party of the second part, witnesseth: That in consideration of the sum of one hundred and forty-two thousand five hundred dollars, to be paid by the party of the second part to the party of the first part, as hereinafter provided, the party of the first part hereby agrees to grant, bargain, sell, assign, transfer, and set over to the party of the second part, her heirs and assigns, the 'Grand Opera-House,' so called, in St. Paul, in the county of Ramsey, in the state of Minnesota, with all the rights, privileges, and easements thereto pertaining, and all the real estate, and all rights, privileges, and easements in any and all real estate in St. Paul aforesaid, particularly all that certain real estate in St. Paul aforesaid conveyed to the party of the first part by William F. Davidson and Sarah A. Davidson, his wife, by deed bearing date April 1st, 1884, recorded in the office of the register of deeds of the county of Ramsey aforesaid, in Book 182 of Deeds, page 693, together with all the rights of way for ingress or egress in a reasonable manner to or from said opera-house as they now exist through the 'Grand Block,' so called, and the 'Court Block,' so called, and the alley from Fourth street to said opera-house described in said deed, and also for the term in the lease hereinafter described over the strip of land seventeen and one-half feet wide adjoining said twelve-foot strip, leased by John L. Merriam to William F. Davidson by lease and supplemental agreement, both dated June 21st, A. D. 1883, but subject to all the provisions of said lease and supplemental agreement, and subject to the rights of all tenants and occupants of block 23 in St. Paul aforesaid, to use said rights of way in common with the party of the second part, her tenants, servants, and patrons. The said right of way through the Grand block and through the Court block is fully described in that certain contract bearing date July 20th, 1887, made by and between Sarah A. Davidson, Peyton S. Davidson, Edward E. Davidson, James H. Davidson, and Frank L. Johnston, as executors of the last will and testament of William F. Davidson, deceased, of the one part, and the St. Paul Opera-House Company aforesaid of the other part, which said contract has been exhibited to the party of the second part hereto, and a true copy thereof delivered to her. The party of the first part covenants and agrees to give or cause to be given and granted to the party of the second part, her heirs and assigns, the perpetual use of the box and man-

ager's offices, and the entrance and stairway to the gallery of said opera-house starting from the main entrance, as now used and enjoyed by the party of the first part. The party of the first part also agrees to sell to the party of the second part, as a part of this agreement, all the scenery, stage properties, desk, safe, office furniture, tickets, plats, and all other personal property and fixtures now being or used in and about the said opera-house and offices as now conducted, and to procure, if desired, from the executors aforesaid, another conveyance more particularly describing the exits and entrances aforesaid, including the exit by the iron staircase as now supported on the outside of said opera-house and Court block, and providing for the use of all said exits and entrances by the party of the second part, her heirs, assigns, tenants, servants, and patrons.

"In consideration of the premises said party of the second part agrees to pay to said party of the first part the sum of one hundred and forty-two thousand five hundred dollars, as follows: Five thousand dollars on the delivery of these presents; seventy thousand dollars on the delivery of good and sufficient deeds and instruments transferring said property so sold as aforesaid to the party of the second part: and sixty-seven thousand five hundred dollars on or before one year from September 10th, 1888, with interest at the rate of seven per cent. per annum, payable semi-annually, said deferred payment to be evidenced and secured by a note and mortgage in the usual form from the party of the second part to the party of the first upon all the real estate herein mentioned and described, and by an insurance against fire to at least fifty thousand dollars in some good insurance company or companies, with loss, if any, payable to the mortgagees to the extent of its or their interest. The party of the second part agrees to assume and carry out all the contracts heretofore made by the party of the first part with actors, players, singers, and musicians for performances in said opera-house during the season of 1888 and 1889; it being the intention hereof that said party of the second part shall assume all the contracts with attractions and People's Church made by said first party for said season, but no other contracts whatever.

"It is understood and agreed that the deed, note, and mortgage aforesaid shall bear date September 10th, 1888, but, as the title to said property cannot be examined by that date, it is covenanted and agreed that the net receipts and income from performances and church services in said opera-house from and after September 10th, 1888, shall be held by the party of the first part for the use of the party of the second part, to be paid or accounted for to her upon the completion of the sale herein contemplated, with interest thereon from the date of the receipt thereof; and the party of the second part agrees to pay interest on the seventy thousand dollars aforesaid from the 10th day of September, A. D. 1888, until the date of the closing of this deal under the terms hereof, if said second party shall then be ready to perform on her part; otherwise until she shall be ready. No interest to be due from the party of the second part for the time during which there may be any delay caused by the default or inability of the party of the first part in completing the sale according to the terms hereof. The transaction is to be consummated fifteen days after the delivery of all the abstracts hereinafter mentioned. Full abstracts of title of the real property and easements sold as aforesaid, and the Court block and Grand block aforesaid, shall be furnished to the party of the second part, or her agent, as soon as practicable. It is understood and agreed that the party of the second part may, if she so elect, purchase the stock of the Opera-House Company aforesaid, and receive the same in lieu of the deeds of conveyance and assignment aforesaid. It is understood and agreed that the sewer and tunnel connections with the public sewers shall remain and be maintained as at present, unless otherwise ordered by the municipal authorities. It is understood and agreed that the taxes and assessments provided for

in said lease from John L. Merriam to William F. Davidson shall be borne and paid, one-half by the party of the first part, or the devisees of said William F. Davidson, and one-half by the party of the second part, her heirs and assigns, until the expiration of said lease. Said party of the first part or said devisees shall keep in repair and good order the open passage from said opera-house to said Fourth street during the time of said lease.

"It is understood and agreed that the interest of the party of the first part in the bill-boards throughout the city, being a one-half interest therein, shall pass to the party of the second part under this contract, together with one-half interest in the bill-posting business, and all the tools, goods, and chattels belonging thereto. It is understood and agreed that the party of the first part guaranties that the Economy Steam-Heat Company will, at the option of the party of the second part, furnish the electric current necessary for electric light and steam heat for said opera-house for the term of five years, upon the following terms, viz.: For the heat, not exceeding two thousand dollars per annum; all the steam radiators and fixtures in the opera-house to be maintained by the party of the second part. For current for electric lights for each day in the week except Sunday, for ten months in the year, at a sum of not exceeding five hundred and seven dollars per month, unless more lights are required than at present, and in that event *pro rata* for such increased lights, and at a *pro rata* cost for such portion of the other two months in the year or Sundays as the party of the second part may desire the lights. And said party of the second part may at her option accept either one or both of said agreements for furnishing said heat and light, said option to be exercised within three months after the closing of this deal. It is understood and agreed that the party of the first part will cause the entrance to the gallery from Wabasha street aforesaid to be put into a condition satisfactory to the building inspector of St. Paul, and will give satisfactory security for the faithful performance of this covenant, and will indemnify said second party, her heirs and assigns, against all loss, damage, suits, and costs that the said second party may suffer or incur by reason of a non-compliance with said inspector's requirements heretofore made as to said gallery entrance. It is understood and agreed that the party of the first part will furnish to the party of the second part satisfactory security for the payment of the mortgages upon the Grand block and Court block covering the right of way aforesaid through said blocks, and forever to keep and indemnify the party of the second part, her heirs or assigns, from all harm, let, trouble, damage, costs, suits, that shall or may at any time arise or come out of the said mortgages.

"It is further agreed, and said first party guaranties, that said second party shall have and enjoy all and the same privileges and rights pertaining to said bill-boards and making paste for the season of 1888-89 heretofore granted by the estate of William F. Davidson, deceased: provided, that said enjoyment shall not interfere with the sale or improvement of any of the property of the said estate. It is agreed that said second party shall have reasonable access to all books of account kept by said first party in the management of its business, and that all contracts for performances for the season of 1888-89 shall be delivered to said second party when the other papers provided for herein are passed. It is agreed that said second party shall have full and complete possession and control of all the property herein described, and under the conditions herein specified, from and after the date when this deal is closed. It is understood and agreed that if, upon examination of the abstracts aforesaid, the title to the property is not good and marketable, or cannot be made so within sixty days, (except as to the mortgages aforesaid,) the party of the second part, at her option, may be released from this contract, and the five thousand dollars paid as aforesaid shall be refunded; but if the title is good and marketable, and shall not be accepted by the party of the second part, the

five thousand dollars, at the option of the party of the first part, shall be forfeited.

"In witness whereof said party of the second part has hereunto set her hand and affixed her seal the day and date first above written, and the said party of the first part has caused these presents to be subscribed and its corporate seal hereto affixed by its treasurer and secretary.

"ST. PAUL OPERA-HOUSE CO.,

"By EDW. E. DAVIDSON, Treasurer. [Seal.]

"ANDREW DELANY, Secretary.

"LOTTA M. CRABTREE. [Seal.]

"MRS. M. A. CRABTREE, Her Atty.

"Signed, sealed, and delivered in presence of

"C. E. HOLMAN.

"H. L. WILLIAMS, as to Opera-House.

"M. D. FLOWER."

2. I find that the contract was executed by Lotta M. Crabtree through her duly-authorized attorney, and by the St. Paul Opera-House Company through Edward E. Davidson, treasurer, and Andrew Delany, secretary, neither of whom had power or authority to enter into and execute the contract binding on the said company.

3. I find that at the time the contract was executed \$5,000, according to the terms thereof, was paid by Lotta M. Crabtree to the treasurer of said company, and that the amount of the deferred installments was by consent of the parties who signed the contract changed so that \$95,000, instead of \$75,000, was to be paid by the vendee on the delivery of good and sufficient deeds and instruments transferring said property sold, and the balance of the purchase price—\$42,500—was to be paid on or before one year from September 10, 1888, the payment of which deferred sum was agreed to be evidenced and secured by a note and mortgage.

4. I find that on the 29th day of September following the execution of the contract it was submitted to a meeting of the stockholders and directors of the St. Paul Opera-House Company, regularly called, and the following resolution duly adopted:

"RESOLUTION.

"The following resolution was offered by F. B. Clarke, and seconded by L. N. Scott, and passed unanimously:

"Resolved, that the board of directors, through its president and secretary, be, and the same are hereby, authorized and empowered to sign, seal, acknowledge, and deliver a deed or deeds of conveyance of the St. Paul Opera-House property, with all easements belonging thereto, to Lotta M. Crabtree, and a bill of sale of all the personal property belonging to the corporation, all according to the terms of that certain contract between the St. Paul Opera-House Company and said Lotta M. Crabtree, dated September 10, 1888, which said contract we hereby ratify and affirm, excepting clauses referred to in agreement for sale and possession of one-half interest in bill-boards and bill-board business. The president and secretary are hereby authorized to make the proper conveyances of said opera-house and easements, and make bill of sale of property specified, excepting bill-board and business.'"

And said attorney of Lotta M. Crabtree, who executed the contract, was informed of the adoption of said resolution. I also find that, at and

prior to the passage of this resolution, Lotta M. Crabtree, the party of the second part, prepared and executed the note and mortgage, and the balance of the last payment was provided by her and brought to the city of St. Paul, and deposited in a bank. I further find that, subsequent to the adoption of their resolution, the officers of the St. Paul Opera-House Co. made propositions to the attorney of the second part looking to a modification of the contract of September 10, 1888, all of which were declined, and two days after being informed of the passage of the resolution aforesaid she left the city, and refused to stand by the contract.

5. I find that on October 2, 1888, after the attorney of Lotta M. Crabtree, who executed the contract for her, had been informed of the resolution of September 29th, and had left the city, and refused to have anything further to do with the contract, the following resolution was adopted at a special meeting of the stockholders of the St. Paul Opera-House Company:

“RESOLUTION, &C.

“ST PAUL, MINN, Oct. 2, 1888.

“A special meeting of stockholders of the St. Paul Opera-House Company, held at following request:

‘ST. PAUL, MINN., Oct. 2, 1888.

“A. Delany, Sec’y. St. Paul Opera-House Co.—DEAR SIR: You are requested to call a special meeting of the stockholders of the St. Paul Opera-House Company, at 340 Cedar street, this afternoon at 3:30 o’clock.

“P. S. DAVIDSON, } Representing stock owned by Es-
“EDW. E. DAVIDSON, { tate of William F. Davidson.”

“A. Delany offered the following resolution, seconded by E. E. Davidson: ‘Resolved, that the resolution passed at the meeting of stockholders of St. Paul Opera-House Company, held Sept. 29th, 1888, ratifying sale of opera-house property to Lotta M. Crabtree, be, and the same is hereby, amended by striking out the following words: “Excepting clauses referred to in agreement for sale and possession of one-half interest in bill-boards and bill-posting business.”’ Carried by the following vote: Ayes—A. Delany, E. E. Davidson. Nays—L. N. Scott. At this meeting the following stock was represented: E. E. Davidson, 100 shares; L. N. Scott, 100 shares; P. S. Davidson, 10 shares; A. Delany, 10 shares; P. S. Davidson and Edw. E. Davidson, 3,500 shares, representing stock estate of Wm. F. Davidson.”

6. I find that before the commencement of this suit, viz., on February 1, 1889, by a proper instrument in writing, Lotta M. Crabtree duly assigned and transferred to the plaintiff all her right, title, and interest in the sum of \$5,000 paid by her to the treasurer of the St. Paul Opera-House Company on the execution of the contract September 10, 1888, and in the following March a demand was made upon the treasurer of the company for the amount.

CONCLUSIONS.

I am of the opinion that the contract dated September 10, 1888, is an entirety, and ratification of the whole was necessary to bind the parties thereto. I am of the opinion that by the passage of the resolution of September 29, 1888, the St. Paul Opera-House Company repudiated the contract of September 10, 1888, and declined to ratify the act of the treasurer and secretary, who executed it; and Lotta M. Crabtree was

thus released from all obligation to perform on her part, and she withdrew from the same, as she had a right to do. I am of the opinion that the contract of September 10, 1888, being treated by the company as imperfect and inoperative, and not a binding obligation, Lotta M. Crabtree could recover the amount paid at the time the contract was executed; and, further, that the assignment from Lotta M. Crabtree to the plaintiff is valid, and entitles her to judgment. I am of the opinion that the resolution of October 2, 1888, amending that of September 29, 1888, if it is a ratification of the contract of September 10, 1888, came too late, and that the minds of the parties never met so as to form a perfect and operative contract. Judgment will be entered in favor of the plaintiff for the sum of \$5,000 and interest from September 10, 1888, to date, at the rate of 7 per cent. per annum, being \$369.44.

SPÖERI v. MASSACHUSETTS MUT. LIFE INS. CO.

(Circuit Court, E. D. Missouri, E. D. September 27, 1889.)

LIFE INSURANCE—CONDITIONS OF POLICY—WAIVER—ESTOPPEL.

Where a policy of life insurance provides for a forfeiture unless the premiums thereon are paid at maturity, but the insurance company has accepted payment of more than half of such premiums after maturity, without warning of any possible forfeiture in future, if the last premium be paid within the same time after maturity as the majority of the previous ones, the company is estopped from asserting a forfeiture though the insured died before such payment.

At Law. Action to recover on policy of insurance.

The facts agreed upon in this case are as follows: Defendant issued a policy of life insurance on the life of plaintiff's husband, dated April 1, 1884. The premiums were payable semi-annually, on April and October 1st, in each year. The policy contained a clause of forfeiture if the premiums were not paid on the day they fell due, and in case of forfeiture the company stipulated for a release from all liability except such as was imposed on it by the laws of Massachusetts. By the laws of that state, if the assured ceased paying premiums at any time after the payment of two full annual premiums, the policy became a paid-up policy for its net value at the time payments ceased. The assured died on April 8, 1888. Of the seven semi-annual premiums that fell due after April 1, 1884, and prior to April 1, 1888, four were paid by the assured and accepted by the company from 7 to 30 days after they fell due. Three payments only were made at maturity. The final premium due April 1, 1888, was tendered to the company on April 9, 1888, and was accepted by it in ignorance of the death of the assured on the day previous. On discovering that the assured was dead, the company offered to return that premium, but the plaintiff would not accept it. Plaintiff claims that defendant is liable for the face of the policy, \$5,000, and in-

terest. Defendant insists that the policy was forfeited by the non-payment at maturity of the premium that fell due April 1, 1888, and that it is only liable for the net value of the policy on March 31, 1888, computed according to the Massachusetts statute, which amount (\$1,789) it now tenders and has heretofore tendered.

Rassieur & Schnurmacher, for plaintiff.

Taylor & Pollard, for defendant.

Before BREWER and THAYER, JJ.

THAYER, J., (after stating the facts as above.) The supreme court of the United States has several times said, in substance, that any course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture will not be incurred, followed by due conformity on his part, will estop the company from insisting on a forfeiture. *Insurance Co. v. Eggleston*, 96 U. S. 577; *Thompson v. Insurance Co.*, 104 U. S. 259; *Insurance Co. v. Doster*, 106 U. S. 37, 1 Sup. Ct. Rep. 18; *Insurance Co. v. Wolff*, 95 U. S. 333. And the same doctrine is held by other courts. *Hanley v. Association*, 69 Mo. 382, and cases cited; *Goedecke v. Insurance Co.*, 30 Mo. App. 608. We think that the conduct of the company in the present case was such as fairly warranted the assured in believing and acting on the belief that a literal compliance, with the provisions of the policy concerning the payment of premiums would not be required. More than one-half of all the premiums that fell due while the policy was in existence were paid by the assured and accepted by the company from one to four weeks after they matured, and without a word of warning, so far as the evidence shows, that the company could or might in future insist on a forfeiture. Even the last payment of April 9, 1888, was accepted, as it seems, without inquiry as to the health of the assured, and that we regard as a significant fact tending to show that the company was ready and willing at all times to accept a premium within a reasonable time after it was due. In point of fact the last premium was paid at about the same time after maturity that the majority of all previous premiums had been paid. In other words, the plaintiff conformed to the established practice and course of dealing with reference to the policy, in tendering the premium on April 9, 1888. In our judgment it would be inequitable, and a violation of good faith and fair dealing, to allow the defendant to take advantage of the non-payment of the premium on the day nominated in the policy, after having given the assured so much occasion by its previous course of dealing to suppose that such a forfeiture would not be insisted on. The law does not favor forfeitures under any circumstances, and we find ample grounds in the present case for holding that defendant has waived the forfeiture, or, to be more accurate, is estopped from asserting it. Our attention was specially called on the hearing of this case to the decision in *Crossman v. Association*, 143 Mass. 436, 9 N. E. Rep. 753. We have examined that case and find that while the assured paid premiums after maturity, and the receipt of such payments by the company was held not to amount to a waiver of the particular forfeiture

invoked, yet the court distinctly placed its decision on the ground that, when each overdue premium was received, the company required the assured to sign a certificate that he was then in good health as a condition of reinstatement. In other words, the court construed what was done on each occasion as tantamount to a readmission of the assured to membership. The case contains nothing in opposition to the views we have expressed.

Judgment will be entered for the plaintiff for \$5,000, with interest at 6 per cent. per annum from August 24, 1888, to this date.

BREWER, J., concurs.

PIKE v. CHICAGO & A. R. Co.

(Circuit Court, E. D. Missouri, E. D. September 27, 1889.)

1. INJURIES ON RAILROAD TRACKS—PLEADING.

One who is injured a half mile distant from a crossing cannot assign the violation of Rev. St. Mo. § 806, requiring the ringing of bells and sounding of whistles at railroad crossings, as the proximate cause of his injury.

2. SAME.

An allegation that the train was running at a dangerous rate of speed, without showing the relation which that fact sustained to plaintiff's injury, states no cause of action.

3. SAME.

But where the petition further alleges that it was plaintiff's duty as watchman to pass over a certain bridge; that it was the duty of all engineers in charge of locomotives to give timely warning of their approach to him by sounding the whistle and ringing the bell; but that on the occasion of the injury the engineer negligently failed to do his duty, whereby plaintiff was injured,—it is good on general demurrer.

At Law. On demurrer to petition.

Action by John Pike, a watchman on one of defendant's bridges, against the Chicago & Alton Railroad Company, for injuries sustained on such bridge from a passing train. About one-half mile west of this bridge is a public railroad crossing, and the petition charges that the engineer of the train which caused the injury failed to sound the whistle or ring the bell as it approached the crossing, and that the train was running at a dangerous rate of speed.

D. P. Dyer, for plaintiff.

R. H. Kern, for defendant.

THAYER, J. The supreme court of the state has held that section 806 of the Revised Statutes of Missouri, concerning the ringing of bells and sounding of whistles at railroad crossings, was intended "for the benefit of persons at the road crossing or approaching it;" and that construction of the local law is, of course, binding on us. It results from that view that the plaintiff, who was not hurt at the crossing, but was injured at

a bridge a half mile east of the crossing, cannot assign the violation of the statutory duty—consisting of not sounding the whistle or ringing the bell at the crossing—as the proximate cause of the injury which he sustained. The statute was not enacted for his benefit. *Bell v. Railroad Co.*, 72 Mo. 58; *Evans v. Railroad Co.*, 62 Mo. 57, 58; *Rohback v. Railroad Co.*, 43 Mo. 187.

It is also true that the petition in the present case shows no necessary relation between the rate of speed at which the train was running and the injury which plaintiff sustained. The rate of speed may have been dangerous, considering the condition of the track, or for many other reasons, but the relation of cause and effect between a high rate of speed and plaintiff's hurt is not satisfactorily shown by the complaint.

Conceding both of these propositions, we still think the complaint will stand the test of a general demurrer, which is all that has been filed. The plaintiff avers that he was employed as watchman on a bridge, and that it was his duty to pass over the bridge, from time to time, to inspect it; that it was the duty of all engineers in charge of locomotives to give timely warning to the watchman at said bridge of their approach, by sounding the whistle and ringing the bell; but that, on the occasion in question, the engineer of the train which occasioned the injury negligently failed to sound the whistle and ring the bell, as it was his duty to do, and, in consequence of such neglect, plaintiff was hurt. The complaint thus shows very clearly a violation of the common-law duty alleged, and an injury resulting from such neglect. On this ground we hold the petition good, and overrule the demurrer.

PREBLE v. BATES *et al.*

(Circuit Court, D. Massachusetts. August 23, 1889.)

1. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

In an action for conversion of bonds, a witness testified that the words "the property of S." were written across the face of many of them. Many witnesses testified for defendants, who were stock-brokers, that such bonds would not be a good delivery in open market, and the court charged that, if the bonds received by defendants were so marked, defendants would be chargeable with notice. *Held*, after verdict for plaintiff, that a new trial would not be granted defendants on the ground that an inspection of the bonds, discovered after the trial, showed no such writing on their face.

2. EVIDENCE—SUFFICIENCY.

Defendants' evidence showed that they sold certain bonds for a third person in 1879, and while plaintiff, on cross-examination, denied possession of these bonds, on direct examination she stated that certain of her funds were invested in that kind of bonds or another sort in 1878. She seldom went to her safe, and may not have known about these bonds. *Held*, that a verdict that such bonds were plaintiff's would not be disturbed.

At Law. On motion for new trial.

Action by Sarah A. Preble against Henry M. Bates and others, stock-brokers, for conversion of certain bonds alleged to belong to plaintiff. Verdict for plaintiff, and defendants move for a new trial.

Benj. F. Butler and L. C. Southard, for plaintiff.

Samuel Hoar, for defendants.

COLT, J. The principal ground relied upon by the defendants in this motion for a new trial is newly-discovered evidence. At the trial, Edward Preble swore that on many of the bonds belonging to his mother there was written across the face of them "the property of Sarah A. Preble," and that he had a recollection that it was written across the face of the five \$1,000 Chicago sewerage bonds, which were a part of the property in controversy. To meet this, the defendants called numerous witnesses, who testified that such bonds would not be a good delivery in open market. The court charged the jury, in substance, that if the bonds received by the defendants were so marked they would be charged with notice, and, consequently, that they would be liable to account to the plaintiff for their value at that time. The defendants, in support of this motion, now produce the original Chicago sewerage bonds, and, upon inspection, it appears that there was no such writing upon their face. The defendants contend that this evidence is not cumulative, because it is evidence of a different character from any which was offered by their side at the trial upon this issue, and authorities are cited to the effect that cumulative evidence, strictly speaking, is evidence of the same kind, to the same point. Motions for a new trial are addressed largely to the discretion of the court. Without entering into the question of whether the defendants, in the exercise of proper diligence, could not have produced this evidence at the trial, I do not think, in view of the evidence taken as a whole, that the defendants can fairly claim the right to a new trial on this ground. The direct evidence of Preble was not of a positive and conclusive character, and it was so fully met by the defendants' evidence that it does not seem to me that the court should direct a new trial by reason of the discovery of this additional evidence.

The verdict in this case was general, but the jury handed to the court with the verdict a paper containing the special items upon which they held the defendants liable. I do not think, on a motion for a new trial, the court should reject this paper. It is perhaps the best evidence possible of the ground the jury took in arriving at their verdict. Comparing this paper with the evidence, it appears that the jury made a mistake with respect to two items. There was no evidence to support the finding of the jury as to one of the Chicago sewerage bonds, which did not come into the hands of the defendants, but which was sold by Edward Preble to another firm of brokers; nor as to one Minneapolis bond, which it appears was loaned to him by his mother in 1877. With respect to the \$2,000 New York and New England bonds, I do not agree with defendants that there was no evidence to support the finding of the jury. By the defendants' evidence, they sold for Edward Preble \$2,000 of these bonds, on or about October 31, 1879. While Mrs. Preble denied in

cross-examination the possession of any of these bonds, she stated on her direct examination that the proceeds of the Lewis notes were, about 1878, put into these bonds or into Southern Pacific bonds. Mrs. Preble seldom went to her safe, and she may not have known about these bonds. Taking all the evidence together, I cannot say that the jury were mistaken in their finding on this item. The verdict was for \$34,772.88, and there should be a remission of \$3,636.53, covering the value of \$1,000 Chicago sewerage and \$1,000 Minneapolis bonds, with premium and interest, and the plaintiff may elect to take judgment for \$31,136.35, or a new trial will be granted. *Cattle Co. v. Mann*, 9 Sup. Ct. Rep. 458; *Kenyon v. Gilmer*, Id. 696.

UNITED STATES *ex rel.* HARSHMAN v. COUNTY COURT OF KNOX COUNTY.

(Circuit Court, E. D. Missouri, E. D. September 25, 1889.)

1. APPEAL—EFFECT—SUPERSEDEAS.

Where a bill to modify the method of collecting a judgment which was not stayed by giving a *supersedeas* bond, as allowed by statute, was dismissed, and no interlocutory order affecting such judgment was ever made in the proceeding on the bill, a *supersedeas* bond upon appeal from such dismissal only stays any orders made in the proceeding on such bill, and does not operate to restrain the collection of the original judgment, even though the proceeding on the bill be deemed a mere continuation of the original action.

2. JUDGMENT—INJUNCTION TO RESTRAIN—COLLECTION.

Where the original judgment has stood for eight years, and the debtor admits the justice thereof, merely seeking to change the method of collecting it, its collection will not be restrained pending the appeal from the dismissal of the bill.

At Law. On motion for rehearing.

For former report, see 15 Fed. Rep. 704.

Thomas K. Skinker and John B. Henderson, for relator.

James Carr, for respondent.

BREWER, J. In this case there is a petition for a rehearing. In 1881, Harshman recovered a judgment against Knox county.¹ That judgment has never been disturbed. No proceedings in error were taken, and no *supersedeas* bond given to stay the collection of that judgment within the 60 days allowed by statute, or, indeed, at any other time. Years after, there having been some intermediate proceedings on *mandamus*, the defendant in that judgment filed a bill in equity to restrain its collection, or perhaps more correctly to modify the method of collection. In that equitable proceeding no interlocutory order was entered, and when the matter came up for final hearing a decree was entered dismissing the bill. Appeal was prayed from that decree, allowed, and appeal-bond fixed in the sum of \$500, and given. Now the contention is

¹Not reported.

that the giving of the appeal-bond operates, as a matter of law, to restrain the collection of the original judgment. The statutes give to a party against whom a money judgment is rendered the right to stay that judgment by giving a *supersedeas* bond within 60 days. That was not done in this case, and it is a general rule that that which cannot be done directly cannot be done indirectly. It would be strange if a judgment debtor, failing to supersede by giving directly a *supersedeas* bond, could years after, by a bill in equity to restrain or modify that judgment, obtain by indirection the same *supersedeas* and stay. The principle is the same whether the judgment debtor is a county or an individual. To neither is the right given to stay it by this indirect process.

It is said that the bill in equity of the county is not an independent suit; that it is a mere continuation of the original action. So it is for some purposes, but, although it be a continuation of the original action, an appeal-bond in this continuation ought not to have any effect upon the original judgment. It may supersede any order made in this subsequent proceeding, but there was nothing here except a judgment for costs to supersede. There was no interlocutory order, no order in the case affecting that judgment at law, and, whatever may be superseded, it is only that which is part and parcel of this continuation proceeding. It seems to us that there can be no doubt that, as this bill was dismissed, as no interlocutory order was ever made, a *supersedeas* bond upon an appeal from such dismissal has no effect whatever upon the original judgment. That remains, with every right to collect which it had at the time it was rendered.

It is further insisted that if there be no *supersedeas* of right by virtue of this appeal-bond, the court has a controlling power over all its processes, and that it ought to stop the collection of this judgment at law until the question presented by this bill in equity has been finally determined by the supreme court. Assuming that it is true that the court has such controlling power, it seems to us that it would be grossly inequitable to exercise it in this case. Of the validity and justice of the original judgment at law, so far as respects the indebtedness, no question is made. All that is challenged is that part of it which refers to the collection and the amount of taxes that can be yearly enforced.

Now, when a debtor admits the justice of the debt, when judgment thereon has stood against him for eight years, we see no equity in restraining for years longer all efforts to collect while he simply pursues a litigation to change the method of collection. The petition for rehearing will be denied.

McNAB v. SEEBERGER, Collector of Customs.

(Circuit Court, N. D. Illinois. July 18, 1889.)

1. CUSTOMS DUTIES—CLASSIFICATION.

Act Cong. March 3, 1883, (Heyl's Arrangement, cl. 336,) provides a customs duty on "flax or linen thread, twine, and pack thread" of 40 per cent. *ad valorem*. Clause 347 provides a duty on "seine and gilling twine" of 25 per cent. Plaintiff imported linen twine, on which he paid a duty of 40 per cent., under protest that it was "seine twine." It appeared that the goods were composed of several yarns, loosely twisted together, and known to the trade as "gill twine." They were classed as book or pamphlet twine, which is composed of single yarns, not twisted together, but of about the size and strength of one of the yarns of the twine in question. *Held*, that the goods were only subject to a duty of 25 per cent.

2. SAME—RECOVERY OF PAYMENTS—PROTEST.

Plaintiff's right of recovery is not affected by the fact that his protest claimed the goods to be "seine twine," while the proof showed them to be "gilling twine," as the two terms are convertible for the purposes of the question in issue.

At Law. Action to recover customs duties.

The plaintiff, Joseph D. McNab, imported linen twine, which he claimed was subject to duty at 25 per cent. *ad valorem*, as "seine twine." The collector classed the goods as "linen thread," on which there was a duty of 40 per cent. *ad valorem*. Plaintiff paid the duty under protest, and appealed to the secretary of the treasury. The action of the collector being affirmed by the secretary, plaintiff brings this suit to recover the excess.

P. L. Shuman, for plaintiff.

W. G. Ewing, U. S. Atty., and *G. H. Harris*, Asst. U. S. Atty., for defendant.

BLODGETT, J. Plaintiff imported a quantity of linen twine, which the collector classified as linen thread, and assessed a duty thereon at 40 per centum *ad valorem*, under clause 336 of Heyl's Arrangement of the act of March 3, 1883, which reads: "Flax or linen thread, twine and pack thread and all manufactures of flax, or of which flax shall be the component material of chief value, not specially enumerated or provided for in this act, 40 per centum *ad valorem*." Plaintiff insisted that said goods should have been classed as "seine" and "gilling" twine, under clause 347 of Heyl, which reads, "Seine and gilling twine, 25 per centum *ad valorem*," paid the duties imposed under protest, appealed to the secretary of the treasury, by whom the action of the collector was affirmed, and in apt time brought this suit to recover the excessive duties which plaintiff claims were imposed upon the goods. The goods in question are composed of several yarns, say from six to thirty, according to the strength required, which are laid together and loosely twisted, and the proof shows that these goods are known to the trade as "gill twine," or sometimes spoken of in the trade, and especially by fishermen, as "salmon twine." The use of said goods is almost exclusively that of making gill-nets for catching salmon.

Defendant claims that the goods were rightfully assessed as "twine," under clause 336, and has introduced proof tending to show that the goods in question are what is known to the trade as "book" or "pamphlet" twine, used for stitching the leaves of books and pamphlets together, and is also known as "shoe thread," used for stitching boots and shoes. I think the proof satisfactorily shows that linen thread is imported for use by book-binders, the threads being about the size and strength of the single yarns composing the twine in question, and the proof also shows that linen thread is imported for use by shoe manufacturers, and when imported for such use the threads are laid together, not twisted, and waxed when used. Clause 347 of Heyl evidently intended to specify and enumerate a kind of linen twine, or manufacture of flax, to be used for the manufacture of gill-nets and seines, which was different from the thread and twine described in and covered by clause 336, and from the proof in this case it seems to me there can be no doubt that the goods now in question are the kind of goods which are used by fishermen to make gill-nets and seines for the salmon fishery, and the intention of congress undoubtedly was to favor the fishing interest by allowing the importation of manufactured seines, and materials for seines, and gill-nets, at a lower rate of duty than was imposed upon the ordinary flax thread and twines. It was also contended in behalf of the defendant, upon argument, that the plaintiff was not entitled to recover in this case because the protest only claimed that the commodity in question was "seine twine," while the proof shows that it is "gilling twine." But I do not think that so narrow a construction should be placed upon the protest, as it is clear from the tenor of the protest that the plaintiff intended to bring the goods within the operation of clause 347 as dutiable at 25 per centum, and, whether he called it "seine twine" or "gill twine," would make no difference, as probably they are, for the purposes of this question, convertible terms.

MANDEL *et al.* v. SEEBERGER, Collector of Customs.

(Circuit Court, N. D. Illinois. July 18, 1889.)

CUSTOMS DUTIES—CLASSIFICATION.

Merchandise invoiced as "onyx columnus, vases, and candelabras," and known by dealers in marble and similar material as "onyx marble" or "onyx," and for which no specific duty is provided in the customs law, is assessable as "manufactures of marble" for a duty of 50 per cent. *ad valorem*, under Rev. St. U. S. § 2499, providing that a non-enumerated article, bearing a similitude to any enumerated article, shall be dutiable at the same rate as the enumerated article, and if resembling two or more enumerated articles, chargeable with different rates of duty, the non-enumerated article is dutiable at the same rate as the article which it resembles paying the highest duty.

At Law.

Action by Leon Mandel and others against Anthony F. Seeberger, collector of customs, to recover excess duty levied upon certain merchandise imported by them.

Shuman & Defrees, for plaintiffs.

W. G. Ewing, U. S. Dist. Atty., and *G. H. Harris*, Asst. U. S. Atty., for defendant.

BLODGETT, J. Plaintiffs imported certain merchandise into the port of Chicago which was described in the invoice as "onyx columns, vases, and candelabras," which merchandise the collector classed as "manufactures of marble," and assessed thereon a duty of 50 per cent. *ad valorem*, under clause 468 of Heyl's Arrangement of the Customs Act of March 3, 1883. Plaintiffs contended that the goods in question were dutiable at 20 per cent. *ad valorem*, under section 2513 of said act, as "articles wholly manufactured, not otherwise provided for," and insisted that they were justified in so claiming by the decision of the secretary of the treasury of September 28, 1887. An appeal was taken to the secretary of the treasury from the classification and assessment upon the goods in question by the collector, by whom the action of the collector was affirmed. The duties so assessed were paid under protest, and plaintiffs brought this suit in apt time to recover the difference between the duties so assessed and the 20 per cent. which they claim should have been the duty on said goods.

It is admitted by the plaintiffs, and the proof shows, that the goods in question are not manufactures of the "onyx" which is known and spoken of as among the gems and precious stones, and usually classed with agates, carnelians, and chalcedonys, but is a stalagmitic formation of lime, resembling, in its chemical composition, and in its structure, the finer varieties of marble. It is known by those dealing in it under the name of "onyx marble," and mainly for brevity, evidently, is often described in the circulars, invoices, and advertisements of dealers in marble and similar materials as "onyx;" the word "onyx," as applicable to this material, being evidently a fanciful or arbitrary name, suggested, probably, by the peculiar veinings and colorings of the stone.

I find in the Imperial Dictionary (volume 3, p. 390) the article defined as follows:

*"Onyx marble—*a very beautiful, translucent limestone of stalagmitic formation, discovered by the French in the province of Oran, Algeria, and first brought into notice at the London Exhibition of 1862. It is used for the manufacture of ornamental articles."

In volume 15 of the ninth edition of the Encyclopedia Britannica, article "Marble," p. 529, this material is spoken of as follows:

"One of the most beautiful stalagmitic rocks is the so-called onyx marble of Algeria. * * * Large deposits of a very fine onyx-like marble, similar to the Algerian stone, have been worked of late years at Tecali, about 35 miles from the City of Mexico. Among other stalagmitic marbles, mention may be made of the well-known Gibraltar stone. * * * This stalagmite is much deeper in color and less translucent than the onyx marbles of Algeria and Mexico."

And in volume 17 of the same edition of the Encyclopedia Britannica, (page 777,) after describing the onyx from which cameos, etc., are cut, it is said:

"While one of them was the true onyx of modern mineralogists, as described above, the other was merely a stalagmitic variety of carbonate of lime, a mineral much softer, less precious, and much more widely distributed than the chalcedonic onyx, yet resembling it in so far as it also presents a parallel banded structure. This mineral is known as 'onyx marble.'"

The proof shows that the material from which the goods in question are manufactured is used for substantially the same purposes as the finer kinds of marble. Its chemical composition is almost identical with that of the statuary marbles, and its general use is in the manufacture of mantels, table tops, clock cases, pedestals or columns, and, in fact, all varieties of ornamental articles which have been usually manufactured of the finer varieties of marble.

There is no specific provision in the customs law for a duty upon "onyx" or "onyx marble," but the proof shows that the onyx from which cameos are cut, and which is treated and considered as a gem, is classed for duty by the custom-house authorities among the "precious stones," (480, Heyl,) at a duty of 10 per cent. *ad valorem*; and that articles similar to the goods in question, manufactured of marble, are classed as manufactures of marble not specially enumerated or provided for, etc., under clause 468, Heyl, and assessed for duty at 50 per cent. *ad valorem*. There being no specific duty upon "onyx marble," as such, or articles manufactured therefrom, I am very clear that the collector rightfully classed the goods in question as a manufacture of marble, and assessed them for duty at 50 per cent. *ad valorem*, under the assimilating clause, (section 2499, Rev. St.,)¹ as, if not actually marble, the material more nearly resembles marble in its composition than it does any other material, while the manufactured goods in their uses are almost identical with manufactures of marble. The issue is therefore found for defendant.

¹Rev. St. U. S. § 2499: There shall be levied, collected, and paid on each and every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any article enumerated in this title, as chargeable with duty, the same rate of duty which is levied and charged on the enumerated article which it most resembles in any of the particulars before mentioned; and if any non-enumerated article equally resembles two or more enumerated articles, on which different rates of duty are chargeable, there shall be levied, collected, and paid on such non-enumerated article the same rate of duty as is chargeable on the article which it resembles paying the highest duty; and on all articles manufactured from two or more materials the duty shall be assessed at the highest rates at which any of its component parts may be chargeable.

ANGLO-AMERICAN PORTLAND CEMENT CO. v. SEEBERGER, Collector of Customs.

(Circuit Court, N. D. Illinois. July 18, 1889.)

CUSTOMS DUTIES—CLASSIFICATION.

Merchandise invoiced as "chalk slags," consisting of raw chalk and a small proportion of mud, mixed, dried, and kiln burned, and afterwards crushed into lumps and used in the manufacture of Portland cement by grinding to a fine powder, which in itself makes a fair low order of cement, is assessable for a duty of 20 per cent. *ad valorem* under act Cong. March 3, 1883, (Heyl's Arrangement, cl. 44.) "as cement, Roman, Portland, and all others."

At Law.

Action by the Anglo-American Portland Cement Company against Anthony F. Seeberger, collector of customs, to recover excess duty levied upon certain merchandise imported by them.

Shuman & Defrees, for plaintiff.

W. G. Ewing, U. S. Dist. Atty., and *G. H. Harris*, Asst. U. S. Atty., for defendant.

BLODGETT, J. Plaintiffs imported a quantity of what was designated in the invoice as "chalk slags," which the collector assessed for duty at the rate of 20 per cent. *ad valorem*, under clause 44 of Heyl's Arrangement of the act of March 3, 1883, "as cement, Roman, Portland, and all others, 20 per centum *ad valorem*." Plaintiffs insisted that said merchandise was dutiable under clause 95, Heyl, as "non-dutiable crude minerals, but which have been advanced in value or condition by refining or grinding, or by other process of manufacture, not specially enumerated or provided for in this act, ten per centum *ad valorem*," paid the duties so assessed under protest; appealed to the secretary of the treasury, by whom the action of the collector was affirmed; and brought this suit in apt time to recover the excessive duties claimed to be paid.

The merchandise in question consists of raw chalk from the Dover cliffs in England, and mud taken from the bottom of the Medway river in England, the mud being the smaller proportion of the two ingredients; but the proof does not show how much smaller. These ingredients are thoroughly mixed, then dried and burned in kilns, and afterwards broken or crushed into lumps of about the size of the ordinary chestnut coal used in this country. This commodity is used by the plaintiffs in this country in the manufacture of what they call Portland cement, which is done by reducing the merchandise in question to a very fine powder, and then thoroughly mixing it with a certain percentage of carbonate of lime. The proof also shows that, in the condition imported, the merchandise in question, by being pulverized, makes a fair low order of cement, like the Portland cement, but it does not set as quickly and is not as hard as the good quality of Portland cement. I do not see how this commodity can be classed as "a non-dutiable crude mineral," and made dutiable under clause 95, as insisted upon by the plaintiffs. Neither of its constituent

parts comes within the description of "minerals," but are strictly earths or earthy materials. The clause invoked seems to me to have been intended to cover ores of various minerals, which may be found profitable to import into this country, and which may have been purified of their rocky or earthy substances in order to save expense in transportation.

It is further quite apparent from the proof in this case that, even in the condition imported, the commodity in question is a cement within the meaning of clause 44 of Heyl, which includes, not only Portland and Roman cement, but all other cements. It is, as the proof shows, a cement as imported, only requiring to be ground to make it fit for use, but probably is improved and made better by the addition of the carbonate of lime. The provision of the law under which the collector acted, however, does not seem to have reference to any special quality of cement; but all cements are made dutiable at the same rate, whether of the higher order of Portland and Roman cement, or of the more common and cheaper sorts. I am, therefore, of opinion that the collector was justified in the classification and assessment of duty in this case, and that the plaintiffs should not recover.

UNITED STATES *v.* LEIGH.

(*Circuit Court, D. Massachusetts.* September 11, 1889)

CUSTOMS DUTIES—APPRAISEMENT—ROYALTY FEES.

Where machinery subject to letters patent in the United States and Great Britain, has been manufactured and sold to the importer in England, the royalty fees for its use paid by the purchaser in this country, which formed no part of the price in England, are not a part of its dutiable value under section 2906, Rev. St. U. S., which requires the collector to cause the market or wholesale price of the article, in the country from which it is exported, to be appraised for the purpose of assessing the duty.

At Law. Action to recover additional duties on machinery.

T. H. Talbot, Asst. U. S. Dist. Atty.

J. P. Tucker, for defendant.

COLT, J. This is an action brought by the United States for additional duties upon certain machinery imported into the port of Boston by the defendant. Parts of the machinery, at the time of importation, were the subject of letters patent issued by the governments of Great Britain and the United States, the owners being the same in both countries. The government contends that the royalty fee paid by the purchaser in the United States to the defendant for the right to use the machinery in question is a part of the dutiable value of the machinery. It is admitted that the defendant, at the time of making the contract of sale to his purchaser in this country, agreed to furnish the machines at a round price, which included the royalty fee for the right to use the machinery. The

sole question presented in this case is whether such a fee, under these circumstances, should enter into the dutiable value of the importation. Section 2906 of the Revised Statutes provides that, when an *ad valorem* duty is imposed on any imported merchandise, the collector shall cause the actual market value or wholesale price thereof at the period of the exportation to the United States in the principal markets of the country from which the same has been imported to be appraised, and such appraised value shall be considered the value upon which the duty shall be assessed. The machinery in question was subject to a duty *ad valorem*, and, if the collector is right, his justification must be found under this provision of the law. The question, therefore, which arises is whether, under this statute, the wholesale price or market value of a machine in England includes a fee paid by a purchaser from the importer in this country to the owners of patents applicable to parts of the machine for the right to use the machine in the United States. It is agreed that in the purchase by the defendant in England of the machine the royalty fee formed no part of the purchase price paid by him. It is difficult, therefore, to see how it can be held to be a part of the market value or wholesale price there, simply because the purchaser from the defendant was obliged to pay a royalty fee for its use in this country. Suppose a machine had been purchased in England for use in some country where there was no patent upon it, could it be held that the royalty fee exacted for its use in the country where it was patented should be added in estimating the market price? A royalty fee paid for the right to make and the right to sell might be considered as a part of the market value for the reason that it is a part of the cost to the maker or vendor, and therefore becomes a factor in the selling price of the article; but a fee paid for use, which in this case it is agreed did not form any part of the price paid by the defendant, cannot, it seems to me, be any part of the wholesale price or market value of the import in the country from which it was imported, because it is a fee accruing only after manufacture and sale in that country, and payable after importation into the United States. Judgment for defendant.

THE CARGO EX LADY ESSEX.

(District Court, E. D. Michigan. July 15, 1889.)

1. CUSTOMS DUTIES—UNLOADING CARGO WITHOUT PERMIT—VESSEL DRIVEN ASHORE.

A vessel which has been driven ashore by stress of weather has not "arrived" within the limits of the collection district, within the meaning of Rev. St. U. S. § 2867, and the unloading of her cargo without authority of the customs officer does not subject it to forfeiture.

2. SAME—FAILURE TO GIVE NOTICE.

The failure to give notice of the contingency which makes such unloading necessary does not authorize a forfeiture of the cargo.

3. SAME—FORFEITURE—ACT OF TRESPASSER.

A forfeiture of goods for a violation of the revenue laws will not be imposed unless the owner of such goods or his agent has been guilty of an infraction of such laws. The act of a mere trespasser, or of one having no interest in the goods, will not have that effect.

(*Syllabus by the Court.*)

In Admiralty. On exceptions to libel on information.

This was an information against 8,000 feet of lumber, being the cargo of the schooner *Lady Essex*, a forfeiture of which was claimed upon two grounds: *First*, that the lumber had been unladen from the schooner *Victor* without a permit; *second*, that this lumber had been fraudulently and knowingly imported into the United States without payment of duties, and contrary to law.

The information averred, in substance, that the schooner *Victor*, laden with a large quantity of lumber, and bound from a Canadian to an American port, arrived within the limits of the collection district of Port Huron, and was there stranded; that 8,000 feet of her cargo were sold to the master of the schooner *Lady Essex*, and were unladen from the *Victor* upon the *Essex* before the *Victor* had been duly authorized by the customs officers to unload, contrary to Rev. St. § 2867; that although this might have been a case of unavoidable accident, necessity, or stress of weather, yet neither the master of the *Victor*, nor the master of the *Essex*, gave notice to the collector or any officers of customs of the unloading of such lumber, nor did the master of the *Victor* comply with any of the provisions of section 2867; that the lumber so unladen was received upon the *Lady Essex* with the consent and procurement of her master, although the notice and proof required had not been given; that the said lumber was subject to a duty of two dollars per thousand, yet the master of the *Lady Essex*, knowing that such duty had not been paid, fraudulently and knowingly assisted in importing such lumber into the United States, and concealed such lumber in the hold of his vessel, proceeding from where the *Victor* was stranded to Mt. Clemens, where he began to unload his cargo without reporting to the customs that he had such lumber on his vessel, although he knew the duty had not been paid; and that the same was thus imported contrary to law.

The information prayed for a forfeiture of the *Lady Essex* and of her cargo. The owner of the cargo excepted to the information upon the ground that it set forth no cause of action against his property.

C. P. Black, U. S. Dist. Atty.

H. H. Swan, for claimant.

BROWN, J. By Rev. St. § 2867, if after the arrival of any vessel within the limits of a collection district any part of her cargo shall be unladen without authority of a customs officer, the master in command shall be liable to a penalty of a thousand dollars, and the merchandise so unladen shall be forfeited, except in case of unavoidable accident, necessity, or stress of weather. In such case, it is made the duty of the master, or other person in command, to make proof upon oath before

the customs officer of such accident, necessity, or distress; and by section 2868, if any merchandise so unladen shall be put or received into any other vessel, except in the case of such accident, necessity, or distress, to be so notified and proved, the master of any such vessel, in which the merchandise shall be so put and received, shall be liable to a penalty, and the vessel in which they shall be so put shall be forfeited.

It is clear that there was no arrival of the *Victor* within the meaning of section 2867, since "a vessel is not considered to arrive so as to be regarded as importing her cargo unless she arrives within a port, and with an intent to enter her cargo." *Harrison v. Vose*, 9 How. 381. It is not enough that she comes within the limits of the district. *U. S. v. Vowell*, 5 Cranch, 372. So it is clear that goods taken and unloaded from a foreign vessel wrecked upon the coast are not subjected to a forfeiture because landed without a permit. *The Gertrude*, 3 Story, 68; *Peisch v. Ware*, 4 Cranch, 347; *The Concord*, 9 Cranch, 387; *Merritt v. Merchandise*, 30 Fed. Rep. 195.

The stranding of the *Victor* made a clear case of unavoidable accident, necessity, or stress of weather, within the meaning of this section, and the only irregularity in the proceeding was the failure to give notice to the customs authorities of such contingency. No forfeiture, however, is imposed for the failure to give such notice, though it would seem from the following section that the vessel receiving such lumber from the stranded vessel incurs the penalty of forfeiture, and the master of such vessel a penalty of treble the value of the merchandise. While it is possible that section 2867 might be construed by inference to work a forfeiture of the cargo where no notice has been given of accident, necessity, or distress, still although the statute may not be subject to the strict construction of a penal one, a forfeiture ought not to be imposed unless the language will bear no other reasonable construction. *Sixty Pipes of Brandy*, 10 Wheat. 421; *U. S. v. Carr*, 8 How. 1; *U. S. v. Coils of Cordage*, Baldw. 502.

So far as a forfeiture is claimed by reason of the goods having been smuggled into the United States at Mount Clemens, or, in the language of the statute, having been knowingly and willfully imported into the United States, contrary to law, the case depends upon different considerations. The authorities are direct to the proposition that the forfeiture of goods for violation of the revenue laws will not be imposed unless the owner of such goods, or his agent, has been guilty of an infraction of such laws. *Peisch v. Ware*, 4 Cranch, 347, 364; *The Waterloo*, Blatchf. & H. 120; *651 Chests of Tea v. U. S.*, 1 Paine, 507; *U. S. v. Bags of Kainit*, 37 Fed. Rep. 326.

It is clear that if goods be stolen from the owner, or if a person has obtained possession of them fraudulently, or without authority, no act of his can forfeit them as against the true owner. Section 16 of the act of 1874 declares in express terms, that, in cases of this description, it is the duty of the judge to submit to the jury, as a separate and distinct proposition, whether the alleged acts were done with an actual intention to defraud the United States; or if such issues be tried by the court with-

out a jury it shall be the duty of the court to pass upon and decide such proposition as a distinct and separate finding of fact. This language must apply to the owner of the goods, or his authorized agents, and not to a mere trespasser.

It is claimed in this case that the master of the *Victor* had no authority to sell this lumber to the master of the *Lady Essex*, without communicating with its owner. And in this connection, counsel relied upon the case of *Cargo of the Bridgewater*, 11 Chi. Leg. N. 327, and upon *Navigation Co. v. Morse*, L. R. 4 P. C. 222. If it should turn out that this lumber did not belong to the master of the *Victor*, and that he made sale of it without communicating with the owner, and without his knowledge or consent, it would follow that the purchaser took no title; and I see no escape from the conclusion that he could do no act with respect to the lumber to the prejudice of its real owner. But the question in this case is not what are the facts, but whether the information avers a cause of forfeiture. In setting forth a delivery and sale of the lumber to the master of the *Lady Essex*, I think I am bound to presume that the sale took place under such circumstances as to constitute it a legal sale, and that the master of the *Victor* should be presumed to have had authority to make such sale. It results, then, that this defense should be set up by answer, and made the subject of proof upon the hearing.

The demurrer is therefore sustained as to the first ground of forfeiture, and overruled as to the second.

UNITED STATES *v.* LEHMAN.

(District Court, E. D. Missouri, E. D. September 5, 1889.)

1. INDICTMENT—FORM AND SUFFICIENCY.

An indictment which states facts constituting an offense under a certain statute, and concludes with the averment that the acts alleged to have been committed were "contrary to the form of the statutes," is not objectionable because it also alleges that defendant thereby committed a certain named crime, while the statute does not declare the offense it prohibits to be that crime, as the allegation is surplusage.

2. PERJURY—NATURALIZATION PROCEEDINGS.

Rev. St. U. S. § 5424, which makes it an offense for any person applying to become a citizen, or appearing as a witness for such person, to "falsely make, forge, or counterfeit any oath," etc., applies to written oaths, and not to false swearing in open court, in a naturalization proceeding by a witness for the applicant, as the latter offense is punishable exclusively under section 5395.

3. SAME.

Rev. St. U. S. § 5425, making any one guilty of a felony who "obtains, accepts, or receives any certificate of citizenship, known to such person to have been procured by fraud," applies to the acceptance of such a certificate obtained by fraud practiced on the court which issued it at the time thereof, and not simply to the acceptance of a fraudulent certificate outstanding in the hands of third persons.

4. SAME—INDICTMENT.

An indictment for a violation of such statute which describes the fraud charged by averring only that defendant obtained a certificate at a time when he was not legally entitled thereto, without describing the facts constituting the fraud, is bad, though it avers that such acts are unknown to the grand jury.

5. SAME.

A subsequent count in the indictment for "counseling and advising" the commission of the offense prohibited by section 5425, in violation of section 5427, which alleges that the fraud charged consisted in making a false statement to the court granting the certificate, is sufficient.

6. SAME—JOINDER OF COUNTS.

As the offense defined in section 5395, *i. e.*, the taking of a false oath in naturalization proceedings, is a felony, counts under that section are properly joined with counts under sections 5425 and 5427.

At Law. On demurrer to indictment.

Lehman was indicted for a violation of Rev. St. U. S. §§ 5395, 5425, and 5427, and demurs to the indictment. Section 5395 makes it a punishable offense to knowingly swear falsely in any proceeding under the naturalization laws. Section 5424 makes it an offense for any person applying to become a citizen, or appearing as a witness for such person, to "falsely make, forge, or counterfeit any oath," etc. Section 5425 makes it a felony to obtain, accept, or receive any certificate of citizenship known to such person to have been procured by fraud. Section 5427 prohibits the counseling or advising of another to commit the offense defined in section 5425.

George D. Reynolds, Dist. Atty.

D. P. Dyer, for defendant.

THAYER, J. I have arrived at the following conclusions on the various points raised by the demurrer:

1. The objection made to the first count by defendant's counsel amounts to this, that because the pleader at the conclusion of the count uses the following language, "and so the grand jurors * * * say * * * that he, the said Julius Lehman, * * * feloniously, falsely, etc., * * * did commit * * * perjury," the count is not good under section 5395, Rev. St. U. S., which does not declare the offense therein mentioned to be perjury. The objection made is not tenable. The language quoted is merely the conclusion of the pleader, and no part of the description of the offense. The facts constituting an offense under section 5395 had been previously stated. It matters not that the grand jury supposed, and so stated, that the offense described was perjury. It was not necessary for them to give a name to the offense, and their attempt in that direction may be rejected as surplusage. Rejecting the words above mentioned, the indictment concludes properly with the averment that the acts said to have been committed were "contrary to the form of the statutes of the United States," etc., which is all that is necessary.

2. The words "or falsely makes, forges, or counterfeits any oath," etc., in section 5424, were intended to describe the offense of counter-

feiting the written oath commonly known as "first papers," provided for in section 2165, Rev. St. U. S., or the final certificate of citizenship issued two years thereafter, or some record of a court pertaining to naturalization, or a written affidavit, notice, etc. This section 5424 does not cover the case of false swearing or false testimony given in open court in a naturalization proceeding by a witness for the applicant. Offenses of the latter kind are punishable exclusively under section 5395. The reasons leading me to this conclusion are as follows: In the first place, congress cannot be presumed to have provided for the punishment of the offense of swearing falsely in a naturalization proceeding, in two different sections of the law, and to have prescribed two different punishments for the same offense, as is the case if sections 5395 and 5424, Rev. St. U. S., relate to, or cover the same offense. Again, the words "or falsely makes, forges," etc., in section 5424, are the words which congress almost invariably uses when the crime of counterfeiting or forging something, such as coin, money-orders, bonds, bank-notes, patents, etc., is intended to be described. See following sections of Rev. St. U. S., where the same language is employed: Sections 5457, 5458, 5463, 5479, 5415, 5416, and 5418. I am fully satisfied that the main thought in the mind of the law-maker, when section 5424 was drafted, was to prevent forging and counterfeiting of first and final papers usually issued to applicants for naturalization, and this view is fortified and enforced by a careful reading of the act of July 14, 1870, (16 U. S. St. at Large, 254,) from which sections 5395, 5424, 5425, 5426, and 5427 are drawn. The result of this ruling is that count No. 2 of the indictment is not good unless it sufficiently states an offense under section 5395, under which the first count is drawn. If it does, it is no more than a repetition of the first count, in slightly different language; but whether it does or not, is not very material, as a man can only be punished once for the same offense, no matter in how many counts the offense is stated.

3. Passing to the third count I understand that two objections are made to the same. This count is framed on sections 5427 and 5425, Rev. St. U. S., and charges the defendant as a principal in the second degree with aiding and abetting another in the commission of a felony. The felony so committed, in the language of the statute, (section 5425,) is consummated when one "obtains, accepts, or receives any certificate of citizenship known to such person to have been procured by fraud, or by the use of any false name, or by means of any false statement made with intent to procure * * * the issue of such certificate." The indictment shows that the principal offender, whom the defendant is said to have aided and abetted, (one Ernst John,) obtained, accepted, and received the certificate from the court that granted it; that is to say, the St. Louis court of criminal correction. The point is made, as I understand, that if so obtained by a fraud committed on the court that issued it, at or just before the obtaining or acceptance, such an obtaining or acceptance is not within the statute; that the statute refers to the obtaining, acceptance, or receipt of fraudulent or forged certificates of citizenship theretofore issued or made, which are outstanding in the hands of third parties.

I can find nothing in the statute that justifies such an interpretation. I think the acceptance from the clerk of a court, or from the hand of the judge himself, of a certificate of citizenship, which the applicant knows that the court has been procured or induced to grant by the fraud or false testimony of the person himself who accepts or receives it, is an offense under section 5425, as well as the obtaining of a certificate from any other party. Congress clearly has power to make the acceptance or receipt of the certificate under the circumstances supposed, an offense separate and distinct from the offense of false swearing, by which the court was induced to grant it, and I think it clear that it intended to punish persons who knowingly accepted a fraudulent certificate from any person or persons.

It is further urged that count No. 3 is bad, because it does not describe the fraudulent acts by which the certificate of citizenship alleged to have been "obtained, accepted," etc., was procured. In an indictment under the third clause of section 5425 for "obtaining, accepting, or receiving a certificate, knowing that it has been procured by fraud," there can scarcely be a doubt that it is essential to allege and describe the fraud by which the certificate was procured. Counsel for the government, in effect, concede that such is the rule of criminal pleading. An indictment in the words of the statute, merely alleging that it was "known to the defendant to have been procured by fraud," and not advising the defendant or the court of the acts constituting the fraud of which the accused was alleged to have had knowledge, would be clearly bad. *U. S. v. Cruikshank*, 92 U. S. 557-559; *U. S. v. Cook*, 17 Wall. 174; *U. S. v. Mills*, 7 Pet. 142; *State v. Parker*, 43 N. H. 83; *State v. Keach*, 40 Vt. 118; *Alderman v. People*, 4 Mich. 414. It is contended, however, that the indictment in this case does sufficiently describe the fraud by which the certificate of citizenship was procured, and that the grand jury has merely omitted, as it might lawfully do, to describe the manner and means by which the fraud was committed, because they were unknown to the jurors. Attention is called in support of this contention, to the following clause of the indictment, as sufficiently describing the fraud by which the certificate was procured, to-wit:

"Which said fraud committed before said last-named court was and is that the said Ernst John (the principal offender) then and there obtained said certificate from the last-named court, notwithstanding that, at the time he arrived in the United States, he was under the age of eighteen years, and had not resided therein three years next preceding his arrival at the age of twenty-one years, and was not then and there entitled to be admitted to become a citizen, and said fraud was so committed by said Ernst John * * * in some manner and by some means to the grand jurors unknown."

It is not claimed that the fraud in question is described or alleged in the indictment, otherwise than in the paragraph quoted. There is an attempt, as will be observed in this allegation, to describe a fraud otherwise than by describing the acts of which it consists. But as the word "fraud" or "fraudulent" is merely a term which is used to denote the character of given acts or conduct, and as a fraud may be committed

in a variety of ways, almost too numerous to mention, it may be doubted whether a fraud can ever be sufficiently described or alleged in a legal proceeding, without describing the acts done of which it consists. In the present indictment, by the language above quoted, the pleader has not described a fraud, or a state of facts from which it must necessarily be inferred that a fraud was committed. It is merely averred that a certificate of naturalization was obtained by a person, notwithstanding at the time of his arrival in the United States he was not under 18, and had not resided here three years preceding his arrival at the age of 21, and was not entitled to be admitted a citizen. But it is not a necessary inference that a fraud was committed by such person. The registry of birth of such person may have been lost, and he may, in good faith, have believed that at the time of his arrival in this country he was under 18, and have so testified, and obtained a certificate on the strength of such evidence, although in point of fact he was over 18 on his arrival in this country. In such a supposable case, it would be erroneous to say that the certificate was procured by fraud within the meaning of the statute. In my judgment the third count of the indictment is bad, because it does not sufficiently describe the fraud by which the certificate of citizenship, alleged to have been obtained and received, was procured. To make out a good count, under the statute in question, the pleader must allege the acts constituting the fraud. If the fraud consisted in making a false oath or statement whereby the court was deceived, the indictment ought to say so, and aver what the statement was. It will not do to say that the fraud in the procurement of the certificate of citizenship consisted in the fact that a person obtained citizens papers who was not legally entitled to them, but that the means by which they were so obtained is unknown, because the means resorted to—the acts done to obtain the certificate—are the very things which the law requires to be alleged and proven; and furthermore, the certificate, although unlawfully issued, may not have been issued under such circumstances as amounted to a fraud. The authority cited, (*Com. v. Webster*, 5 Cush. 295,) showing that in an indictment for murder it is not always necessary to describe the implements or weapons by which the murder was committed, or the precise manner of the killing, seems to me to have no bearing on the point involved in the case at bar. Neither does the decision in *Com. v. Ashton*, 125 Mass. 384, have any just application to the present case. In that instance, (as I infer from the opinion,) a statute declared it to be an offense "to obtain money by means of a game, device, sleight of hand trick, or other means, by the use of cards." The indictment averred that money was obtained "by a game, device, trick, etc., by the use of cards." The court held this to be sufficient, saying, in substance, that as the statute itself described all the elements of the offense with certainty, it was sufficient to allege it in the words of the statute.

In the present case, it is not contended that the federal statute describes the offense with such certainty that the language of the statute will suffice in an indictment. It is admitted that the word "fraud" is

so general, and may be applied to such a variety of acts, that the particular kind of fraud meant, and intended to be proven, ought to be averred. The defect in the third count is that the kind of fraud is not averred. The grand jurors say the acts constituting it are unknown to them, and in attempting to describe the general nature of the fraud they merely describe a result,—that is, the obtaining of a certificate of citizenship,—which result may have been brought about without practicing any fraud or deceit.

4. The fourth count of the indictment is also framed under sections 5425 and 5427 of the Revised Statutes, and is for "counseling and advising" the commission of the same felony described in the third count. No substantial defect in this count has been pointed out. In this count, the fraud by which the certificate of citizenship obtained and accepted by Ernst John, the principal offender, was procured, is clearly stated. It is alleged that the fraud consisted in making a false statement to the court that granted the certificate, and what that false statement was is properly averred. A similar averment in count No. 3 would have made that count tenable. The result is that the demurrer is overruled as to counts 1 and 4, but is sustained as to count No. 3, and the same is quashed.

5. Under late rulings in the federal courts, it seems that the offense defined in section 5395 is a felony, hence counts under that section are properly joined with counts under sections 5425 and 5427. *U. S. v. Johannesen*, 35 Fed Rep. 411.

UNITED STATES v. GOUJON.

(District Court, S. D. California. August 26, 1889.)

CRIMINAL LAW—SENTENCE—COMMUTATION FOR GOOD BEHAVIOR.

Act Cong. March 3, 1875, provides that a United States prisoner confined in execution of any sentence in a prison of any state or territory, which has no system of commutation for its own prisoners, shall have a deduction of five days in each month in which no charge of misconduct shall be sustained against him. Rev. St. U. S. § 5544, provides that in other cases such prisoner shall be entitled to the same credits applicable to other prisoners. *Ibid.* that as act Cal., amended March 14, 1881, provides for commutation for such prisoners only as are confined in the state-prisons for terms of one year and over, a United States prisoner sent to the county jail for six months is entitled to no credits for good behavior.

At Law. Application for release from imprisonment.

J. Marion Brooks, for petitioner.

A. W. Hutton, U. S. Atty.

Ross, J. The petitioner, who was on the 4th day of March, 1889, sentenced to be imprisoned in the county jail of Los Angeles county for the period of six months, and to pay a fine of \$500, upon conviction of

the crime of smuggling cigars into the United States, claims, by reason of his good behavior during his imprisonment, to be entitled to a credit of five days for each month of his term, and therefore to be now entitled to be discharged.

The provisions of the United States statutes bearing on the subject are contained in the act of congress of March 3, 1875, (1 Supp. Rev. St. 184.) and in section 5544 of the Revised Statutes, the first of which reads as follows:

"All prisoners who have been or shall hereafter be convicted of any offense against the laws of the United States, and confined in execution of the judgment or sentence upon such conviction, in any prison or penitentiary of any state or territory, which has no system of commutation for its own prisoners, shall have a deduction from their several terms of sentence of five days in each and every calendar month during which no charge of misconduct shall have been sustained against each severally, who shall be discharged at the expiration of his term of sentence less the time so deducted, and a certificate of the warden or keeper of such prison or penitentiary of such deduction shall be entered on the warrant of commitment."

Section 5544 reads:

"In other cases, all prisoners now or hereafter confined in the jails or penitentiaries of any state, for offenses against the United States, shall be entitled to the same rule of credits for good behavior applicable to other prisoners in the same jail or penitentiary."

These provisions are perfectly plain and admit of but one construction. By its express terms the deductions provided for by the act of 1875 can be allowed only to prisoners confined in a state or territory having no system of commutation for its own prisoners; and, as the state of California has such system, it necessarily results that the deductions provided for by that act do not apply to the case of the petitioner. The cases of offenders against the laws of the United States, confined in execution of a judgment or sentence upon conviction in a prison of any state or territory having a system of commutation for its own prisoners, are provided for by section 5544 of the Revised Statutes, above quoted, which gives to the prisoner confined in such state or territory for an offense against the United States the same rule of credits for good behavior which by the law of the state or territory where the imprisonment is had is applicable to other prisoners in the same prison. The system of commutation provided by the statute of California (act Cal. 1880, as amended March 14, 1881) has no application to county jails, or to prisoners confined therein; and, in respect to prisoners confined in a state-prison, no credit is allowed when the term of imprisonment is less than one year. *In re Terry*, 37 Fed. Rep. 649; *U. S. v. Schroeder*, 14 Blatchf. 345. Writ denied, and petition dismissed.

UNITED STATES v. BRAUN.

SAME v. SOHN.

(District Court, E. D. Missouri, E. D. September 2, 1889.)

TRADE-MARK—COUNTERFEITING—INDICTMENT.

A certificate of registration of a trade-mark is merely *prima facie* evidence that the applicant is the owner of a valid trade-mark; and indictments, under act Cong. Aug. 14, 1876, § 1, to punish counterfeiting of registered trade-marks, which allege that a certain word has been admitted to registration as a trade-mark, without averring facts showing that the alleged owners acquired an exclusive property therein, are bad.

At Law. On demurrer to indictment.

George D. Reynolds, U. S. Atty.

John M. Holmes and Kerr & Kerr, for defendants.

THAYER, J. These are indictments under section 1 of the act of August 14, 1876, to punish counterfeiting of trade-marks that have been registered in accordance with the laws of the United States. The section is as follows:

"Be it enacted that every person who shall, with intent to defraud, deal in or sell * * * any goods of substantially the same descriptive properties as those referred to in the registration of any trade-mark, pursuant to the statutes of the United States, to which, or to the package in which, the same are put up, is fraudulently affixed said trade-mark, or any colorable imitation thereof, calculated to deceive the public, knowing the same to be counterfeit or not the genuine goods referred to in said registration, shall, on conviction thereof, be punished," etc. *Vide* 1 Supp. Rev. St. U. S. 241.

The law was evidently designed to punish those who, with fraudulent intent, pirate a valid trade-mark which has been duly registered by the commissioner of patents. If a person, by any means, secures the registration of a mark, symbol, word, or device, claiming it to be a trade-mark, which, according to the rules of the common law, is not a valid trade-mark, another person who affixes the same mark, symbol, or device to his own goods, and sells them, cannot be punished under the penal statute above quoted. Registration does not create a trade-mark; nor is it conclusive proof that the person procuring registration has a valid trade-mark. Property in a trade-mark can only be acquired by the adoption of some mark, symbol, sign, or word susceptible of being used as a trade-mark, and by the actual application of the same to goods, wares, or merchandise of a certain class, so that it serves to indicate the origin or ownership of the particular commodity. Congress, by the act of March 3, 1881, (1 Supp. Rev. St. U. S. 606,) has merely provided for the registration of a certain class of trade-marks used in commerce with foreign nations or Indian tribes, when, according to common-law tests, a right to use the mark, symbol, or word as a trade-mark is established to the satisfaction of the commissioner of patents. Admission to registration under the act of March 3, 1881, is merely an ad-

mission on the part of the government that the applicant for registration is the owner of a valid trade-mark. The certificate of registration granted by the commissioner is only *prima facie* evidence of that fact, but it does not conclude a third party. The certificate is not a grant of any right or privilege; it is merely a recognition on the part of the government of the existence of an asserted exclusive right to affix a certain mark, symbol, word, or device on certain goods, as a trade-mark. Browne, Trade-Marks, §§ 338, 374-378, inclusive.

Necessarily, therefore, in a criminal proceeding under the act of August 14, 1876, the question whether the trade-mark involved (it having been admitted to registration) is valid, is an issuable question. In view of what has been said, it would seem reasonable to require a pleader, in drawing an indictment under the act of August 14, 1876, to allege that the person or persons claiming the trade-mark involved, at some given time and place, adopted the same (describing it) and used it in commerce with foreign nations or with Indian tribes on a certain class of goods, (describing them,) to indicate their origin or ownership, and caused the said trade-mark on a certain day to be registered in the patent-office, in accordance with law, and that, thereafter, the defendant, with intent to defraud, dealt in or sold certain goods (describing them) of substantially the same descriptive properties as those referred to in the registration of the trade-mark in question, to which goods, so sold, was fraudulently affixed the registered trade-mark in question, or a colorable imitation thereof, he, the said defendant, well knowing the goods so sold not to be the genuine goods referred to in said registration, etc. Allegations equivalent to those thus generally outlined, appear to me to be requisite to constitute a valid indictment. An indictment ought to allege facts showing the existence of a valid trade-mark as well as the fact that registration has been obtained, inasmuch as the registration does not create a trade-mark; and inasmuch as the certificate of registration is, at best, only convenient *prima facie* evidence that a certain word or symbol has become a trade-mark. The owner of a trade-mark acquires the same by acts wholly independent of the registration thereof, and registration is not even necessary to entitle him to protection in a civil proceeding, although it is necessary to secure the protection of the penal statute.

Tested by these rules, the indictments now in question are bad. They contain no allegations showing that Battle & Co., who appear to have registered the word "Bromidia" as a trade-mark, ever acquired an exclusive property therein. No acts done by Battle & Co., sufficient in law to give that firm a title to the word "Bromidia," are alleged. The indictments appear to have been drawn on the theory (which, for reasons above indicated, I deem erroneous) that it was sufficient for the indictment to show merely that the word "Bromidia" had been admitted to registration, and that defendants had subsequently sold goods of substantially the same descriptive properties as those referred to in the registration, to which was affixed the word "Bromidia." An allegation that a word has been admitted to registration by the commissioner, is not a sufficient averment in a criminal proceeding that a certain

person has acquired an exclusive right of property in the word when affixed to a certain class of goods, because, notwithstanding such registration, the word may not have become a valid trade-mark, either because the necessary steps have not been taken to make it a trade-mark, or because the word itself, for certain reasons, is not susceptible of appropriation for that purpose. Take the word "Bromidia" as an example. If it is a generic word,—that is, the name by which an article or compound which any one may make or sell is generally known, and which must necessarily be used in describing that article,—it clearly cannot be appropriated as a trade-mark, and registration of the word, though allowed, confers no rights. If, as seems highly probable, the word "Bromidia" is used, and is regarded by the public more as a description of the qualities and an ingredient of the article to which it is affixed, as containing bromine, than as indicative of the origin and ownership of the article, it cannot be appropriated as a trade-mark. *Burton v. Stratton*, 12 Fed. Rep. 698, and cases cited; *Browne, Trade-Marks*, §§ 134, 135. These considerations serve, in my judgment, to show the necessity of averring a state of facts, which, as a matter of law, is sufficient to make the word a valid trade-mark. Without such averments, a criminal offense is not stated with sufficient certainty.

It is claimed by defendants' counsel that the indictments are bad for various other reasons, and among the number, because the trade-mark law of July 8, 1870, was void, congress having no power to pass such a law, as was held in the *Trade-Mark Cases*, 100 U. S. 82, and because at the time of the enactment of the penal act of August 14, 1876, under which the indictments are drawn, there was nothing upon which that act could operate, and it was therefore nugatory, and remained inoperative, even after the passage of the act of March 3, 1881, *supra*. It is unnecessary, however, at this time to express any opinion concerning the novel question thus raised, as the indictments must be held bad for the reasons heretofore indicated. Demurrer sustained.

CARSON v. URY *et al.*

(Circuit Court, E. D. Missouri, E. D. September 2, 1889.)

INJUNCTION—FRAUDULENT MISREPRESENTATIONS.

The Cigar-Makers' International Union of America, an unincorporated association for mutual benefit, adopted a label purporting to be issued by the union, and to be placed on boxes of cigars made by members of the union. Complainant, who was a manufacturer of cigars, and a member of the union, filed a bill to restrain defendants, who were not members thereof, from making and selling counterfeits of the union labels, with the alleged attempt to defraud complainant and the public. The bill alleged that by the use of the labels complainant was enabled to receive a higher price for his cigars, and that the sale of such counterfeit labels injured his trade. *Held*, that though there is no trade-mark in such labels, as complainant shows special damage and that the right to use them is valuable, and as the adoption and use of

such labels are in no way unlawful, and the action of defendants is confessedly fraudulent, in that they sold the spurious labels, though they may not have used them on cigars of their own manufacture, the bill alleges good grounds for equitable relief.

In Equity. On demurrer to bill.

The case made by the bill, and admitted by the demurrer, may be summarized as follows: The "Cigar-Makers' International Union of America" is a voluntary, unincorporated association of practical cigar-makers, having many members, and was formed to promote the mental, moral, and physical welfare of its members, to assist them in obtaining remunerative wages, to extend pecuniary aid to members and their families in case of sickness or death, and generally to maintain a high standard of workmanship. In September, 1880, at a convention held by members of the union, a label was adopted to be placed on cigar boxes, for the purpose of designating cigars made by members of the union. The label is nothing more than a certificate printed on blue paper, and purporting to have been issued by authority of the union, to the effect that the cigars contained in the box to which it is affixed have been made by first-class workmen, members of the union, and not by "inferior rat-shop, cooly, prison, or tenement-house workmanship." All members of the "Cigar-Makers' International Union of America," (and the membership is said to exceed 25,000) are allowed to affix the label to cigars made and sold by themselves, provided they do not employ others to make cigars. It is also the practice of the union to furnish the label gratuitously to all cigar manufacturers throughout the United States, who employ exclusively members of the union at an agreed schedule of wages. Complainant in this case is a member of the union, and for two years past has been making and selling cigars of his own manufacture in the city of New York, and in the course of his business has used (as he is entitled to) the union label aforesaid, and built up a profitable trade. The wages received by members of the union are about three dollars higher per thousand cigars than the wages received by other cigar-makers; and cigars bearing the union label are worth in the market three dollars per thousand more than they would be worth without it, because in public estimation the label is a guaranty that the cigars bearing it have been made by competent workmen, in clean and healthy shops. By the use of the genuine label in question on cigars of his own manufacture the complainant has made great profits, and the public has also been protected from purchasing inferior cigars. Since the adoption of the union label, and since complainant began to use the same, the defendants have conspired to cheat and defraud complainant and other members of the union, as well as the public, by making and selling and offering for sale counterfeit labels for cigar boxes. The label made and sold by defendants is a *fac simile* of the union label, and cannot fail to deceive. In furtherance of the scheme to defraud, defendants have adopted a fictitious name under which they manufacture and sell the counterfeit label in question, and they also have their correspondence concerning the same sent to a false address in the city of St. Louis,

whence it is forwarded to defendants' real place of business. By making and selling such spurious and counterfeit labels to cigar manufacturers throughout the country, the public is deceived, and a great pecuniary loss is occasioned, which is borne by the complainant and other members of the union who, like him, manufacture and sell cigars, and make use of the genuine union label in the course of their business to enhance the value of their product and increase the demand therefor. Such, in brief, is the case made by the bill.

Brilsen, Steele & Knauth and Hough, Overall & Judson, for complainant.
Chester H. Krum, for defendants.

THAYER, J., (*after stating the facts as above.*) On the facts stated I think that complainant is entitled to equitable relief. It is no doubt true that the union label does not answer to the definition ordinarily given of a technical trade-mark, because it does not indicate with any degree of certainty by what particular person or firm the cigars to which it may be affixed were manufactured, or serve to distinguish the goods of one cigar manufacturer from the goods of another manufacturer, and because the complainant appears to have no vendible interest in the label, but merely a right to use it on cigars of his own make, so long, and only so long, as he remains a member of the union. In each of these respects the label lacks the characteristics of a valid trade-mark. The court cannot interfere in this instance, as in ordinary trade-mark cases, on the ground that one person is intentionally or unintentionally appropriating a mark, symbol, design, or word which has become the exclusive property of another when used by him to distinguish goods of a certain class. In short, this is not a trade-mark case. As I view it, it is a bill filed to restrain the defendants from perpetrating a fraud which injures the complainant's business, and occasions him a pecuniary loss. Even where no trade-mark was infringed or involved, courts of equity have granted injunctions on more than one occasion against the use upon goods of certain marks, labels, wrappers, etc., when the evident design of such use was to deceive the public by concealing the true origin of the goods, and making it appear that they were the product of some other manufacturer of established reputation, thereby depriving the latter of a portion of the patronage that would otherwise come to him, or injuring the reputation of his goods. *Croft v. Day*, 7 Beav. 84; *McLean v. Fleming*, 96 U. S. 245; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Seixo v. Provezende*, L. R. 1 Ch. 195; *Thomson v. Winchester*, 19 Pick. 214; *Perry v. Truefitt*, 6 Beav. 66; *Newman v. Alvord*, 51 N. Y. 189; *Avery v. Meikle*, 81 Ky. 73; *Burton v. Stratton*, 12 Fed. Rep. 696; *Chemical Co. v. Myer*, 31 Fed. Rep. 453; *Browne, Trade-Marks*, §§ 43, 44. No valid reason can be assigned why the principle which underlies these decisions does not entitle the complainant to relief. The right of the court to grant relief in the cases cited was predicated on the ground that the conduct of the parties proceeded against, in intentionally marking, labeling, wrapping, or advertising their wares so that they would be mistaken for the goods of some other manufacturer, was fraudulent. That, and

the fact that the fraud complained of had a natural tendency to injure the business of the person whose marks, labels, etc., had been simulated, by lessening his sales or injuring the reputation of his goods, was held sufficient to give the person who had thus sustained or was liable to sustain special damage a right to equitable relief. In the case at bar complainant shows that he has a clear right to use the union label, and that the right to use it is a valuable privilege, inasmuch as it enhances the value of the cigars which he manufactures and sells, and increases the demand therefor.

It does not appear from the averments of the bill that the action of the Cigar-Makers' Union, in adopting a label to distinguish cigars made by its members, was or is in any respect unlawful, or opposed to public policy. On the other hand, the action of the defendants is confessedly fraudulent. The demurrer admits that they are engaged in making and selling counterfeit labels purporting to have been issued by the "Cigar-Makers' International Union of America." The bill avers that the sale of such counterfeit labels injures the complainant's trade and business, and such would seem to be the necessary and immediate result of such fraudulent acts. In other words, complainant shows that he has sustained such special pecuniary damage as gives him the right to complain of the fraud. It is true that the bill does not show that the defendants have affixed any of the spurious labels to cigars of their own manufacture, or that they have sold any cigars bearing the counterfeit certificates or labels. But this is not important. From the fact that they have made and sold spurious labels and advertised them for sale the court must presume that defendants intend that they shall be used on cigar boxes by the persons who buy them, and that they manufacture and sell them for that purpose. The conduct of the defendants is equally as culpable as that of the manufacturers of cigars who buy and use the spurious labels, and the loss which complainant sustains by the use of the same on cigar boxes is as directly attributable to the persons who make and sell the counterfeit labels, as to the dealers in cigars who buy and use them.

In conclusion I will add that my attention was called, on the hearing of the demurrer, to a recent decision of the supreme court of Minnesota affecting the union label in the case of *Protective Union v. Conkaim*, 41 N. W. Rep. 943; also to a decision of the court of chancery of New Jersey in the case of *Schneider v. Williams*, 14 Atl. Rep. 812. In both of those cases the bill seems to have been framed upon the theory that the union label was a technical trade-mark, and that as such it was the property of the members of the union in the aggregate, and that any one or more members of the union, whether they were or were not engaged on their own account in the manufacture and sale of cigars and in the use of the label, might maintain a suit to restrain an unauthorized party from using the label. The decision in each case was adverse to such contention. The bills appear to have been filed by persons and by an association who were not engaged in the manufacture and sale of cigars on their own account. Hence they were not injuriously affected by the

fraudulent acts complained of, or, if they were liable to suffer a pecuniary loss to any extent or at any time in consequence of such acts, the loss to be apprehended was indirect and speculative. It may well be conceded that the plaintiffs in those cases had no such property rights involved as would enable them to maintain an action, even on the theory on which this decision proceeds. The case at bar differs from those cases, however, in the respect before mentioned, that complainant is himself a manufacturer of cigars, and, according to the averments of the bill, has built up a profitable trade by the use of the union label, which trade has been damaged, and is liable to be further damaged, by the fraudulent acts of the defendants. I think that he is entitled to relief on the facts stated in the amended bill, and accordingly overrule the demurrer.

TAFT v. STEPHENS LITHOGRAPHING & ENGRAVING Co.

(Circuit Court, E. D. Missouri, E. D. September 16, 1889.)

COPYRIGHT LAWS—VIOLATION—PENALTY.

Where a number of chromos, all bearing the word "copyrighted," in violation of Rev. St. U. S. § 4963, which provides a penalty for such offense, were struck off each day on several succeeding days, such chromos being of the same kind, except that each respective issue bore the name of a different firm by way of advertisement, the penalty is recoverable for each issue.

At Law. On motion to strike out part of amended petition. For opinion on demurrer to petition, see 38 Fed. Rep. 28. For opinion on plea to jurisdiction, see 37 Fed. Rep. 726.

W. E. Fisse, for plaintiff.

R. A. & Paul Bakewell and *W. B. Thompson*, for defendant.

THAYER, J. At the last term of this court we held in this case that when the word "copyrighted" is impressed on a large number of chromos of the same kind, that have not in fact been copyrighted, and the impression upon each and all is made under the same circumstances, and at or about the same time, so that the act is practically "a single continuous act," only one penalty of \$100 is recoverable under section 4963, Rev. St. U. S. We called attention on that occasion to the fact that the statute does not impose a penalty for each imprint of the word "copyrighted" wrongfully made on an engraving, map, or chromo. 38 Fed. Rep. 28.

The present motion raises the question whether more than one penalty is recoverable in a case where 2,000 chromos wrongfully bearing the word "copyrighted" were struck off each day for 25 consecutive days, the chromos so struck off on the respective days being of the same kind, and differing only in the respect that each day's issue had printed thereon, by way of advertisement, the name of a firm different from that appear-

ing on every other day's issue. While it is clear that the statute does not impose a penalty of \$100 for each imprint of the word "copyrighted" wrongfully made on an engraving or chromo, where numerous copies of the same chromo or engraving are struck off practically at the same time, yet we think it equally clear that the penalty is not strictly limited to \$100, no matter how many copies have been published, in all cases where the charge relates to the same print, engraving, or chromo. The latter construction would sometimes defeat the purposes of the law, as persons might well afford in some instances to pay a single penalty for the privilege of making a fraudulent use of the word "copyrighted," or some equivalent expression, on many copies of an engraving, print, or chromo. Congress intended to punish each and every wrongful act that was a complete transaction in itself, and hence, under certain circumstances, more than one penalty may be recovered for fraudulently affixing the word "copyrighted" to more than one copy of the same print, engraving, or chromo. When the continuity of an act is broken by lapse of time or other circumstances,—as where a number of chromos are struck off on one day for a particular customer with the word "copyrighted" wrongfully affixed thereto, and on a succeeding day or several succeeding days other copies of the same are struck off for other customers, each bearing the fraudulent mark in question,—the several acts are so far separate and distinct that each may, in our judgment, be counted upon as a separate offense. We accordingly overrule the motion to strike out all of the counts but the first, holding that the plaintiff in his amended petition has sufficiently alleged the commission of distinct offenses for which several penalties may be recovered.

POHL *et al.* v. ANCHOR BREWING Co.

(*Circuit Court, S. D. New York.* August 7, 1889.)

PATENTS FOR INVENTIONS—LAPSE OF FOREIGN PATENT.

The "term" of a foreign patent referred to in Rev. St. U. S. § 4887, which requires letters patent issued for an invention previously patented abroad to be limited "to expire at the same time with the foreign patent," or, if there be more than one, "with the one having the shortest term," is not the original term expressed in the foreign patent, but its period of actual existence, and the United States patent expires when the foreign patent, having the shortest term, is terminated by lapse or forfeiture by failure of the patentee to comply with the requirements of the foreign patent law.

In Equity. Hearing on plea.

Grosvenor Lowrey, Clarence A. Seward, and Joseph M. Duell, for complainants.

W. J. Townsend, for defendant.

WALLACE, J. The bill of complaint alleges infringement by the defendant of letters patent of the United States dated March 18, 1879, for

improvement in barrel and cask scrubbing machines, granted to Carl Pohl of Dresden, Germany, upon an application filed January 3, 1879, "subject to the limitation prescribed by section 4887 of the Revised Statutes, by reason of German patent dated September 6, 1877, and French patent dated September 3, 1877." The defendant has interposed a plea averring, in substance, that both the German and the French patent were issued to Pohl for the same invention described in, and prior to his application for, the United States patent; and that the German patent lapsed, and the French patent became forfeited, prior to the commencement of the present suit, by reason of the failure of the patentee to pay the annuities and work the invention as required by the laws of Germany and France, in force when the foreign patents were granted. The plea alleges that the original term of each of the foreign patents was for 15 years. The plea has been set down for argument, and the question for determination is whether, by section 4887, Rev. St., the United States patent expired when the foreign patent having the shortest term terminated by lapse or forfeiture, or whether it does not expire until the original term of such foreign patent expires. By the section in question the patent in suit is to be limited "to expire at the same time with the foreign patent, or, if there be more than one, at the same time with the one having the shortest term." Until the decision of the supreme court in *Refrigerating Co. v. Hammond*, 129 U. S. 151, 9 Sup. Ct. Rep. 225, it was generally supposed that the time of expiration of this section was the time of expiration of the original term of the foreign patent, and that the duration of the United States patent was independent of the contingency that the foreign patent might cease to be an operative grant prior to the term specified on its face by the breach of a condition subsequent. This was so decided in several adjudged cases. *Paillard v. Bruno*, 29 Fed. Rep. 864; *Refrigerating Co. v. Gillett*, 31 Fed. Rep. 809; *Protective Co. v. Alarm Co.*, 21 Fed. Rep. 458. These decisions interpreted the statute upon considerations of public policy and convenience so imperative that it was thought they could not have been disregarded by congress, and emphasized the effect to be given to the word "term" as used in the section. It was supposed that when congress referred to the patent having the "shortest term" to define the time of expiration of the United States patent in case there should be two foreign patents, the time of expiration in all cases was the end of the term of the foreign patent; that the term of a patent meant the period of duration expressed in the patent; that in a legal sense a patent does not "expire" until its term expires; and that a construction of the section by which the duration of the United States patent should be fixed when the patent issues, by applying the rule, *id certum est quod certum reddi potest*, was the more reasonable one, and the one intended by congress. And it had been pointed out that, unless this was the true construction of the section, neither the owner of the patent nor the public would know the duration of the grant, and that the United States patent might expire, if there were two foreign patents, at the same time with the one having the longest term, notwithstanding the language of

the section that it is to expire with the one having the shortest term. The decisions of the circuit courts, which have been cited, were not referred to in the opinion of the supreme court in *Refrigerating Co. v. Hammond*; but other adjudications of circuit courts in construction of the section, which proceeded upon the same considerations, were distinctly disapproved. These were *Henry v. Tool Co.*, 3 Ban. & A. 501; *Reissner v. Sharp*, 16 Blatchf. 383; *Refrigerating Co. v. Gillett*, 13 Fed. Rep. 553,—where it had been held that the time of expiration of the United States patent was the end of the term expressed in the foreign patent, notwithstanding the prolongation of the original term was a matter of right to the patentee, and had actually been obtained by him. It is now urged for the complainants that the decision of the supreme court does not overrule or discredit the decisions of the circuit court, which were not referred to and distinctly considered in the opinion, and is to be read as merely deciding the precise question in the case, which was whether an extension of the term of a foreign patent, which by the foreign law was a matter of right to the patentee upon complying with certain conditions, prolonged the duration of the United States patent. The opinion does not discuss the reasons for the construction given to the section, but it states that the point in controversy is whether the United States patent expires “at the same time with the term to which the foreign patent was in fact limited when the United States patent was granted,” or expires “when the foreign patent expires, without reference to the limitation of the term of such foreign patent in actual force at the time the United States patent was granted,” and it declares that the statute means “that the United States patent shall not expire so long as the foreign patent continues to exist,” and “is to be so limited by the courts as a matter to be adjudicated on evidence *in pais*, as to expire at the same time with the foreign patent,” and “is to be in force so long as the foreign patent is in force.” The contention for the complainants would be justified if the opinion had suggested that the term of a foreign patent, within the meaning of the section, may be deemed either the original term expressed in the patent, or a period of duration to which its life may be prolonged as a matter of right and law in the country of its origin; or that, although a patent expires when its term expires, congress did not mean to limit the life of a United States patent to the original term of the foreign patent. But, in the absence of any such suggestion, and by the extracts which have been given, it seems plain that the supreme court has not acceded to the interpretation adopted in the previous adjudications, as well those not referred to in the opinion as those that were. The opinion cannot be reconciled with the view that the statute intends that the United States patent shall have a fixed term, ascertainable when it issues by reference to the term of a foreign patent. It does not attach any significance to the word “term,” as defining the period of duration of the foreign patent or of expiration of the United States patent, but treats that period as one to be ascertained *de hors* the foreign patent, by evidence *in pais*, and without reference to any supposed inconvenience or uncertainty to the public or the patentee

which may ensue in consequence of their ignorance, whether the patent is or is not in life. The statute is capable of the meaning that the exclusive right to the invention here is to cease with the exclusive right of the patentee in any foreign country, or of the meaning that it shall continue to exist for such period, not exceeding 17 years, as coincides with the shortest term of any foreign patent. The supreme court seems to have adopted the first of these meanings. This is the view of the decision expressed in the recent case of *Huber v. Manufacturing Co.*, 38 Fed. Rep. 830, and is the construction of the statute adopted by the commissioner of patents shortly after the passage of the act of July 8, 1870, in which the section first appears, in *Case of Mushet*, 2 Com'rs Dec. 106. The conclusion thus reached is contrary to the impressions entertained at the argument of the plea, but a careful reading of the opinion of the supreme court constrains the conclusion that the plea must be held to be good.

JONES *et al.* v. CLOW *et al.*

(Circuit Court, N. D. Illinois. July 22, 1889.)

PATENTS FOR INVENTIONS—PATENTABILITY—WANT OF NOVELTY.

Letters patent No. 208,376, granted September 24, 1878, describe an "improvement in heating apparatus," consisting of a portable heater or fire-pot mounted upon an oil reservoir by means of standards projecting upwards from the top of the reservoir, and a burner placed thereunder, consisting of a spiral coil of iron pipe, with an inlet for combustible fluid at the top, and a burning jet in the center of the bottom of the coil, which is surrounded by a metal jacket with openings at the lower part to admit air. Air is also introduced into the upper part of the reservoir to force the fluid through a pipe leading from near the bottom of the reservoir to the top of the burner, where it is connected with the top of the coil. The flame from the jet in passing upward through the coil vaporizes the fluid as it passes from the inlet pipe to the jet, and produces a heating flame in the fire-pot. *Held*, that the combination was a mere aggregation of old parts of two prior patents,—one granted in June, 1878, with a fire-pot and burner mounted on an oil reservoir, and the other granted in March, 1868, with the reservoir at the side, instead of under the burner and fire-pot, and is void for want of novelty.

In Equity.

Bill in equity by Thomas J. Jones and others against James B. Clow and others, for injunction and an accounting for infringement of patent for an "improvement in heating apparatus."

John G. Elliott and W. A. Reading, for complainants.

West & Bond, for defendants.

BLODGETT, J. The bill in this case asks for an injunction and accounting by reason of the alleged infringement of patent No. 208,376, granted September 24, 1878, to Thomas Connelly, for an "improvement in heating apparatus." In his specification the patentee says:

"My invention consists of a portable heater or fire-pot, serviceable for plumbers and others, for heating solder, soldering-irons, and other articles, and for other purposes. I employ a fire-pot, an oil or fluid reservoir, and an

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interposed burner, which latter consists of a jacket depending from the fire-pot, and inclosing a coil, whose inlet from the reservoir is at top, and outlet or jet at the bottom, under the central space of the coil; the several parts being constructed and operating as will be hereinafter more fully set forth."

The patentee arranges these parts by mounting the fire-pot upon the oil reservoir by means of standards projecting upwards from the top of the reservoir, and placing the burner underneath the fire-pot,—that is, between the fire-pot and top of the reservoir,—or, as the patentee expresses it, "the burner depends from the opening in the bottom of the fire-pot, so that the flame will pass from the burner into the fire-pot or heater." The burner consists of a spiral coil of iron pipe, with an inlet for the combustible fluid at the top of the coil, and the burning jet in the center of the bottom of the coil, this burning coil being surrounded by a jacket of sheet iron or other metal, with openings at the lower part for the admission of air. The combustible fluid—gasoline, alcohol, or any other suitable hydro-carbonic fluid—is placed in the reservoir, into the upper part of which atmospheric air is forced so as to produce sufficient pressure upon the fluid to force it through a pipe, which leads from near the bottom of the reservoir to the top of the burner, where it is connected with the top of the coil. The flame from the burning jet passing upwards through the coil heats the coil so as to vaporize the burning fluid in its passage from the inlet pipe to the jet, and thereby produces a strong heating flame in the fire-pot. The patent contains two claims, as follows:

"(1) The reservoir, A, and fire-pot, D, in combination with the burner, E, consisting of the jacket, G, depending from said pot and inclosing a coil, F, whose inlet is at top, and communicates with a pipe leading to the reservoir, and whose outlet or jet is at bottom, under the central space of the coil, all substantially as described. (2) The fire-pot, D, supported on and connected to the reservoir, A, and supporting the depending burner, E, which communicates with the reservoir in the manner described, all combined and forming together an improved portable heating apparatus."

The defenses interposed are: (1) That the patent is void for want of novelty, and because of the non-patentability of the combination shown in the claims; (2) that defendant does not infringe.

The patent contains the following disclaimer at the foot of the specifications:

"I am aware that it is not new to construct burners, with surrounding jackets, and of coils to which oil or fluid is supplied under pressure, wherefore I disclaim such features."

In considering the question of patentability, we start with the admission from the patentee himself, that both the coil-burner and the means shown for forcing the burning fluid into the coil, and the jacket of the burner, are old. The proof also shows that a fire-pot, essentially like that shown in this combination, is old. Defendant has put into the record a large number of prior devices for plumbers' or tinnern's furnaces, and heating furnaces, which show oil-pots, or oil reservoirs, burners, and fire-pots, operating together to produce the result produced by the complainant's device. In other words, it may be considered, as proven in this

case, that oil reservoirs with a device to force the oil or other combustible fluid to the burners by means of compressed air were old, that jacketed coil-burners were old, and fire-pots were old, at the time the patent was applied for. There is also shown in the proof a patent granted in June, 1878, to Jesse Burgess, for a furnace for heating soldering-irons, wherein the fire-pot and burner were mounted on an oil reservoir. It is true that Burgess' furnace was arranged to heat by means of wick-burners extending up into the fire-pot or heat receiver from the oil-pot, but I do not see that the means by which Burgess produces the heat for his furnace affects the question as to the combination of operative parts in this patent. The patent in suit may then be said, in the light of the proof, to consist of an old oil reservoir with an old coil-burner and old fire-pot mounted upon it, by which arrangement of those old parts or elements together a more portable and convenient heater is produced for practical purposes. But I think the proof fails to show that these separate elements, when arranged or combined as shown in the complainant's patent, produce any new result by reason of their new juxtaposition; assuming for the purpose of the argument that it was new with Connelly to mount the fire-pot or burner on the reservoir. The patent granted to J. S. Hull in March, 1868, was intended to use gasoline, as does the complainant's patent, for heating soldering-irons. It shows a reservoir arranged at the side of the burner and fire-pot, and coil-burner dependent from the bottom of the fire-pot, and the device for forcing the burning fluid into the burner by compressed air. It only differs in the arrangement of its operative parts from the complainant's device in the fact that the oil-pot or reservoir stood at the side, instead of standing under, the burner and fire-pot. But it was a device for heating soldering-irons by the same instrumentalities as that of the complainant, and these instrumentalities operated in the same manner in the Hull device as in the device of the complainant. Then, with the fact that Burgess had at an earlier date mounted his wick-burner and fire-pot on an oil reservoir, I do not see that this patentee has accomplished any new result.

The patent seems to me to be clearly within the rule laid down by the supreme court of the United States in *Huiles v. Van Wormer*, 20 Wall. 368:

"All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly, as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known, and in common use before the combination was made. But the result must be a product of the combination, and not a mere aggregation of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and there allowing each to work out its own effect without the production of something novel, is not invention."

And the same doctrine was applied by the supreme court in *Reckendorfer v. Faber*, 92 U. S. 356, and *Pickering v. McCullough*, 104 U. S. 317; the court, in *Reckendorfer v. Faber*, saying by Mr. Justice HUNT:

"A combination, to be patentable, must produce a different force, or effect, or result, in the combining of forces or processes from that given by their separate parts. There must be a new result produced. If not so, it is only an aggregation of separate elements."

More might be quoted from the authorities to the same point, but I think it sufficiently appears, from the facts in this case, that none of the separate elements in the complainant's combination produce any new result by virtue of such combination. The reservoir supplied the oil or burning fluid, the coil-burner produced the flame, and the fire-pot afforded facilities for heating the soldering-iron, or melting solder, in the same manner in the older art as these respective parts do in the complainant's combination. They produce no new result. It is true, as I have already said, it is a more convenient arrangement of those operative parts than is shown in the older art, except what is shown in the Burgess patent; and, waiving the question as to whether the complainant's patent is or is not defeated for want of novelty by reason of the Burgess patent, I think it sufficient to say that I find in the complainant's patent only an aggregation of old parts producing no new result, and hence no patentable combination. The patent in question is in all its essential particulars like the patent involved in the case of *Preston v. Manard*, heard in this court in January, 1882, and which, after a re-issue, was before the supreme court, and is reported in 116 U. S. 661, 6 Sup. Ct. Rep. 695. There the patentee had combined a truck, a hose-reel mounted on the truck, a hose, and a standard to hold the hose in position to operate as a lawn-sprinkler; and, while it made a convenient arrangement of old operative parts, each part only did in the combination what it had done before, and the patent was held void in this court and in the supreme court, because it showed nothing but an aggregation of old parts. The bill is dismissed for want of equity.

CONDÉ v. VALKENBURGH.

(Circuit Court, N. D. New York. July 15, 1889.)

1. PATENTS FOR INVENTIONS—DESIGN FOR KNIT OVERSHIRT—NOVELTY.

Design letters patent No. 14,239, granted to complainant August 25, 1883, for a "design for a knitted overshirt," the claim of which is, "In a knit overshirt, the front and collar being of a different pattern than the body of the shirt, and the front ornamented by a lacing down the center thereof, substantially as shown," are void for want of novelty if the claim be construed as covering every design of that description, and not simply the particular pattern annexed.

2. SAME—INFRINGEMENT.

If the claim be limited to the design shown in the drawing, viz., a striped front, striped collar, and unstriped body, defendant's pattern, which presents a different appearance to the eye, though its front and collar are of a different pattern from the body, is not an infringement.

In Equity. Bill for infringement of patent. Motion for preliminary injunction.

George W. Hey, for complainant.

Ezek Cowen, for defendant.

BLATCHFORD, J. This is a motion for a preliminary injunction in a suit in equity brought by Swits Condé against J. M. Valkenburgh, for the infringement of design letters patent No. 14,239, granted to the plaintiff August 28, 1883, for seven years from that day, for a "design for a knitted overshirt." The specification says:

"The annexed drawing represents a knit overshirt, folded in the usual manner, to expose the front and collar thereof. My design consists, essentially, in the front, A, and collar, C, being of a different pattern than the body, B. The front, A, is further ornamented by a sham lacing, *a*, running down the center thereof, as shown."

The claim is as follows:

"In a knit overshirt, the front and collar being of a different pattern than the body of the shirt, and the front ornamented by a lacing down the center thereof, substantially as shown."

The drawing annexed shows a particular pattern to the eye, but the claim is not for that pattern. It is for every pattern or design where the body of the shirt is of one pattern and the front and collar are of another pattern, and the front is ornamented by a lacing down the center. It is doubtful whether so broad a claim is valid, because not a claim for a particular design, in the sense of the statute. Under section 4929 of the Revised Statutes the patent in question, if under any head, falls under that of an impression or ornament to be placed on or worked into an article of manufacture. There is no individuality to the eye in an impression or ornament unless one part of the article presents a different appearance from other parts; otherwise there is entire sameness, and with that there can be no impression or ornament or pattern. The claim, to be valid, must be a claim to a particular impression or ornament, of a particular configuration, or color, or pattern, and it must be so shown or described as to be identified. However this may be, it is shown that the broad claim of this patent is invalid; that shirts of various fabrics, each shirt having a body, a front, and a collar, were old; that shirts in which the front and the collar were of a different pattern from the body were in use before 1883; that before 1883 woolen shirts were made with linen fronts and collars, and cotton shirts with plain bodies and figured collars and fronts; that before 1883 woolen overshirts were made and sold and used in this country, having the front and the collar of a different pattern from the body of the shirt, and the front laced up with a cord; and that before 1883 woolen overshirts were made, sold, and used in the United States, in which the front and the collar were ornamented with various stripes, while the body of the shirt was plain, and the front was laced with a cord. This last arrangement is shown in letters patent of the United States granted to March Brothers, Pierce & Co., as assignees of Joseph G. Barker, February 7, 1882, on

an application filed December 12, 1881, for an improvement in shirts. The drawing annexed to the patent in suit shows a striped front, and a striped collar, and an unstriped body. This pattern has a given effect on the eye. Another shirt, having no stripes, may yet have the pattern of its body different from the pattern of its front and collar, and be a different design in fact from that shown in such drawing, and yet be within the terms of the claim of the patent. The particular shirt complained of as an infringement has no such appearance to the eye as the one shown in the drawing annexed to the patent, except that its front and collar are of a different pattern from the body; so that, if the claim were to be limited to the design shown in the drawing, and were to be held valid so construed, there would be no infringement. The motion is denied.

BALL GLOVE FASTENING CO. *v.* BALL & SOCKET FASTENER CO.

(*Circuit Court, D. Massachusetts.* August 20, 1889.)

PATENTS FOR INVENTIONS—PRIOR STATE OF THE ART.

The spring-flanged eyelet, combined with the dome-shaped cap having a button-like appearance, claimed in letters patent Nos. 290,067 and 306,021, issued for glove fasteners, is an improvement on former English and American patents, and the prior state of the art, as shown by them, does not limit the patentee to the exact form of device described in his patents.

In Equity. On bill for injunction and accounting.

W. E. H. Dowse and John R. Bennett, for complainant.

T. W. Clarke and F. P. Fish, for defendant.

COLT, J. When this case was heard on motion for injunction, (36 Fed. Rep. 309,) the questions which are now raised were ably argued by counsel and carefully considered by the court. I see no reason upon the additional evidence now before me to change the conclusions then reached. The present hearing only tends to make it clearer to my mind that, under the license which the defendant took of the Kraetzer patents, it has no right to take the position that the Mead fastener, which it makes, is outside of those patents, because an examination shows that the Mead fastener contains certain vital and important elements of the Kraetzer inventions. The defendant is right in saying that it is privileged to make the Mead fastener if it is no infringement of the patents covered by the license, but the difficulty is that the Mead fastener seems clearly to infringe certain claims of the Kraetzer patents. I have compared the two devices in the opinion on motion for an injunction, and I do not think it necessary to go over the same ground again. I have reviewed once more the prior state of the art as bearing on the question of limiting Kraetzer to the precise form of devices described in his patents. In the spring-flanged eyelet, combined with the dome-shaped cap having a button-like appearance, of Kraetzer, there is found a marked

improvement over the prior English patents of Schloss and Bayer, and the American patents shown in the present record, and I do not discover anything in those patents which should limit Kraetzer to the exact form of devices which he patented, and, while the changes made in defendant's fastener may be an improvement upon Kraetzer, that fastener is none the less an infringement of the Kraetzer patents. Decree for complainant.

PENINSULAR NOVELTY CO. v. AMERICAN SHOE-TIP CO. *et al.*

(Circuit Court, D. Massachusetts. September 4, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—BUTTON-SETTING INSTRUMENT.

The invention described in letters patent No. 293,234, issued February 12, 1884, to Charles H. Eggleston, is a button-setting instrument, which fastens buttons with metallic staples strung in the eye and clinched on the opposite side of the fabric, the feature being a guide to receive a staple and attached button and hold them in place while being fastened. This guide has a groove to inclose the outer sides of the staple-legs, a slot to embrace the sides of the button-eye between the staple and the button, and a groove in its rear for that portion of the button-eye which extends behind the crown of the staple. It also has clinching dies for operating on the points of the staple, towards and from which a guide moves to admit the insertion of the fabric to which the button is fastened. Defendants' machine is made according to letters patent No. 371,632, issued to Ira J. Saunders. At its top is a button and staple reservoir, with many channels, each holding an upright row of buttons with staples inserted in the eyes. The reservoir can be partially revolved by hand, so that one of the channels will communicate with a single lower one, into which the buttons and staples fall. This channel is cut away at the rear, near the bottom, where a driver is inserted to drive the staple and then withdrawn. The driver is substantially like the Eggleston driver, and moves in a right angle towards the anvil through the guide. The guide is also substantially like the Eggleston guide, being a rectangular tube, with a slot to receive the shank of the button, and moves up and down towards the anvil against which the staple is clinched. *Held*, that defendants' machine is an infringement of the Eggleston patent.

2. SAME.

The invention described in letters patent No. 312,987, issued February 24, 1885, to Edward O. Ely, is a machine for presenting buttons and staples automatically to a guide, united with a stationary channel in which a number of buttons and staples are held, and from which they slide downward. The guide is funnel-shaped, and so narrow at the bottom that the staple will not drop out, but must be forced out by the driver. Its rear wall is inclined outward at the top, and its sides inclined inward as they descend, so as to pinch the staple-legs towards each other. A movable guide receives the legs of the staple and guides them into alignment with the path of the driver. In defendant's machine the channel and guide are in the same line, and the guide is of the same bore throughout, but in order to prevent the staple from dropping out there is applied to the bottom of the guide an oscillating finger. Complainant bases its charge of infringement on claims 3 and 6 of the patent, which include as elements of the combinations the guide and raceway. *Held*, that defendant's machine does not infringe the Ely patent.

3. SAME—ANTICIPATION.

As the Eggleston machine is not merely one for inserting and clinching metallic staples, but is a device to insert and clinch staples with buttons attached, and, as prior inventions will not set staples with buttons, it cannot be held that the Eggleston button-setting machine is anticipated by the McGill patent of 1879, or others of that class, for setting and clinching metallic staples.

In Equity. On motion for preliminary injunction.

Suit by the Peninsular Novelty Company against the American Shoe-Tip Company and others for the infringement of letters patent No. 293,-234, of February 12, 1884, to Charles H. Eggleston, for button-setting instrument, and No. 312,987, of February 24, 1885, to Edward O. Ely, for an improvement in button-setting machines.

George L. Roberts & Bro., for complainant.

Chauncey Smith and William A. Macleod, for defendants.

COLT, J. The present hearing was had on motion for a preliminary injunction. The suit is brought against the defendants upon two patents, namely, No. 293,234, of February 12, 1884, granted to Charles H. Eggleston, for button-setting instrument, and No. 312,987, of February 24, 1885, granted Edward O. Ely for an improvement in button-setting machines. The complainant is the owner of both patents. The inventions secured by these patents are specially well adapted for use in setting metallic staple fasteners, like those manufactured in large quantities by the complainant. Eggleston describes his invention as relating to that class of setting devices used in clinching metallic staples, or fasteners, which engage with the eye of the button, and have prongs which pass through the fabric, and are clinched on the side opposite the button; the object of the invention being to produce a setting device which can be used conveniently for setting and clinching an ordinary metallic staple, and have the two prongs of the staple in a line at right angles with the strain on the button. The instrument consists of three parts: *First.* A guide to receive a two-pronged staple with attached button, and to hold them in proper position while operated upon by the jaws. This guide has a groove which incloses the outer sides of the staple-legs, a slot which embraces the side of the button-eye between the staple and the button, and a groove in its rear to give room for that portion of the button-eye which extends behind the crown of the staple. *Second.* A jaw, J, which is provided with suitable clinching dies for operating upon the points of the staple under pressure, and towards and from which the guide can be moved to admit the insertion of the material through which the legs of the staple are to be driven. *Third.* A jaw, J', which serves as a plunger or driver adapted to pass into and through the groove in the guide which incloses the legs of the staple. Upon the acting face of this driver there is a recess or slot which enables it to straddle the eye of the button during the operation of setting the staple, and the driver consequently acts upon the crown of the staple without interference from the eye of the button. The single claim of the patent is as follows:

"In a button-setting instrument the guide, G, provided with slot, *z*, and groove, *t*, placed between and in combination with the jaws, J J', the groove, *t*, and the slot, *z*, being so placed with reference to each other that the groove will receive the staple and the slot, *z*, the eye of the button, substantially as described."

The specification also states that the setting device may be constructed to be operated by any suitable power. The button-setting machine of

the defendants is constructed substantially in accordance with letters patent No. 371,632, granted to Ira J. Saunders. In this machine there is at the top a button and staple reservoir, provided with many channels, each holding an upright row of buttons, with staples inserted in the eyes thereof. This reservoir can be partially revolved by hand, so that one of the channels will communicate with a single channel on a lower level, and the buttons and staples will fall by gravity from one of the channels into this single lower channel. The lower channel is cut away at the rear, not far from its lower end, so that a driver can be introduced into the channel to drive a staple, and then be removed from the channel. This driver, in its acting part, is shaped substantially like the Eggleston driver, and when driving the staple it moves in a right line towards the anvil and through the guide, the guide in this machine being the lower end of the single channel in which the driver moves. This guide is constructed like the Eggleston guide, it being a rectangular tube to receive a staple carrying a button, and with a slot in its face to receive the shank of the button. An anvil is secured below the lower end of the guide against which the staple is clinched. The guide moves up and down with reference to the anvil so as to permit the insertion and the withdrawal of the fabric. I have no doubt that the defendants' machine contains the invention set forth in the claim of the Eggleston patent.

It is strongly urged, however, by the defendants that, in view of prior structures, the Eggleston device was not patentable. No prior machine is referred to which contains the invention of Eggleston, but prior patents and machines are introduced which show general features of construction which approach the Eggleston machine, and it is contended that these anticipate or limit the Eggleston invention. In dealing with the prior state of the art as affecting the Eggleston patent it must always be borne in mind that the Eggleston device is not merely a tool for inserting and clinching staples, but for inserting and clinching staples with a button attached. The prior devices, referred to as an anticipation of Eggleston's, are, as a class, machines for inserting and clinching staples, and they will not set staples with buttons attached, at least not without changes in construction, and then in a crude and imperfect manner. Now that Eggleston has pointed out the way, it may seem comparatively easy to alter a staple-setting tool made after the McGill patents, or after the Heyl patent, into a tool for setting a button; but this is not sufficient to overthrow the Eggleston patent. To set a staple with a button hanging loosely upon it, and to set a staple simply, or one having a fixed projection like a horseshoe attached to it, are quite different problems. In the construction of his guide with its traverse slot for holding the eye of the button in connection with his driver and anvil, Eggleston solved this problem, and it proved to be so important that the defendants seem to be obliged to incorporate his invention into their improved machine in order to have it practically operative. I do not feel called upon in this opinion to critically compare the Eggleston device with each of the many prior devices introduced in evidence by the defendants. The last expert called by defendants appears to rely mainly on the McGill pat-

ents as an anticipation of the Eggleston invention. The McGill patent of October 28, 1879, No. 220,932, is for a staple-setting implement. It shows two jaws in the form of a pair of pliers and a supplemental jaw. This supplemental jaw, or staple-holding case, has grooves which support the staple-legs, and an opening which is to receive the horseshoe made in one piece with the staple, but it has no slot whose edges center the button-eye in the staple as in Eggleston's. The pliers of McGill will not hold the button-eye in the proper place on the staple, the acting face of the driver has no slot in it to receive the button-eye, and the driver and anvil are so shaped and constructed that the button would be smashed before the staple could be driven or clinched. In McGill patent No. 220,933, also dated October 28, 1879, the specification states that a staple provided with almost any shape of head may be inserted with this device by using in it plungers with faces correspondingly shaped, provided that the bottom of the plunger-feathers will always rest on the shoulders of the shanks of the staple. The Eggleston patent is not for the form of the acting face of the driver, and it may be questioned whether this description in the McGill patent would cover a driver whose face was constructed to set a staple with a button attached, though it undoubtedly covers drivers so shaped as to fit staples of various shapes. However this may be, the Eggleston invention must be taken as a whole, and it may be said that McGill never contemplated driving a staple with a button strung upon its crown, and never had any idea of making a machine that would perform that duty. With respect to the Eggleston patent I think the complainant has made out a case which fairly entitles it to the injunction asked for by this motion.

We come next to the Ely patent. Ely states that his invention has for its object to produce a machine wherein the buttons and staples shall be automatically presented to a guide, or carrier, having a combined driver and former co-operating therewith. The Ely patent has the jaws and guide of the Eggleston patent, but they are united in a machine, and there is combined with them a race-way or channel-way, in which a number of buttons or staples may be held, and which slide downward by force of gravity. The channel in the Ely machine is represented as stationary. Below it is a vertical guide, and there is an opening between the two through which the driver can enter to drive staples and be withdrawn after a staple is driven. In the Ely machine the guide is funnel-shaped, widest at the top, and so narrow at the bottom that the staple will not drop out, but must be forced out by the driver. Its rear wall is inclined outward at the top to secure the legs of the staple, and its sides are inclined inward as they descend, so as to pinch the staple-legs towards each other. In this machine a moveable guide receives the legs of the staple from a stationary, inclined race-way, and guides them into alignment with the path of the driver. In defendants' machine the race, or channel-way, and the guide, are in the same line, or, as the defendants say, the race and guide are the same. The driver has at times a horizontal motion so as to enter the guide, and then a vertical motion to drive the staple, and there is an opening in the back of the

channel-way to permit the driver to enter in order to descend into the guide and to retreat after it has withdrawn from the guide. In the defendants' machine the guide is of the same bore throughout, but in order to prevent the staple from dropping out there is applied to the bottom of the guide an oscillating finger. I am not satisfied that the defendants' machine contains the invention of Ely. The complainant bases its charge of infringement mainly on claims 3 and 6 of the patent. These claims include as elements of their combinations the guide and race-way. It seems to me that the guide and race-way of the defendants' machine are different from the guide and race-way of Ely, and I do not feel warranted on this motion for an injunction in giving such a broad construction to the Ely patent as would embrace the machine of the defendants.

An injunction is granted as to the Eggleston patent in suit and refused as to the Ely patent.

IRESON v. PIERCE.

(Circuit Court, D. Massachusetts. August 24, 1889.)

1 PATENTS FOR INVENTIONS—INFRINGEMENT.

The first claim in letters patent No. 352,548, dated November 16, 1886, and granted to John and James Lee for improvement in leather belting, so that it would conform to the crowning of the pulleys on which it ran, was for a link belting provided with joints both in the direction of its length and transverse of its length. The second claim was for a link belting composed of a series of two or more narrow ribbons of linked belting, united together from side to side at even distances by flexible joints. *Held* that, as the English patent to Howe of December 3, 1884, was for a leather belt of sections, having strips composing it, secured by pins, the two sections united together by wide strips forming a hinge, the pins and washers of which could be applied to link belts as well as strips of leather, the first claim of the Lee patent was too broad, and their patent should be limited to the second claim.

2. SAME.

A belt made under letters patent granted to C. A. Schieren, March 1, 1887, taking the flexible joint of the Lee patent and cutting it in two parts, and arranging it so that the bend of each joint is in an opposite direction from the adjoining one, while in the Lee patent the bend of all the joints is in the same direction, is an infringement of the Lee patent.

3. SAME.

A belt made under the Schieren patent, whose hinges are links like those composing the rest of the belt, riveted at their opposite ends to opposite strips of the belt, but which do not connect the two pins in the opposing strips, which are in the same straight line across the belt, does not infringe the Lee patent.

4. SAME—PUBLICATION.

Under Rev. St. U. S. §§ 4886, 4920, 4923, the only evidence that can be used in proof of a foreign invention for any purpose is that derived from a patent or printed publication. The Howe patent was enrolled December 3, 1884. The provisional specification of the Lee English patent was dated August 30, 1884, and the enrollment of the complete specification was dated April 28, 1885. *Held* that, there being no evidence when the provisional specification of the Lee patent took effect as a printed publication, the patent did not exist as a patent for uses under the above sections until the enrollment of the complete specifications, and was antedated by the Howe patent.

In Equity. Bill to restrain infringement of patent.

Clarke & Raymond, for complainant.

J. H. Lange, for defendant.

COLT, J. This suit is brought for infringement of letters patent No. 352,548, dated November 16, 1886, and granted to John and James Lee, for an improvement in machine belting. The object of the invention is the manufacture of leather link belting, which will conform to the crowning of the pulleys on which it is run. This is done by dividing the width of the belt into two sections, and introducing flexible joints of leather or metal between the sections. These sections are composed of links of leather, each pair of links projecting in one direction, holding between them a link projecting in the other direction, and through the holes in the links is passed a pin of metal with a head at one end, and the other end provided with a washer on which the pin is riveted. The first claim is for a link belting provided with joints both in the direction of its length and transverse of its length, and the second claim is for a link belting composed of a series of two or more comparatively narrow ribbons of linked belting, united together from side to side, at even distances apart, by flexible joints. Belts of this class, in order to accommodate themselves to the crowning of the pulley, must have a certain degree of transverse flexibility. There existed prior to the Lee patent link belts in several forms. The characteristics of these belts were—*First*, that all of them were composed of strips of leather of greater or less length set side by side, so that the edges of the leather ran upon the pulley; *second*, that these strips were secured together by pins or rivets passing crosswise of the belt from side to side, the ends of the rivets being secured by washers and rivet-heads. These belts had little or no crosswise pliability, and would not accommodate themselves to the surface of crowned pulleys. In the patent granted to C. M. Roullier in 1862, and in the English patent granted to John Tullis in 1880, are found various forms of these leather-edge belts. In the English patent to George Howe, of December 3, 1884, there is described a leather belt made of two sections, each section having the strips composing it secured to each other by pins, and the two sections united together by wide strips which form a hinge when riveted together. Howe, in his specification, says:

"Where this improved belt runs on the pulleys the wide strips are upon the crown or greatest diameter of a pulley, and form a hinge, whereby the two series of strips or side portions of the belt are connected together, thus allowing a certain amount of play, and preventing the bending and breaking of the pins by the covered surface of the pulley."

Howe further says in his specification:

"The pins, c, and washers, d, may be advantageously applied to other belts of somewhat similar construction,—such as link belts."

It appears, therefore, that at the time of the Lee invention leather belts composed of links riveted together were old; that belts composed of strips of leather riveted together, and made into two ribbons or sections united together by a wide strip of leather, which formed a hinge,

were old; and also that Howe states in his patent that his pins and washers may be applied to link belts as well as to his strips of leather. Such being the prior state of the art, it seems to me that the Lees are not entitled to their broad first claim of a link belting provided with joints both in the direction of its length and transverse its length, but that their patent should be limited to the second claim, or to their improved form of hinge as applied to linked belting. With this limitation, I am of opinion that the Lee patent describes a patentable improvement over anything which existed before, and that the second claim of the patent is valid.

The defendant is charged with making two forms of belt which infringe the Lee patent. The first form is made under the patent granted to C. A. Schieren, March 1, 1887. It is admitted that, if both the claims of the Lee patent are good, this belt contains the invention therein described; and, limiting the Lee patent to the second claims, I still think this belt infringes the Lee patent. Schieren merely takes the flexible joint of Lee and cuts it into two parts, and so arranges those parts that the bend of each joint is in an opposite direction from the adjoining one, while Lee bends all the joints in the same direction.

The main controversy in this case is over Schieren belt No. 2, made by the defendant, and here it seems to me there is a radical departure from the Lee structure. This form of belt has not the U-shaped hinges of Lee, and it is not connected in a straight line by means of hinges and pins across the belt as a whole. The Schieren hinges are links like those which compose the remainder of the belt, and these links are riveted at their opposite ends to opposite strips of the belt; but they do not connect the two pins in the opposing strips, which are in the same straight line across the belt. In construction and result the Schieren link is a departure from the Lee hinge, and in my opinion it does not contain the Lee invention, and therefore does not infringe the Lee patent.

It is urged in behalf of complainant that the Howe patent is not prior in date to the Lee invention, by reason of the fact that the patent must take effect as of the date of the enrollment of the complete specification, which was December 3, 1884, whereas the provisional specification of the Lee English patent bears date August 30, 1884, and that, therefore, the Lees are entitled to rely, in this case, upon the date of the provisional specification as evidence of the date of their invention. The defendant, on the other hand, contends that the earliest date upon which the complainant can rely as showing invention in the Lees is the date of the enrollment of the complete specification of the Lee English patent, namely, April 28, 1885, and that the date of the Lee provisional specification can have no bearing in this case in determining the date of the Lee invention. I do not think the Lee provisional specification can be used as a printed publication as of a date prior to the enrollment of the complete specification. No testimony has been submitted indicating when the provisional specification took date as a printed publication, and, in the absence of such testimony, the date of the provisional specification as a printed publication is unknown, and cannot be relied upon in this case. *Sey-*

mour v. McCormick, 19 How. 96, 107; *Elizabeth v. Pavement Co.*, 97 U. S. 126; *Coburn v. Schroeder*, 11 Fed. Rep. 425. The invention which forms the subject-matter of the Lee patent in suit is a foreign one. This is clear from the Lee English patent in evidence, and other proofs in this case. Under sections 4886, 4920, 4923, Rev. St., the only evidence that can be used in proof of a foreign invention for any purpose is that coming through the channel of a patent or printed publication. It has been repeatedly held that an English patent does not exist as a patent for uses, under the sections of the Revised Statutes above referred to, until the enrollment or sealing of the complete specifications, at which time the English patent becomes open to the public. *Smith v. Goodyear*, 93 U. S. 486, 498; *Bliss v. Merrill*, 33 Fed. Rep. 39; *Howe v. Morton*, 1 Fish. Pat. Cas. 586, 595; *Brooks v. Norcross*, 2 Fish. Pat. Cas. 661; *Manufacturing Co. v. Railroad Co.*, 26 Fed. Rep. 522; *Elizabeth v. Pavement Co.*, 97 U. S. 126, 131; *Schoercken v. Swift, etc., Co.*, 19 Blatch. 209, 7 Fed. Rep. 469; *Coburn v. Schroeder*, 11 Fed. Rep. 425. A decree may be drawn for complainant in accordance with this opinion.

JOLIET MANUF'G Co. v. KEYSTONE MANUF'G Co. et al.

(Circuit Court, N. D. Illinois. July 22, 1889.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT.

Complainant's patent, No. 188,263, issued March 13, 1877, to Andrew H. Shriffler, for an "improvement in corn-shelling machines," the distinctive feature of which is a contrivance for the delivery of the corn in a horizontal direction from the elevator to the shelling mechanism, is not infringed by a feeding contrivance which delivers the corn immediately from the elevator to the shelling mechanism, both machines employing an endless apron to deliver the corn.

2. SAME—NOVELTY.

A leg or brace attached to the lower end of the elevator and frame of the machine, to regulate the height of the elevator, is not patentable, for want of novelty.

In Equity. Bill for injunction.

Munday, Evarts & Adcock, for complainant.

John G. Manahan, for defendants.

BLODGETT, J. This is a bill for an injunction and accounting by reason of the alleged infringement of letters patent 188,263, granted March 13, 1877, to Andrew H. Shriffler, for an "Improvement in corn-shelling machines," and which has been duly assigned to complainant. The complainant's machine, in its working parts and their arrangement, is substantially like the machines covered by the patents of August, 1861, and May, 1866, to Augustus Adams, and of October 15, 1872, to Henry A. Adams, except that in the complainant's machine the gravity chute

by which the corn is carried from the end of the elevator into the shelling device is dispensed with, and with the further exception that in complainant's machine the shaft of the shelling-wheel, K, is slightly raised, so that the shaft of the shelling-wheel is nearly on a line with the shafts of the beater-shaft, D, the beveled runners, H, and picker-wheels, F. Shriffler does not claim to have added anything new to the Adams machines, before mentioned, or to have changed them in any particular, except by leaving out the gravity chute, and slightly changing the relations of the picker-wheels and beveled runners to the shelling-wheel. The distinctive feature of the Shriffler machine is what he terms the "horizontal feed;" that is to say, the corn is delivered from the elevator directly over the beater-shaft, which he places below the line of travel of the corn, instead of above it, as Adams placed it in his chute, and from the beater-shaft the corn is carried horizontally, or nearly so, along the moving surfaces of the picker-wheels, F, and beveled runners, G, into the shelling device, consisting of the rag-irons, J, and shelling-wheel, K. This special characteristic of the complainant's machine is described in the specification as follows:

"It will be noticed that the path of the ear from the elevator delivery to the shelling-wheel is nearly a straight horizontal line, and it may be made quite so, if desired. At no point does the ear fall rapidly by its own weight, nor is the gravity of the ear at any point relied upon to carry it forward solely, but all of the time, and at all points, it is carried forward by the moving surfaces of the several wheels, beaters, etc., which, for this purpose, are so arranged that the path of the corn shall be horizontal, or nearly so. This arrangement prevents the abrupt change of direction at the elevator delivery which is usual in machines of this class, and which, by causing the ear to tip at the rear end and enter the throat in a vibrating manner, is productive of a great deal of trouble sometimes, which is entirely obviated by the present arrangement. By the present arrangement, also, the corn is caused to proceed in a regular and even manner, being fed along smoothly, instead of falling rapidly, and then being thrown violently forward, as has been customary."

In other words, Shriffler changed the Adams machines by dispensing with the gravity chute, locating the beater-shaft under instead of over the stream of ears of corn as they were delivered from the end of the elevator, and, as I said, slightly raising the shaft of the shelling-wheel, so that it may be more nearly in a horizontal line with the shafts of the wheels intermediate between the beater and the shelling device. These characteristics of the complainant's machine are covered, or claim to be covered, by the first, second, third, and fourth claims, which are:

"(1) The combination, with the shelling-wheel in a corn-sheller, of the feeding wheel or wheels, and beater or beaters, arranged substantially as specified, so that the path of the corn shall be horizontal, or substantially so, from the delivery end of the elevator to the sheller-wheel. (2) The corn-sheller in which the path of the corn from the delivery end of the elevator to the sheller-wheel is horizontal, or substantially so, along the moving surfaces of wheels, beaters, or other like contrivances for urging it along, substantially as specified. (3) A corn-sheller provided with a horizontal, or substantially horizontal, feed, continuing from and including the delivery end of the elevator, substantially as specified. (4) The combination with the corn-sheller having a horizontal, or substantially horizontal, feed, of an elevator

for bringing the corn up to the feed, having its delivery end upon a level, or substantially upon a level, with the feed mechanism, substantially as specified."

The patent also covers a device for regulating the pitch or inclination of the elevator by means of legs, which are fastened to the lower end, or near the lower end, of the elevator, and carried from there to the frame of the machine, to which they are fastened by pins or bolts, and by changing the length of these legs, by means of a succession of pin or bolt holes, the height or pitch of the elevator can be changed; and this feature is covered by the fifth, sixth, and seventh claims of the patent, which defendants are charged with infringing.

Defendants by their answer deny (1) the validity of the Shriffler patent, on the ground that he has made no material change in the Adams machines which involved invention; (2) that they do not infringe; (3) that the device for regulating the pitch of the elevator is old, and not patentable for want of novelty.

Defendants manufacture and sell a corn-sheller which is constructed substantially in accordance with certain patents granted to Harvey Packer, since the date of complainant's patent. Defendants' machine is unlike the complainant's machine in its shelling mechanism, and it also differs from complainant's machine, in the fact that the corn is delivered from the delivery end of the elevator directly into the shelling mechanism, instead of being carried horizontally over the beater, picker-wheels, and beveled runners, under the rag-irons, and against the shelling-wheel. The stream of ears of corn, as they leave the delivery end of the defendants' elevator, fall diagonally downward into the shelling mechanism, their fall and direction being, to some extent, secured by the beaters located upon the beater-shaft directly over the delivery end of the elevator, which is the throat of the machine. It will be noticed that the first claim of the Shriffler patent is for the "combination, with the shelling-wheel, of the feeding wheel or wheels, and beater or beaters, arranged substantially as specified;" and a recurrence to the specifications shows that Shriffler has placed a beater-shaft immediately at and below the delivery end of the elevator, so that the corn, on leaving the elevator, is taken by this beater-shaft, and carried over the moving surface of the beater, onto the moving surface of the picker-wheel, F, and from thence to the beveled runner, G, whence it is delivered under the rag-irons to the shelling-wheel; and, as I construe this first claim, it is for the combination with the shelling-wheel of this beater, picker-wheels, and beveled runners, whereby the corn is to be carried in a horizontal position into engagement with the shelling device. The defendants' machine, as I have already said, has none of these intermediate moving surfaces interposed between the delivery end of the elevator and the shelling device, but the corn is pitched, so to speak, directly from the delivery end of the elevator into the shelling mechanism, hesitating or over-riding ears being accelerated and forced into the shelling mechanism by means of the beater-shaft over the delivery end of the elevator.

The second, third, and fourth claims of the complainant's patent are

but a reiteration of the first claim, and what I have said with regard to the first claim applies with equal, if not more, force to the subsequent claims which cover the horizontal feed feature. In view of these considerations, therefore, it seems very clear to me that the defendants do not infringe the complainant's patent. Defendants do not have in their machine a forcing horizontal feed such as is specifically described and provided for in the complainant's patent, and covered by these first four claims, but, as I have already said, the defendants' feed is direct from the delivery end of the elevator into the shelling mechanism, partly by gravity, and partly by the action of the beaters over the delivery end of the elevator, and the corn in the defendant's machine is not carried forward to the shelling mechanism by the moving surfaces of the several wheels, beaters, etc., as called for and provided for in the complainant's patent. The defendants' shelling device being substantially new, so far as the proof shows, and different from those employed by Shriffler, and elevators for delivering the corn to the shelling mechanism being old, as shown in the proof, (Kauffman patent of August, 1873, and the Adams machines above referred to,) and complainant saying in the specifications of his patent, "the corn is fed to the machine, as usual, by an endless apron or elevator," I can see no reason why the defendants were not at liberty to use the endless apron or elevator, which they employ to deliver the corn directly into the shelling mechanism, in the manner shown in the Packer patents. I am therefore of opinion that the defendants do not infringe the first four claims of the patent, as charged.

In regard to the alleged infringement of the fifth, sixth, and seventh claims, which simply cover the feature of adjustability as to pitch or incline of the elevator, I think it extremely doubtful, from an inspection of the defendants' full-sized working machine, which is an exhibit in this case, whether the defendants have this feature of adjustability of pitch which is covered by these claims in the complainant's patent; but, of the feature of adjustability by means of a leg or brace attached to the lower end of the elevator and the frame of the machine, it is enough to say that these devices were old, and used in the patent of Gray of August, 1870, for a hay-loader, where the same device is applied to change the incline of the hay elevator as is applied in complainant's patent to change the incline of the corn elevator, but I do not think it necessary to go even into the older art to meet the question, as far as these claims of changing the incline are concerned, in any elevator working with a corn-sheller, or a straw-cutter, or a threshing-machine, or a hay-loader, by means of which the article to be operated is brought to the operating device. If it becomes necessary to change the incline of such elevator, it could be readily done by propping it up in any of the mechanical ways which are known to a mechanic, and the method adopted by Shriffler, and covered by these claims of his patent, is obviously old in its application to hay-loader elevators, and any one had the right to apply it to the elevator of a corn-sheller. I am therefore of opinion that the defendants do not infringe the complainant's patent, and the bill is dismissed for want of equity.

HURLBURT *et al.* v. CARTER & Co., Limited.

(Circuit Court, N. D. New York. September 14, 1889.)

PATENTS—INFRINGEMENT—PRELIMINARY INJUNCTION.

On bill for infringement of a patent, it appeared that the patent had never been adjudicated, and that many infringing devices existed. An averment in the moving papers that the patent had been recognized by the public was not supported by facts. The defense involved the validity of two patents. Defendant had invested large sums in business, with the knowledge of complainants, who were guilty of laches in asserting their rights. Defendant was amply responsible, and it appeared would suffer greater injury from a preliminary injunction than complainants would if it were refused. *He'd*, that a preliminary injunction would not be granted, even though defendant did not cast serious doubt on the validity of complainants' patent.

In Equity. On motion for a preliminary injunction.

Bill by Charles A. Hurlburt and others against Carter & Company, Limited, to restrain an alleged infringement of a patent.

Wells W. Leggett, for complainants.

W. Cary Ely, for defendant.

COXE, J. The complainants' patent, No. 288,048, was granted to John H. Frink, November 6, 1883, for an improvement in duplicate sales-slips. The patent has never been adjudicated. There is no proof of acquiescence. True, a general statement that the patent has been recognized and respected by the public appears in one of the affidavits, but it is unsupported by facts. Names, places, and figures are wanting. An indefinite averment of this character avails but little, especially when it also appears by the moving papers that infringing devices in large numbers have been openly sold and used since January, 1887, in the complainants' own city.

The defendant insists that its copying-books are manufactured under a reissued patent owned by it, and that the complainants' patent is invalidated by a prior patent granted to John R. Carter. These defenses necessarily involve a careful analysis of the patents referred to, and a determination as to the validity of the reissue. Although they do not, as now presented, offer a formidable barrier to the complainants' recovery, yet, in the light of the final hearing, they may, perhaps, assume a different aspect.

It is strenuously asserted, and not satisfactorily denied, that the defendant has invested large sums in its business with the knowledge of the complainants, and that the latter have been guilty of inexcusable laches in asserting and maintaining their rights. The defendant is amply responsible, and will suffer greater injury if the injunction is granted than the complainants will if it is withheld. The cause is one which, if due diligence is used, can be prepared for argument at the next term of the court.

In these circumstances, even though it be conceded that the defendant has not succeeded in casting serious doubt upon the validity of the

complainants' patent, it would seem that the safer and wiser course will be not to permit this severe and arbitrary writ to issue at the present time. *Fish v. Sewing-Machine Co.*, 12 Fed. Rep. 495; *Brown v. Hinkley*, 6 Fish. Pat. Cas. 370; *Hockholzer v. Eager*, 2 Sawy. 363; *Spring v. Sewing-Machine Co.*, 4 Ban. & A. 427; *Keyes v. Smelting Co.*, 31 Fed. Rep. 560; *Kittle v. Hall*, 29 Fed. Rep. 508, and cases cited on page 511. The complainants are at liberty to move, upon proper proof, for a bond, and, if the final hearing is unreasonably delayed by the defendant, this motion may be renewed.

CONSOLIDATED ROLLER-MILL CO. v. COOMES.

(Circuit Court, E. D. Michigan. July 22, 1889.)

PATENTS FOR INVENTIONS—INJUNCTION—SUSPENSION OF WRIT.

After an adjudication upon the merits in a patent case, an injunction will not be suspended unless public interests are involved, or the issuing of the writ will involve the stoppage of a manufactory in the operation of which a large number of persons are interested. Hence, where the defendant used but one machine, and the evidence tended to show that the patented device might be taken out of such machine without great expense or long continued stoppage, it was held that the injunction ought not to be stayed.

(*Syllabus by the Court.*)

In Equity. On motion to stay injunction.

Plaintiff obtained against the defendant the usual decree in patent cases for an injunction against further infringement, and a reference to a master to compute damages. Defendant moved to stay the issuing of the injunction upon the ground that plaintiff was not a manufacturer, but derived its profits from selling or licensing its machine, and that the damages to defendant by stopping his mill would be out of all proportion to the amount of plaintiff's license, or to any damages that would be occasioned to it by defendant's continued use of machines.

R. Mason, for plaintiff.

Parkinson & Parkinson, for the motion.

BROWN, J. We are asked by this motion to determine whether after an adjudication adverse to the defendant upon the merits of a patent case we ought to stay the issue of an injunction until final decree. So far as preliminary injunctions are concerned, it is entirely well settled that while the patent may be adjudged valid and the defendant an infringer the award of an injunction is purely a matter of discretion, and courts are constantly in the habit of withholding it upon such terms, as to the giving of a bond and the like, as may seem just and equitable, having regard to the comparative injury that will result to the parties by granting or withholding it. *Parker v. Sears*, 1 Fish. Pat. Cas. 94; *Howe v. Morton*, Id. 586; *Morris v. Manufacturing Co.*, 3 Fish. Pat. Cas. 67; *Tracy*

v. *Torrey*, 2 Blatchf. 275; *Potter v. Whitney*, 1 Low. 87; *Hoe v. Advertiser Corp.*, 14 Fed. Rep. 914; *Forbush v. Bradford*, 1 Fish. Pat. Cas. 317.

After an adjudication upon the merits, the case becomes somewhat complicated by the provisions of the constitution and statutes which secure to the inventor "the exclusive right to his discovery." If this right be "exclusive," it is difficult to see how the court can limit or impair it by requiring the patentee to accept anything less than the complete monopoly which the law awards him. While he may not be a manufacturer himself, and may derive his sole profit from licensing others to use his device, still such licenses are entirely voluntary upon his part, are completely within his own control, and the courts have, strictly speaking, no power to demand of him that he shall license the defendant to use his machine, as they are enabled to do indirectly by refusing an injunction upon requiring a bond to pay the amount of the license or such damages as he may have suffered by defendant's use of his machines. If this, then, were a final decree, we should have no hesitation in denying this motion to stay the injunction, unless immediate notice were given of an appeal, when the provisions of the ninety-third rule would attach, and the staying of an injunction would become a matter of discretion, to be determined by the facts of each particular case.

It has undoubtedly been the practice in a few of the circuits to stay an injunction in certain cases where an appeal is contemplated, and defendant would be irreparably injured; and where public interests are involved, and the people are likely to be injured by denying them the use of plaintiff's machine, there can be no question as to the propriety of such action. *Bliss v. City of Brooklyn*, 4 Fish. Pat. Cas. 597; *McElroy v. Kansas City*, 21 Fed. Rep. 257; *Ballard v. City of Pittsburgh*, 12 Fed. Rep. 783.

A reference to some of the leading cases will show under what circumstances it has been the practice of the courts in these circuits to suspend an injunction after an adjudication upon the merits. In *Barnard v. Gibson*, 7 How. 650 the supreme court indicated that the injunction ought to be suspended where defendant had invested many thousand dollars in machinery which, by such a procedure, became useless, and their right to run the machines would expire in the course of a few months. The court remarked that unless the defendants were in doubtful circumstances, and could not give bond to respond in damages, should the right of the plaintiff be finally established, they supposed the injunction would be suspended. In *Sanders v. Logan*, 2 Fish. Pat. Cas. 167, Mr. Justice GRIER held that neither an injunction nor an accounting were necessary or proper, because the only injury to the plaintiff's rights consisted not in using his invention, but in failure to pay the price of the license. The learned judge uses strong language in this connection, and the opinion undoubtedly lends considerable support to the defendant's position in this case. In *Rake Co. v. Marsh*, 6 Fish. Pat. Cas. 387, Judge McKENNAN, of the third circuit, withheld an injunction upon filing a bond, upon the ground that the plaintiff, not being a manufacturer, would be adequately protected by the payment of a just compensation for the use of his invention; and the defendants had an exten-

sive establishment, and a large capital invested in it for the manufacture of machines, and seemed to have conducted their business under the impression that it was no invasion of the rights of others. "A sudden stoppage of it would be disastrous to them, and would not benefit the plaintiff." In its facts the case is readily distinguishable from the one under consideration. In the same circuit, in *McCrary v. Canal Co.*, 5 Fed. Rep. 367, an injunction was denied without discussion, upon the ground that much greater injury to the respondent than benefit to the complainant would result from it. We think these three cases may be regarded as establishing a rule in the third circuit somewhat at variance with those existing in most of the others. In *Hoe v. Knap*, 27 Fed. Rep. 204, Judge BLODGETT denied an injunction, after entering an interlocutory decree, upon the ground that the owner of the patent had not, after a reasonable time, put it into use, holding as matter of law that a patentee is bound either to use the patent himself, or allow others to use it on reasonable or equitable terms. I find myself unable to concur in this view. A man has a right to deal as he chooses with his own. I know of no reason why a patentee is bound to make use of his own inventions, or to license others to use them, any more than the owner of a manufacturing establishment is bound to run it for the benefit of his neighbors or employees. As observed in the earlier portion of this opinion, the question of licensing another to use an invention is one which the patentee alone has the right to answer; and courts cannot lawfully compel him to make use of his invention, or to permit others to use it against his will.

We will now proceed to examine the authorities in the other circuits. In *Howe v. Newton*, 2 Fish. Pat. Cas. 531, Judge LOWELL, of the first circuit, held that the fact that plaintiff granted licenses, and that defendant was not a maker and vendor, but only a user, was, independently of the fact that the maker had not been sued, a circumstance to be taken into account; "but it has not been considered sufficient reason in this circuit to refuse the writ, excepting in combination with other circumstances, either of doubt as to title, or of hardship in the operation of the injunction." The defendant was restrained from using one boot-tree. It is but just to say that it appeared that no special damage would result to defendant by enjoining the machine. The case is not unlike the one under consideration. In *Potter v. Muck*, 3 Fish. Pat. Cas. 428, Mr. Justice SWAYNE observed that when a patentee obtains a decree settling the right to an injunction, the practice in all the circuits, as he had understood, was to make the injunction a part of the decree. "That is the right of the party unquestionably, unless there be shown some special grounds of peculiar hardship to the defendant. * * * There may be circumstances which would render that action proper, but I should not be willing to establish such a rule as general." "Again, too, as within my own knowledge, the practice in all the other courts is adverse from that now sought to be established, and I should be reluctant to strike out a new course." The court found no special hardship in the case, and ordered an injunction. See, also, *Whitney v. Mowry*, Id. 175.

In *Chemical Works v. Hecker*, 11 O. G. 330, Judge NIXON, of New Jersey, refused to assent to the proposition that it had become the established practice in his circuit to stay injunctions until the coming in of the master's report.

"No special practice," says he, "has ever prevailed in this circuit; although sporadic instances may be found where the court has very properly listened to and heeded such applications. On the other hand, the ordinary practice is for an injunction, as a matter of course, to follow a decree in favor of the complainant on the merits, unless the defendant is able to show the court such facts and circumstances existing in the case as make it manifest that the equities between the parties demand the withholding of the injunction until after an accounting has been had."

In *Brown v. Deere*, 6 Fed. Rep. 487, the question has been discussed at length by Judge TREAT, and the motion to suspend the injunction was overruled, although, before the hearing, defendants had entered into a large number of contracts to furnish their machines to agriculturalists in several states, and there was no adequate time for them to reconstruct them so as to avoid the infringement without disappointing their customers, and fastening large damages upon themselves for non-fulfillment of their contracts. The opinion is a very valuable and instructive one, and the question appears to have been fully considered by the court. In *Munson v. Mayor, etc.*, 19 Fed. Rep. 313, Judge WHEELER held, on a motion to suspend an injunction during the pendency of an appeal from a final decree, that it should not be suspended unless some extraordinary cause were shown to exist outside the rights of the parties established by the decree. The defendant in this case was the city of New York, and the patented device was a register to preserve for safety and convenience of reference paid bonds and coupons. The learned judge held that the interests of the public were not such as required protection by staying the injunction.

There is no case in the supreme court which throws much light upon this question, although in *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. Rep. 244, it is held that an infringer does not, by paying damages for making and using a machine in infringement of a patent, acquire any right himself to the future use of the machine. "On the contrary," says the court, "he may, in addition to the payment of damages for past infringement, be restrained by injunction from further use, and, when the whole machine is an infringement of the patent, be ordered to deliver it up to be destroyed." In *Penn v. Bibby*, L. R. 3 Eq. 308, the vice-chancellor observed:

"The patent is a continuing patent, and I do not see why the article should not be followed in every man's hand until the infringement is got rid of. So long as the article is used, there is continuing damage." "As to the royalties, I cannot compel the plaintiff to accept the same royalty from these defendants as he received from others. I cannot, in the decree, do less than give the plaintiff his full right, and I cannot bargain for him what he may choose, or may not choose to do."

The circumstances relied upon in this case in support of the motion are: That the plaintiff is not a manufacturer of these machines itself,

but derives its sole profit from licensing others to use them. That the defendant is not a manufacturer, but uses one of these machines in a series of roller-mills; and that the issuing of this injunction would involve the stoppage of the entire series, and a large expense to him in purchasing a new mill, or in so reconstructing this one as to avoid the use of plaintiff's invention. The counter-affidavits, however, satisfy me that his estimate of damages is greatly exaggerated, and that the change could be made with but little expense or inconvenience, and without stopping his establishment. It is incredible that an accident, which is liable to occur at any time, should involve the disastrous consequences set forth in the defendant's affidavits. We are willing, however, that he should have 20 days to make the necessary changes. At the expiration of this time, the usual injunction will issue, to stand until the final decree, after which, if an appeal be taken, the propriety of continuing the injunction under the ninety-third rule will be considered by the court. We do not wish to be understood as denying the power of the court to stay an injunction, even after final decree, and, if this writ involved the stoppage of a manufactory, in the operation of which a large number of people were interested, the question might be determined by different considerations. The motion is denied.

THE CITY OF CARLISLE.

BASQUALL v. THE CITY OF CARLISLE.

(*District Court, D. Oregon.* August 20, 1889.)

1. ADMIRALTY—JURISDICTION.

The United States courts, as courts of admiralty, have jurisdiction of all cases of admiralty cognizance when the thing or parties are within the reach of their process, without reference to the nationality of either.

2. SEAMEN—PROTECTION—SICKNESS.

It is the right of a seaman injured in the service of a vessel to be cared for at least to the end of the voyage, and nothing short of gross negligence or willful misconduct, causing or concurring to cause the injury, will forfeit such right.

3. SAME—LIEN FOR INJURIES.

A seaman injured in the service of a vessel has a lien on the same for the damages he may sustain by reason of the neglect or misconduct of the officers thereof, in caring for him while affected by such injury.

4. EVIDENCE—DOCUMENTARY—*LEX FORI*.

The admissibility or competency of evidence in a legal proceeding pertains to the remedy, and is governed by the *lex fori*, and therefore a clause in the British shipping act of 1854, making certain entries in the official log-book competent evidence in all courts, does not make them so in the courts of any other country.

5. ADMIRALTY—PLEADING—JOINDER OF CAUSES.

The joinder of causes of suit not enumerated in admiralty rules 12 to 20, inclusive, are not governed thereby, but by rule 46; and, where the facts in a case establish a liability against the master and a lien on the ship for the same claim, such liability and lien may be enforced in one libel.

6. SEAMEN—DAMAGES FOR NEGLECT.

On the facts found, *held* that the master and vessel are liable to the libelant for damages for not caring for him after his injury as he was entitled to be, and for the aggravation of his injury and suffering caused thereby.

(*Syllabus by the Court.*)

In Admiralty. Libel for damages for injuries sustained, and neglect and maltreatment thereafter.

Edward N. Deady, for libelant.

C. E. S. Wood and *J. Ditchburn*, for defendant.

DEADY, J. William Basquall, a minor, by his guardian, Frederick V. Holman, brings this suit against the British bark *City of Carlisle*, and her master, C. D. Moore, to recover \$15,000 damages, for an injury sustained by him on board said bark, and neglect and maltreatment thereafter.

The charge in the libel is shortly this: In sending the main lower topsail down on one occasion, the work was so carelessly and negligently done as to cause the starboard clew-iron thereof to strike the libelant on the head and fracture his skull; and thereafter the master failed to give or procure for the libelant such medical aid and assistance as the case required, and he "was able to give and render," and maltreated and abused him.

The master admits, in his answer, that the libelant was injured as alleged, but avers that the injury was not caused by any negligence or carelessness in lowering said sail, but by the fault and carelessness of the libelant. He denies that he failed to give the libelant such medical aid and attention as the case required, and he was able to give or render, or that he maltreated him or abused him; and avers, in effect, that the libelant was well cared for after said hurt.

Some 36 witnesses were examined,—22 by the libelant and 14 by the defendant. Among these were 11 of the officers and crew of the bark, and a number of experts who were called to testify whether or not the sail was lowered in a seamanlike manner.

The evidence from the vessel is, of course, more or less contradictory. Those of the crew who remain with the bark are called by the defendant, while those who have left her are called by the libelant.

The master, mate, second mate, steward, and two apprentices, who are in the last year of their service, testify for the vessel, while the cook, sailmaker and two apprentices, including the libelant, and a stowaway boy, testify for the libelant.

In weighing this evidence, I am constrained to believe that the master is not worthy of credit, and his testimony is of but little worth. The mate, George Dodd, impressed me favorably as a man. But he has been with his present employers, as man and boy, for a number of years, and may reasonably expect employment from them, in the near future, as a master. Under these circumstances he is strongly tempted to make as good a case as he can for the vessel, which I think he has done, without

going so far as to tell a downright falsehood. But he does not always remember when I think he might.

John A. Bebb is an apprentice in the service of the vessel's owners. He has only eight months more to serve, when, if he remains with the ship, he may be examined for a mate's certificate. I think he made up his mind that he could not testify against the ship, and go home in her with safety and comfort to himself. I am convinced that he gave altogether a different account of the matter to the libelant's attorney, when he may not have thought that he would be called as a witness, from that which he gave on the witness stand. It was indeed pitiful to see the confusion and shame on the poor fellow's face as he tried to deny or explain his former utterances.

Of the rest of the crew that remain with the bark, Harry Hart, the second mate, Thomas Noble, the steward, and George Eggert, an apprentice, nothing more need be said than this: that in giving their testimony they probably did not forget that the master had it in his power to make them very uncomfortable during the remainder of the voyage, which circumstance ought not to be overlooked in estimating the value of their evidence.

The libelant is largely interested in the result of the suit. Therefore his testimony ought to be received with caution, if not distrust. But he appears to be a simple, honest lad, and I seldom, if ever, heard one in his walk in life, or any other, testify with more apparent candor and artlessness than he did. The same may properly be said of the other three boys who testified for him, Henry Carley, the stowaway, William J. Freer, an apprentice, and Lawrence Ainsworth, an apprentice left in this port by a British vessel some months ago, and a former shipmate of the libelant in a training vessel at Liverpool.

Estimating the evidence in the light of these suggestions, I find the facts as follows:

(1) The libelant, a native of Dublin, whose parents reside at Stockport, Cheshire, having served two years and four months in the training ship *Indefatigable*, at Liverpool, was on September 22, 1888, at the age of 16 years, with the consent of the officers of said ship, voluntarily apprenticed to Peter Iredell & Sons, of Liverpool, for the term of four years, to learn the business of a seaman, and thereupon he was duly shipped on the bark *City of Carlisle*, a vessel of 204 feet in length and 37 feet beam, then and now owned by said Iredell & Sons, to serve thereon as such apprentice on a voyage from Liverpool to Portland, Or., and thence elsewhere on the Pacific coast, and back to a port of discharge in the United Kingdom.

On Monday, November 12, 1888, at 8 o'clock A. M., in latitude 24.19 S., and longitude 37.15 W., and about 6 deg. or 332 geographic miles east of Rio Janeiro, it being the first mate's watch on deck, in which were the libelant and Carley, it was determined to change the lower main topsail for a heavier one, as they were getting out of the tropics, whereupon the mate gave directions to prepare the sail to be lowered on deck, which was done by a seaman and the libelant and Car-

ley, the latter two of whom cut the robands or ropes that fastened the head of the sail to the yard, and then returned to the deck.

Under the direction of the mate the sail was clewed up or the lower corners brought up to the yard at the bunt or middle of the sail, by means of the clew-lines, the buntlines or ropes used to pull up the sail were hauled, a gantline or rope used to lower the sail was rove through a block on the crosstrees and sent down and bent around the sail and hauled taut; then the sheets and clew-lines were taken off, the earings loosed, the robands cut, and the head earings brought into the gantline and then made fast, and then the sail was lowered.

The clews when hauled up were not stopped or fastened together, and, when the clew-lines were detached from the clew-irons, the clews or lower corners of the sail fell down loose on either side of the gantline. At this time there was from a four to a six knot breeze on the starboard quarter, and the yard was braced so as to let the sail down on the port or lee side.

Before and at the time the sail was being furled and lowered the master was on the port side of the poop overlooking the sailmaker who was preparing the sail to be sent aloft in the place of the one coming down. The libelant was standing on the starboard side of the vessel, just forward of the main hatch, and Carley was standing on the port side of the poop, assisting the sailmaker.

In lowering the sail the ship rolled, and the starboard clew got foul of the mainstay, and the mate thinking it would clear itself—be pulled over the stay by the weight of the descending sail, to the port side—allowed it to lower until he feared that if it did clear itself the clew-iron would hit the deck and mar it, when he sang out, "Hold on the gantline,"—the rope with which the sail was being lowered,—and sent the man then aloft down the mainstay to clear the clew. Before the man went down the stay the mate sang out, "Stand clear," and just before the clew was let go—passed over to the port side of the stay—he said, "Look out there."

As the clew was being cleared from the stay the master called to Carley to tell the libelant to come aft, where he wanted him to help the sailmaker. Carley went forward on the port side of the vessel, and told the libelant the master wanted him. The latter started aft immediately, going quickly across the main hatch in a diagonal direction, and as he reached the after corner of the same, on the port side, the clew of the sail dropped from the mainstay, and the clew-iron, an irregular shaped ring of four or five pounds weight, fastened to the corner of the sail, struck him on the right side of the head, about two-thirds of the way from the ear to the crown, and fractured and depressed his skull, from the effect of which he fell senseless on the deck.

(3) The mate and others who were present picked libelant up and carried him to the poop, where the steward, under direction of the master, washed the wound, cut the hair away around it, put some balsam on it, bandaged it, and moistened his lips with brandy, when he was taken forward and placed in his bunk in the house on deck, and Carley set to watch him that day and during the nights following, for some three or

four weeks. During the day the master took some stitches in the wound, and this is all the personal attention he ever gave the libelant while confined to the house, except to look in the room once a day or less, and turn up his nose at the smell, and go away.

In this condition the libelant was left in an unconscious or delirious state, sweltering and rolling in his own excrement, with no regular attendant but the boy Carley at night, and such casual attention and observation as he might receive from the members of the crew during the day, until Sunday, the 18th day of November, when the master, on repeated complaint of some of the crew, permitted, rather than directed, the mate and others to wash him and put some clean burlap under him. On the next day the mate restitched the wound, the first stitches having broken out, and thereafter he was washed at regular intervals and his personal comfort in this respect reasonably cared for; but he was stinted in his food and water, and some of what he got was furnished or obtained for him by members of the crew.

(4) In about six or seven weeks from the date of his injury the libelant was "turned to" by order of the master, and kept at work on deck from 6 in the morning to 6 in the evening, for the rest of the voyage; at first making paint swabs, sennit, and then cleaning brass, scraping dead-eyes, washing and sweeping decks, hauling on the braces and handling sails,—in short, all ordinary seaman's work except going aloft.

(5) The wound on the libelant's head was still a running sore when he was set to work; at the same time he had a bad bed sore on his buttock, another on his heel, and one on his ankle. On account of the latter two he could not wear his shoes, and in the tropics the hot deck burned his feet. From neglect, these bed sores got proud flesh in them, and finally, at the suggestion of one of the crew, the libelant went to the master and asked him "to burn" them, which he did with caustic, repeatedly. In so doing he made the libelant let down his trousers, while on the poop, and needlessly expose his private parts, at the same time making brutal and indecent remarks to him on the subject.

(6) In consequence of the injury to his brain, the left side of the libelant, and particularly the arm and leg, were paralyzed, so as to seriously affect the use of them during the remainder of the voyage, in addition to which his eyesight was much impaired and his perception and memory materially weakened, notwithstanding which the master required him to be on deck and at work as aforesaid, and often arbitrarily compelled him, to his great discomfort, to stand up, when the work at which he was employed admitted of his sitting down; he also habitually accosted him in a harsh, derisive, and contemptuous manner, calling him a "useless bugger," a "wastrel," and the like.

(7) On March 13, 1889, the vessel arrived at Portland, when the libelant had leave to go ashore in the evening, where he met a boy, the witness Ainsworth, whom he knew on the training ship at Liverpool, who took him to a boarding-house and saloon kept by the witness Mrs. Pauline Rosenberg, where he stayed all night. In the morning Mrs. Rosenberg took him down to the vessel, and with the assent of the mas-

ter took him back to her house for the purpose of taking care of him. His condition appears to have aroused her sympathy, and she endeavored to raise means to send him home direct, but failed. She then consulted counsel in the case, with a view of making the vessel send him home, and the result was the boy was sent to the Good Samaritan hospital, and thereafter, on March 29th, this suit was commenced.

(8) The master failed and neglected to procure or provide any medical aid or advice for the boy after the arrival of the vessel in port, and was contriving and intending to get rid of him as easily as possible.

(9) When the libelant went to the hospital his arm and leg were still partially paralyzed, and the attendant had to cut his food for him. At the trial he appeared to have improved mentally and was able to answer the questions put to him readily and intelligibly. The wound on his head had healed over. The scar is bare of hair and about three inches long and three-fourths of an inch in width, and the depression in the skull is about three-eighths of an inch. He had not recovered from the paralysis of his side, and according to the testimony of the medical expert he may never do so, but probably will on account of his youth. The doctor also thinks that the brain may accommodate itself to the depression in the skull, so that it will not be necessary or desirable to resort to the operation of trephining, but this is at least problematical.

(10) The master did nothing towards sending the libelant home at the vessel's expense, and in my judgment never intended to, and the equivocal and invalid offer made at the trial to that effect was merely made for effect; and the proposition to send the boy home as a passenger on the City of Carlisle, with her present master, considering the duration of the voyage and the treatment he is likely to receive in the mean time, was simply inhuman.

(11) The injury to the libelant was the result of the concurring carelessness of the vessel in lowering the sail without "stopping" the clews at the bunt thereof, and that of the libelant himself in passing directly under the sail when and as he did; but his carelessness was not of that gross character, nor was it the result of such reprehensible motives or purpose, as will forfeit his right to be kept and cured at the expense of the vessel, for he might not have perceived that the clew, when cast off the stay, would reach him, as it would not if he had been on the deck instead of the hatch, in crossing which, instead of going round in front of it, he was actuated by a laudable desire to obey the command of the master with alacrity, and get to the port side of the poop, where he understood he was wanted, by the shortest way and in the least possible time.

These are the material facts in the case. Before proceeding to state the law arising thereon, it may be well to briefly advert to the testimony in support of the last finding, for over this point the chief contention of the parties was made.

The weight of the expert testimony shows that in sending down the topsail good seamanship requires that the clews when drawn up to the bunt of the sail should be "stopped" or tied together there. The dan-

ger of sending it down with the clews loose and the clew-irons dangling about is apparent to any one who has given any attention to the subject. The evidence also shows that in good weather, when a vessel is not rolling, the sail is often sent down with the clews loose. But in such cases the vessel simply takes the chances. Then it may be said, "All's well that ends well," but otherwise not.

The libelant must have been aware of the fact that the sail was being lowered with the clews loose, and that the starboard one had swung over with the roll of the vessel and got foul of the stay. He had just come down from the yard, where he had been assisting in cutting the robands to let the sail loose therefrom. When called by the master he was standing on the deck just forward of the main hatch, and probably looking at the man on the stay casting the clew loose. He must have heard the mate's warning, though neither he nor Freer, who stood close beside him, was questioned on that point.

It is also true that the mate testifies he gave the first warning two minutes before the clew was cast off, and the second one one minute before; from which it may be claimed that the warning was given so long before the event as to be no warning at all. But in the nature of things the warning, if given at all, would be nearer the event than this. And when the mate speaks of one or two minutes from recollection, at this distance of time, he merely intends to convey the idea that it was a very short time, —only momentary.

Besides, I think it was the duty of the libelant, under the circumstances, to "look aloft" before he undertook to cross the hatch.

But, as I have found, this carelessness of the libelant is not of such a character as to deprive him of his right to be cared for and cured by the vessel. The fault which will forfeit this right must be some positively vicious conduct, such as gross negligence or willful disobedience of orders. *The Chandos*, 6 Sawy. 549, 4 Fed. Rep. 645, and cases there cited; *The City of Alexandria*, 17 Fed Rep. 390. In this latter case Mr. Justice BROWN says, (page 395:)

"The only recognized qualification of the seaman's right of recovery is where the injuries have arisen from his own gross and willful misconduct."

And in *Olson v. Flavel*, 34 Fed. Rep. 479, this court said:

"Where the negligence is concurrent, or both parties are in fault, courts of admiralty will apportion the damages, or give or withhold them, in the exercise of a sound discretion, according to principles of equity and justice, considering all the circumstances of the case."

Citing *The Marianna Flora*, 11 Wheat. 54; *The Explorer*, 20 Fed. Rep. 135; *The Wanderer*, Id. 140; *The Max Morris*, 28 Fed. Rep. 881; *Atlee v. Packet Co.*, 21 Wall. 389.

There is nothing in the case to indicate that the libelant was either a negligent or willful boy, but the contrary. He appears to have stood well in the training ship, where he held some petty office, and had made such progress that he was allowed to become an apprentice and go to sea eight months before his period of training had expired. Nor do I think that the rule applicable to an experienced seaman as to skill and pru-

dence in taking care of himself ought to be rigidly applied to a boy of 16 years of age, a few weeks at sea, on his first voyage. He was only to receive £28 for four years' service; and was there to be taught and cared for,—looked after in rather a paternal way.

The relation of master and apprentice is well recognized in the English law as imposing a peculiar responsibility on the master. Whether on land or water, he stands to the apprentice *in loco parentis*; so that the relation is not merely that of master and servant or master and seaman. As Sir HENRY HOBART said in the year 1616, in *Coventry v. Woodhall*, Hob. 134a:

"The matter of putting an apprentice is a matter of great trust for his dyet, for his *health*, for his *safety*. And generally no man can force an apprentice to go out of the kingdom, except it be so expressly agreed, or that the nature of the apprenticeship doth import it, as if he be bound an apprentice to a merchant-adventurer or a saylor or the like."

And although Basquall was not directly apprenticed to the master, he was to his owners, for whom he stood, and whom he represented in all this matter.

On the question of going into Rio Janeiro for surgical aid for the libellant, I do not feel warranted on the state of the evidence as to the wind, in holding that it was the absolute duty of the master to make the deviation, though I am much inclined to think he might very properly have done so. He was 6 degrees east of Rio, and, calling a degree of longitude at that point $55\frac{1}{2}$ geographic miles, he was about 232 miles from the port. The master says it was 600 miles. In this he is certainly mistaken, and probably intentionally so. He did not say whether he meant geographic or statute miles, but probably the former. However, the distance is less than 400 statute miles. With a six-knot breeze this distance might have been made in less than two and a half days, which does not seem a great delay or sacrifice to make in a voyage of five months to save the life or mind of a boy committed to the care of the master *in loco parentis*. And later on he might have gone into Montevideo or the Falkland islands without going 100 miles out of his way. If the vessel was in need of a spar or topmast, I doubt not he would have gone into either of these ports to replace it.

As usual in these cases of suits against British vessels in this court, objection is made to the jurisdiction, because the parties and the vessel are British; and in this case because the contract sued on (the articles of indenture) is not maritime.

And first, this suit is not brought on the articles of indenture, but on a tort committed on the high sea. The articles are mere matter of inducement, by which the relation of the libellant to the ship is shown—that of an apprentice to the owner—as the shipping articles would in the case of a similar suit by a seaman. Besides, the articles of indenture are just as much a maritime contract as the shipping articles. They are both contracts executed on land to be performed on sea. *Insurance Co. v. Dunham*, 11 Wall. 1; Ben. Adm. § 261.

Before taking this apprentice to sea the master was required by section

145 of the British merchants' shipping act of 1854 to cause him to appear before the person before whom the crew was engaged, and there produce the indenture; and the name of the apprentice with the date of the indenture, and the name of the port at which it was registered, was then entered on the "agreement" with the seaman. Thereupon he was duly shipped as an apprentice on the City of Carlisle for the voyage mentioned in the "agreement" or shipping articles, and has the same remedy against the master or vessel for any injury or wrong sustained by him during the voyage as any other member of the crew; and this in addition to any right of action he may have against Iredell & Sons directly on the covenants in the articles of indenture.

Courts of admiralty in the United States have jurisdiction of torts committed on the high seas without reference to the nationality of the vessel on which they are committed, or that of the parties to them. Such jurisdiction will, in the discretion of the court, be declined in suits between foreigners, where it appears that justice will be as well done by remitting the parties to their home forum. But the jurisdiction will not be declined where the suit is between foreigners who are subjects of different governments, and therefore have no common forum. *Bernhard v. Creene*, 3 Sawy. 230; *The Noddleburn*, 12 Sawy. 132, 28 Fed. Rep. 855; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. Rep. 860; Ben. Adm. § 282.

There is no reason to decline the jurisdiction in this case. To do so would be equivalent to a denial of justice. The libelant is separated from the vessel. His condition and the circumstances justified him in leaving her; and it is highly probable that the master indirectly encouraged him to do so. The vessel is not expected to reach her home port for many months yet. And if he has a remedy on the covenants in the articles of indenture directly against the owners in England, how is he going to get there in the mean time? and when there, where will his witnesses be? The crew have all left the vessel except the officers and two apprentices, and no one can say where they will be in that time. Indeed, it is shocking to think of turning this poor helpless boy out of court in a civilized country without redress for a grievous wrong, upon the theory that he has a remedy in the courts of his own country, when it is apparent that, however just may be the laws of such country and impartial their administration, such remedy is, under the circumstances, to him utterly unavailable.

As Mr. Benedict, in discussing this question, well says, (Ben. Adm. § 282:)

"Nothing within the territory of a nation is without its jurisdiction. * * * All persons in time of peace have the right to resort to the tribunals of the nation where they may happen to be for the protection of their rights. The jurisdiction of the courts over them is complete, except when it is excluded by treaty."

The official log-book was offered in evidence for the defense, on the question of the injury to the libelant and his subsequent treatment. On objection made by the libelant, it was admitted subject thereto.

The British merchants' shipping act of 1854 provides (section 282)

that an entry shall be made by the master in the official log-book in "every case of illness or injury to any member of the crew, with the nature thereof and the medical treatment adopted, if any;" and section 285 of the same declares:

"All entries made in any official log-book as hereinbefore directed shall be received in evidence in any proceeding in any court of justice, subject to all just exceptions."

But this act does not settle the question for this court. So far as it declares the admissibility of the log-book as evidence, it is only in force in British courts. By the law of this court, the *lex fori*, the competency of evidence in a proceeding before it, must be determined, and not that of Great Britain. Whart. Confl. Laws, § 752. However, I think the book is admissible under our law, as *prima facie* evidence of the truth of the entries required by the British act to be made therein. 1 Greenl. Ev. § 495; 1 Whart. Ev. § 648.

But the entries in the log are shown to be materially untrue, and could not well have been made contemporaneous with the events to which they relate. Under no circumstances could they have any more weight, as evidence, than the master's statement on oath, as a witness, which I am constrained to consider unworthy of credit.

It is also objected that the suit "joins a libel *in personam* with a libel *in rem*." This objection comes too late on the argument. It ought to have been made, if at all, by exception to the libel before answer. And if it were well taken now, and it had any merit, the court would allow the libelant to dismiss as to the master.

I had occasion to examine this subject in the case of *The Director*, 11 Sawy. 493, 26 Fed. Rep. 708, and the conclusion there reached was that the admiralty rules, from 12 to 20 inclusive, relating to joinder of parties or causes of suit in certain cases, do not apply to cases not therein enumerated; and that such cases may be proceeded in, in this respect, under rule 46, in such manner as the court may deem expedient for the administration of justice; and also, that where the facts of the case establish the liability of the master, and give the libelant a lien on the vessel, as well, for the amount of his claim, it is proper and expedient that the proceeding against him and the vessel be joined in one libel.

This case is not within any of the admiralty rules aforesaid regulating the joinder of causes of suit, and therefore comes under rule 46. The claim of the libelant, if established, is certainly a lien on the vessel; and a suit to enforce it may include a cause of suit against the master, arising out of the same facts. *The Clatsop Chief*, 7 Sawy. 274, 8 Fed. Rep. 163; Ben. Adm. §§ 396, 397.

This I believe disposes of the case, except the question of damages.

Assuming, as I do, that it was the duty of the vessel to take care of the libelant, at least to the end of the voyage, including such medical treatment as was proper and could reasonably have been obtained, as decided in *The City of Alexandria*, *supra*, in *Reed v. Canfield*, 1 Sum. 195, and *The Atlantic*, Abb. Adm. 451, the damages under this head will be

confined to what is necessary to make good, as far as possible, the default of the vessel in this respect.

When the City of Carlisle arrived at Portland, the master should have sent the libellant at once to a hospital, and had him examined by some skillful and well-known physician. This would probably have resulted in trephining him, when he might have been able to continue on the voyage, but most likely not; in which case he should have been sent home direct, as soon as he was able to travel.

Measured by this rule I estimate and assess these damages as follows: Hospital expenses for five months at \$1 per day, \$150; expense of trephining, \$150; expense of journey to Liverpool, \$200;—in all \$500. This includes nothing for pain, suffering, or inconvenience resulting from the injury, whether temporary or permanent. He is entitled to wages until his return home or the end of the voyage, which will be about a year. This is £6, or \$30.

In addition to this, the libellant must have damages for the gross neglect and mistreatment he received after the injury, whereby his injury and suffering were much aggravated.

In *The City of Alexandria*, *supra*, (395,) Mr. Justice BROWN, after stating that the ship was bound for the care of an injured seaman and wages to the end of the voyage, unless the injury arose "from his own gross and willful misconduct," says:

"Misconduct or neglect by the officers in the treatment of the seaman, after he has been wounded in the service of the ship, becomes a different and additional cause of action against the ship, because a legal obligation to him then arises to afford suitable care and nursing; and, if this be neglected, the ship may be held to consequential damages."

On the ground of gross neglect and cruel maltreatment of the libellant since his injury, I estimate and assess the damages of the libellant at \$1,000.

It may be said that this result is a hardship on the owners, who will probably have to satisfy the decree. That may be so, but Basquall's is much the harder lot of the two. And if owners do not wish to be mulct in damages for such misconduct, they should be careful to select men worthy to command their vessels and fit to be trusted with the safety and welfare of their crews, and particularly apprentice boys, during the long and perilous voyage from the North Atlantic to the North Pacific.

A decree will be entered in favor of the libellant for \$1,530, and the costs of the suit.

CARD v. HINE.

(District Court, D. South-Carolina. July 3, 1889.)

1. ADMIRALTY—JURISDICTION.

A libel *in personam*, with attachment of the vessel, may be maintained for breach of a contract made with the agents of her owners, who are all non-residents, and who, by the law of their country, are each liable *in solido* under such contract, though but one of the owners is named in the action; the others being unknown to libellant. The object of the suit is not to obtain a personal judgment against any of the owners, but to subject their common property to the satisfaction of their common liability.

2. SAME—ACTS OF CONGRESS.

The measure of liability is not affected by act Cong. June 26, 1884, entitled "An act to remove certain burdens on the American merchant marine, and to encourage the American foreign trade, and for other purposes," nor by act Cong. June 19, 1886, amending the former act, and making it applicable to all sea-going vessels, and also to "all vessels used on lakes or rivers, or in inland navigation, including canal-boats," etc. These acts are not declaratory of the maritime law, but are special in their character.

3. SHIPPING—CHARTER-PARTY—EXCEPTIONS.

The owners of the steam-ship *West C.* entered into a charter-party with libellant for the freight-room in the ship on a voyage from Charleston, S. C., to Liverpool or the continent, she to reach the port of Charleston by November 30, 1887. "Should the steamer not arrive at her loading-port, and be in all respects ready to load under the charter on or before that day," the charter might be canceled. She was to be "in every respect tight, staunch, and strong, classed 100 A 1, and in every way fitted for the voyage." The exceptions in the charter were the act of God and "all other dangers and accidents of the seas, rivers, and navigation." November 9th she grounded on the rocks in the river St. Lawrence, and, on reaching Montreal, was promptly inspected by Lloyd's agent, who found a small leak in her water-tank. A complete survey would have required her to go into dry-dock at Quebec, which would have caused a long delay. The agent gave his certificate that she was seaworthy, and fit to carry a perishable cargo, and her rating at Lloyd's remained unchanged,—100 A 1. She then sailed for Charleston, reaching there Nov. 28. The insurance companies at Charleston, having heard of her accident in the St. Lawrence, refused to take risks unless a survey was first had on her; but, there being no dry-dock at Charleston, the owners refused to put her on the hard, an operation attended with danger. The best rates the insurance companies would offer were at $1\frac{1}{2}$ per cent., the ordinary rate being 9-16. Libellant refused to accept the ship. *Held*, that neither party was in fault; that the ship-owners were excused; and that libellant had no cause of action, except for moneys advanced to the master.

In Admiralty. Libel for breach of charter-party.

J. N. Nathans, for libellant.

J. P. K. Bryan, for respondent.

SIMONTON, J. The British steam-ship *West Cumberland*, built of iron, with water-tight compartments, was on a voyage up the St. Lawrence river to Montreal, with cargo, on 5th June, 1887. On that day the agents of the owners in New York entered into a charter-party with libellant for the freight-room in the ship on a voyage from Charleston to Liverpool or the continent, at the lump sum of 37 shillings per ton, net register. She agreed to reach the port of Charleston on or before 30th November. "Should the steamer not arrive at her loading port and be

in all respects ready to load under the charter on or before that day," charterer had the option of canceling the charter. The charter provides that she must be in every respect tight, staunch, and strong, classed 100 A 1, and in every way fitted for the voyage, when she shall load a cargo of cotton, etc. The exceptions throughout the whole of the charter-party are the act of God, and others, including "all other dangers and accidents of the seas, rivers, and navigation." On 9th November, in the river St. Lawrence, she grounded on the rocks, and, after remaining a few hours, got off under her own steam. Reaching Montreal, she was inspected by Lloyd's agent at that port, on 15th November. He found a small leak in the water-tank forward, from a loose rivet; but no plates could be discovered which were broken. The survey was such as could be had at Montreal. A more complete survey would have required her to go to Quebec, and into dry-dock there. He gave his certificate that she was seaworthy, and fit to carry a perishable cargo. She was rated at Lloyd's, and, the report of the survey having been received, her rating remained unchanged,—100 A 1. She then sailed for Charleston, reached that port on 28th November, and reported to her charterer. Before her arrival, Ravenel, Johnson & Co., insurance agents, had received instructions from the companies they represented not to take risks on the West Cumberland, unless a survey was first had on her to ascertain the result of her grounding on 9th November. This was communicated to the several shippers in the port, including libellant, and put him on the inquiry. He received the papers connected with the Montreal survey from the master. After examining them, he suggested to the master to have his vessel examined again. The latter consulted his owners by cable. They said, "No." There is no dry-dock at Charleston. The ship drew 13 feet. The mean rise and fall of tide is 6 feet. Putting her on the hard—a heavy, iron ship—was attended with danger. The master tendered the ship as she was to the charterer. Thereupon Mr. Card refused to load her, and brought his action for breach of charter-party, and for moneys advanced to her. Her sailing register gave Wilfred Hine as her owner, a resident of Great Britain. The action is *in personam*, with attachment. The only defendant named is Wilfred Hine, who, and others unknown to libellant, are alleged to be the owners of the West Cumberland.

The first question in the case is, will this action lie? The moneys were advanced for the ship, at the special instance and request of the master, the agent of all of the owners of the ship. The charter-party was made with the agents of the owners, and binds all of them. These owners are all non-resident. At the time the libel was filed only one of them—Wilfred Hine—was known. The process by attachment, and the judgment thereon, can only bind the property attached. This ship is the common property, and it is attached for the common debt. Under the Code a judgment against common property for a common debt can be had, binding only the common property by serving one or some of the joint debtors. Code S. C. § 157. Mr. Benedict says that the same practice prevails in admiralty, if the joint debtors be

each liable for the whole debt. Ben. Adm. § 387. The more rigid rule, requiring that all of the owners be named, would materially impair—in many instances would destroy—the remedy by attachment. In all cases it is very difficult, in very many impossible, to ascertain the names of all the co-owners of a foreign vessel. Even when the names of her owners when she left port can be learned, changes may have occurred since her departure,—may occur at any moment, even during the preparation of the papers,—of which it is impossible to have any knowledge. Indeed, process by foreign attachment proceeds upon the ground that the defendants themselves are without the reach of process, and that the only remedy which can be given is against their property within the jurisdiction. The owners are not served. They are not in court. They cannot be served. The attachment of the property is substituted for service upon them. It binds them to the extent of the value of this property, and no further. Thenceforward the proceeding is to all intents and purposes *in rem*. It is an excellent practice, and will be followed by me. It is said, however, that the acts of congress approved 26th June, 1884, and 19th June, 1886, limit the liability of ship-owners for the joint debt to the proportion of their respective shares in the vessel. That under these acts, which counsel contend are simply declaratory of maritime law, (*The Scotland*, 105 U. S. 24; *The Belgenland*, 114 U. S. 369, 5 Sup. Ct. Rep. 860,) Wilfred Hine can only be held for 9-64 of the debt, his share being the half of 18-64. But this action is not to make Hine responsible individually, or to proceed against Hine's interest, seeking to make that responsible for the whole debt; the purpose is to make the whole common property responsible for the common debt; and Hine is taken as the representative of all the owners,—the only one of them known to libellant,—so that by process against him and his unknown co-owners all the joint property should be affected for the joint debt. The practice approved by Benedict is based upon the ground that each joint contractor is liable *in solido* for the debt. In England each co-owner is so liable for the debts of the ship. If these acts of congress change this measure of liability, the attachment cannot be sustained. But upon examination of these acts it will be perceived that they are not declaratory of the maritime law, but are special in their character. The first act is entitled "An act to remove certain burdens on the American merchant marine, and to encourage the American foreign carrying trade, and for other purposes." This apparently, in its provisions, applies only to sea-going vessels. The second act, reciting its title, amends it, and makes it apply to all sea-going vessels, and also to "all vessels used on lakes or rivers, or in inland navigation, including canal-boats, barges, and lighters." There is another consideration. The contracts here sued upon are the contracts of the owners made by the general agents of them all. By English law, as among themselves, each owner is liable *in solido* for the common debts. Story, Partn. § 455. When their agents contract for them within the scope of their authority, these agents have the same power as they have, and the same result follows as if they had contracted. Hence the acts of the agents bind each *in solido*. "The extent

of the authority of the master," and of course of any other agent of the owners, "to bind the ship, the freight, or the owners is limited by the law of the home port of the ship." *Lloyd v. Guibert*, L. R. 1 Q. B. 115; *Pope v. Nickerson*, 3 Story, 465; *The Karnak*, L. R. 2 P. C. 505; *Steam Co. v. Insurance Co.*, 129 U. S. 449, 9 Sup. Ct. Rep. 469. In *The Brantford City*, 29 Fed. Rep. 384, a case quoted with strong approval in the case in 129 U. S. and 9 Sup. Ct. Rep., *supra*, Judge BROWN says: "The later English decisions hold that the law of the ship's home port should govern as respects the future and unforeseen incidents of the voyage,—such as the execution of bottomry in a port of distress, and the liability of the owners for damages beyond the value of the ship and freight." On page 385, 29 Fed. Rep., after quoting Mr. Justice BRADLEY in *The Lottawanna*, 21 Wall. 558, saying: "In matters affecting the stranger or the foreigner the commonly received law of the whole commercial world is more assiduously observed, and in justice it ought to be," Judge BROWN adds: "As respects any extension of the owner's personal liability beyond the rule of the maritime law, or any acts of the master beyond the scope of his authority as generally recognized by that law, the law of the flag may justly be invoked." This action will lie.

The case is on two distinct causes of action,—for breach of charter-party, and for certain moneys advanced for the necessities of the ship.

1. *Breach of Charter-Party.* The contract made on 5th November, 1887, warranted that the ship, after going to the port of Charleston on or before 30th November, "and being then in every respect tight, staunch, strong, classed 100 A 1, and in every respect fitted for the voyage across the Atlantic," shall load a cargo of cotton. Was she, when offered to the charterer, up to these representations? She was certainly so at the date of the charter-party. But four days afterwards she got aground on rocks. Lloyd's agent surveyed her, and, after survey, declared her seaworthy, and fit to carry a perishable cargo. The only leak—a small one—was into the water-tank forward. This tank was designed to hold water. The presence of water in it could not therefore injure any cargo she could have. The leak, being into the water-tank, water-tight on every side, was necessarily limited in the quantity of water the tank could hold. Her class with Lloyd's, 100 A 1, was, for this reason, in no respect changed; and Lloyd's is high mercantile authority, even if it be not conclusive. *Insurance Cos. v. Wright*, 1 Wall. 473. The master had taken proper precautions, and had reasonable ground for believing that his ship was still staunch, tight, and strong; and, if the case turned only on this, it would be so held from the evidence. See *Dupont de Nemours v. Vance*, 19 How. 168. Was she in every way fitted for the voyage with a cargo of cotton across the Atlantic? The charter requires her to be classed 100 A 1. It does not say where this classification shall be made. The evidence is that she was classed at Lloyd's. "None of these registers have or can have any right to determine conclusively the rate of a vessel when that question comes to be determined in a court of justice." *Insurance Cos. v. Wright*, 1 Wall. 473. "Like any other question of value or quantity or quality, left open in a written contract, it should be de-

cided by a reference to all the sources of information which enable the jury to fix the rate correctly. What is meant by the rating of vessels in insurance policies? It means the determination of their relative state or condition in regard to their insurable qualities." *Id.* The insurance companies had lost faith in her, notwithstanding Lloyd's rating. Even her owners could not obtain offers less than $1\frac{1}{2}$ per cent., the ordinary rate being 9-16. This apprehension of the insurance companies did not arise from mere suspicion, or blind prejudice, or caprice. It had a substantial basis,—a reasonable ground of apprehension. It was not confined to the local companies. Now, the ship was chartered to be used in a mercantile adventure. It was evident by the terms of the charter that the charterer intended to offer his freight-room to shipping merchants. His charter-party called for the highest classification,—100 A 1. "This is not a warranty that the charterer could get insurance. But it is a warranty that she was insurable; that is to say, a proper subject for insurance at the ordinary rates for such a cargo and such a voyage." *Premuda v. Goepel*, 23 Fed. Rep. 411. When the charterer made his contract he expected, and had the right to expect, from the promised classification of the ship, that in his freight contracts he could compete on equal terms with all competitors. The accident of 9th November so changed "the relative state or condition" of the ship that her insurable quality was diminished, and he could only get $1\frac{1}{2}$ per cent. as against 9-16. Whatever may have been her other qualities when she was offered to the charterer, she was not "in every way fitted" for the contemplated voyage. See *Stanton v. Richardson*, L. R. 9 C. P. 390. But this objection came from an accident arising after the date of the charter-party, and within an exception throughout the entire charter-party. Was the ship bound to remove it? Was she bound to make an inspection so thorough, and to make repairs thereon so complete, as to remove all fears of the insurance companies? Or could she stand on her contract and its exceptions? When a vessel contracts to carry a cargo, and actually receives it, and meets with an excepted accident in the inception of or during her voyage, no time being limited, she must repair, and continue and complete the voyage, if the repairs can be completed within a reasonable time. *Jackson v. Insurance Co.*, L. R. 10 C. P. 125. So, also, a vessel under charter-party, in which no definite time is fixed, meeting a disabling accident within an excepted peril, must repair damages resulting therefrom, and perform her contract, if this can be done in a reasonable time. *Id.* But here we have a charter-party requiring her to be at the loading port by a fixed date, and in every way fitted for the voyage, with option of cancellation in the charterer on default,—two conditions precedent, both to be performed. The excepted accident made one or the other impossible. If she had waited to go into dock, be surveyed, and repaired, she could not have reached the loading port in time. As it was, she was within two days only of its extreme limits. She saved her time, and the other condition precedent could not be fulfilled. Besides this, it would be unjust to require the ship to delay her voyage, and so lose her right to enforce the charter-party, and to make a minute examination for

injuries and perfect repair, if any perchance were found, and, when this is all done, to be entirely at the mercy of the charterer, who could reject her simply because she was too late. The master did all that he could reasonably be required to do. Promptly after the accident he had his ship inspected by the agent of Lloyd's, who gave him his rating. Being assured that the accident had not lost him his rating, but left his ship still seaworthy, and able to carry perishable cargo, he went on, and fulfilled the time of his charter-party, tendering his ship to his charterer. He met a condition of things he could not have anticipated. With every assurance that his ship was staunch, strong, tight, classed 100 A 1, he found that she was not fitted for the voyage because the insurance companies feared her, and required a survey which could not be held. This he could not control. He had no means in the loading port of satisfying the insurance companies. It would have been unreasonable to compel the charterer to load the ship with cotton, if, after doing so, he must go without insurance, or submit to injurious rates. It would "have been equally unreasonable to make the ship-owner responsible because she was not a proper subject for insurance at ordinary rates," when reasonable precaution had been taken to ascertain the extent of her injuries, and when her master had come to fulfill his contract, armed with certificates of very high authority. "The circumstances excuse the ship-owner, but give him no right. The charterer has no cause of action, but is released from the charter. When I say 'he' is, I think both are. The condition precedent has not been performed, but by default of neither." *Jackson v. Insurance Co.*, *supra*.

2. During the stay in this port of the West Cumberland, libellant advanced to her master for her purposes the sum of \$142.85. The items are not disputed, nor is the advance or its necessity denied. The amount certainly should have been paid. Let libellant take his decree for the amount of \$142.85, with interest from the 2d December, 1887, and costs.

NIPPERT *et al.* v. THE WILLIAMS.

(District Court, D. Kentucky. July 16, 1889.)

1. MARITIME LIENS—ADVANCES OF MONEY.

Where money necessary to a boat is borrowed by her master in a foreign port, where the credit of her owners alone is not sufficient to obtain such money, the lenders have a lien on the boat therefor, whether the claims against the boat paid by such money constitute liens or not.

2. SAME.

But they have no lien for money advanced directly to the owners of the boat, when they did not understand that such money was to be used in paying claims against the boat.

In Admiralty. On libel for advances.

Goodloe & Barr, for libellants.

Knox & Reed and Brown, Humphrey & Davie, for claimant.

BARR, J. The evidence satisfied me that the sums which were borrowed of the libelants, M. Nippert & Co., by the captain of the Williams on the 11th of December, 1888, and February 12, 1889, were necessary for the boat. The wages due the crew, and the supplies which the boat had obtained on the voyages immediately preceding the 11th of December, 1888, and the 12th of February, 1889, were more than the amounts advanced by the libelants, and I think the payment of these wages and supply bills was absolutely necessary for a continuance of the business of this boat. The weight of the evidence is that, excluding the Williams herself, her owners were without sufficient credit to borrow here the necessary sums to pay off these wages and supply bills, either on the 11th of December, 1888, or February 12, 1889, and that the sums advanced by the libelants at those dates were advanced for the purpose of paying off the wages due the crew of said boat and the supply bills, and such was the understanding of both the libelants and the captain of the boat, except as to the \$2,000, which was sent in a draft to the Grand Lake Coal Company. The money which was advanced by the libelants, M. Nippert & Co., was raised by them through the Masonic Savings Bank, by discounting 90-day drafts of the boat, which were drawn on the Grand Lake Coal Company, and made payable to the order of M. Nippert & Co., and indorsed by them. Although the business of libelants is carried on in the name of M. Nippert & Co., M. Nippert is dead, and the only partners are Chris Bosche and Albert Bosche. These drafts, which were signed by John Williams, captain of boat, and one of which was accepted by the Grand Lake Coal Company, by J. B. Williams, state on their face that they were for "wages and supply account of steamer." The amount of the proceeds of these drafts discounted by the Masonic Savings Bank was \$6,364.95 for draft dated December 11, 1888, and \$8,824.25 for draft dated February 12, 1889. It appears from the evidence that Chris Bosche, one of the firm of M. Nippert & Co., and Capt. John Williams, captain of the boat, went together to the bank where these drafts were discounted, and where the checks for the proceeds of the discounts were given. Mr. Bosche explains his going with Capt. Williams by saying: "I always went with him to get a bill discounted, because Captain Williams was a man of very limited education, and could just barely write his name, and I did the figuring." Mr. Bosche gave checks for the amount of the discount of these drafts to order "proceeds of St'r J. B. Williams' draft or bearer" as to the February 12th draft, and to order "proceeds of draft or bearer" as to the December draft, and neither of them are indorsed. He states, however, that, as to the check of February 12, 1889, he gave to the teller of the bank a deposit ticket for the amount of their supply bill against the boat, amounting to \$1,022.50, and the balance was paid in money to the boat's officer, and taken over to the steamer across the river from this city.

As to the amount of money which was drawn out of the Masonic Bank, and taken to the boat on the check dated December 11, 1888, there is some conflict in the testimony. Mr. Bosche states generally that the

money received from the checks actually passed into the hands of Capt. Williams, and that he did not know that any of the money was appropriated to the payment of any purpose other than the necessary running expenses of the boat, and that he only got information the morning he testified, that \$2,000 of it had been sent to the Grand Lake Coal Company. Ike Williams, who was the clerk of the boat, whose deposition was taken by Mr. Risher, the mortgagee, says: "I got the \$6,500 in December, 1888, at the office of M. Nippert & Co., in cash, and took it down to the boat. The captain sent the \$2,000 to Pittsburgh by draft. I gave him the money in cash on the same day I received it, or the next day." But, as against these statements, there is exhibited a draft by the Masonic Savings Bank on the Importers' & Traders' National Bank, New York, dated December 11, 1888, to the order of M. Nippert & Co., or \$2,000, which is indorsed by M. Nippert & Co. to the order of Grand Lake Coal Company, and then by Grand Lake Coal Company, by J. B. Williams. This indorsement is in these words, viz.: "Pay to the order of the Grand Lake Coal Company. [Signed] M. NIPPERT & Co.,"—and is proven to be in the handwriting of Mr. Chris Bosche. There is also produced another draft drawn by said bank on its correspondent in New York, (Importers' & Traders' National Bank,) of same date, December 11, 1888, to order of M. Nippert & Co., for \$500, and by them indorsed to James Rafferty, and then by Rafferty. This indorsement is also proven to be in the handwriting of Mr. Bosche. Rafferty was a pilot on the Williams, and the books of the boat show that he was paid that sum on account of wages, December 11, 1888. The check of M. Nippert & Co. for the proceeds of the draft dated December 11, 1888, and which was exhibited by the libelants, has on the back of it pencil figures, proven to be in the handwriting of the paying teller of the bank, as follows:

\$2500
200
<hr/>
\$2700
6364.95
<hr/>
\$3664.95

This \$6,364.95 was the amount of the check, and the inquiry is, what, if anything, is meant by these figures? Capt. Williams was not a witness for either party, and was proven to have been at the time on a trip to New Orleans as captain of the boat Williams, and the paying teller of the bank was not called as a witness, but Mr. Bosche was present when these two drafts on New York were presented as evidence on behalf of the mortgagee, and was not recalled to give an explanation. In this state of the testimony I am embarrassed somewhat; but, considering all of the probabilities, I have concluded that the preponderance of the whole evidence is that this \$2,000 draft on New York was bought with a part of the proceeds of the \$6,500 draft, and that Mr. Bosche received it from the bank in part payment of his check, and then and there indorsed it to the Grand Lake Coal Company. This seems, under the evidence, the

probabilities, and, in the absence of any explanation by the libelants, was, I think, a loan directly to the company, and rebuts any presumption which the other facts would raise that this \$2,000 was intended to pay the wages of the crew and supply bills of the boat, or that Mr. Bosche either understood or expected at the time that it would be so used. This being the fact as to this \$2,000, libelants have no lien on the boat, her tackle, engine, etc., for the advance of this \$2,000.

It appears from the evidence of the clerk of the boat and the boat's books that a considerable part of the money advanced by libelants was actually used in the payment of wages of the crew and other claims which were liens on the boat; but it also appears that part of these advances were paid to Thomas Patterson, who was a salaried pilot on the Williams, and a part owner, and John Williams, who was the captain of the boat, and a part owner. The question arises, have the libelants a lien for these advances, which were used in the payment of claims against the boat, which were not lien claims? There may have been other claims than that of Capt. Williams paid, which were not lien claims, but the facts as to the payments to him raise the question. It appears that Capt. Williams drew \$675 on February 12, 1889, and that he left Louisville on that day for Pittsburgh, where he resides, and where the Grand Lake Coal Company did business, and that on the next day, February 13th, he, with others of the Grand Lake Coal Company, who were owners of the Williams, executed a mortgage to J. D. Risher, which mortgage has been properly registered and recorded. He then returned to this city, after having executed some kind of assignment for the benefit of his creditors in Pittsburgh, and on the 15th or 16th of February, 1889, drew from the clerk of the boat all the money remaining, \$3,655.82, making, presumably, \$4,330.82 of the money advanced by the libelants on the 12th of February, 1889, that he received. This was on account of salary due him as captain of the boat, and was clearly not a lien claim against the boat, tackle, etc.

The able and learned counsel for the excepting mortgagee insists that before money advanced the captain of a boat in a foreign port, such as another state from that which she is registered and owned, can be a tacit lien on the boat, etc., it must be loaned on an apparent necessity, both as to the credit of the owners of the boat and the needs of the vessel itself; and also that the money thus loaned must be used for wages, repairs, and such supplies as would, of themselves, be lien claims against the boat. In other words, being money advanced, and not such as is directly attached to the vessel, or used in its navigation, it can have only such lien by subrogation as the claimants have whose debts have been paid by the money advanced. He refers to *The Wyoming*, 36 Fed. Rep. 494; *The Cumberland*, 30 Fed. Rep. 453; *The Thomas Sherlock*, 22 Fed. Rep. 255; *The Guiding Star*, 18 Fed. Rep. 264; *The J. F. Spencer*, 5 Ben. 152; *The Sarah Harris*, 7 Ben. 28; *Davis v. Child*, 2 Ware, 76; *Thomas v. Gittings*, Taney, 472; *The William Penn*, 3 Wash. C. C. 484; *The A. R. Dunlap*, 1 Low. 350; and *The Tangier*, 2 Low. 7, 15,—as tending to or sustaining his contention.

I have read with care these cases, and, while there are expressions in some of them that seem to sustain this view, I think only one of them distinctly sustains the counsel's contention. In *The Wyoming*, 36 Fed. Rep. 493, Judge THAYER says:

"It is well settled that money advanced to pay maritime claims that are a lien by virtue of the maritime law or a local statute may itself become a lien against the vessel whose debts have thus been discharged. But, in order to establish a lien for money advanced, it must be clearly shown that it was advanced on the credit of the vessel to pay lien claims, and that it was so used."

This case sustains the contention of the counsel. In the case of *The Cumberland*, 30 Fed. Rep. 453, the money advanced was actually used to pay lien claims, and the court say that the money thus advanced "is to be placed on the same footing as the lien to pay which it was borrowed and used;" but the question now under discussion was not in the case, nor was it discussed or considered. *The Sherlock Case*, 22 Fed. Rep. 255, does not sustain *The Wyoming Case*, and is only important in considering the present question from the fact that Judge SAGE says that in *The Guiding Star*, 9 Fed. Rep. 521, the evidence showed that the parties making the advances which were rejected as lien claims knew that their advances were being applied to the payment of miscellaneous claims. In view of the fact that Judge SAGE was at the bar in Cincinnati, where *The Guiding Star* was decided, and is the successor of Judge SWING, who decided *The Guiding Star* in the district court, this is important in construing the decision in that case as reported in 9 and 18 Fed. Rep. In *The Guiding Star*, 9 Fed. Rep. 523, the district judge, (SWING,) an able and accurate lawyer, states the doctrine thus:

"It is well established that where money is advanced to meet such claims as in themselves have liens according to the rules of admiralty, a lien also exists for such money. But, before a lien exists for money advanced, it must be clearly shown that the purposes for which it is advanced are entitled to a lien. If advanced for the purpose of paying seaman's wages, necessary supplies and repairs, or anything else to which a lien in admiralty attaches in that case, a lien attaches to such money, but not otherwise."

In that case there were claims presented for money advanced for the "general purposes of the boat," and, there being no evidence to show that it, or a part of it, was borrowed and used for the payment of lien claims, a lien was refused for these advances. But the court says:

"In the case of Menge's loan, however, * * * I am inclined to think that the advance of \$1,000 was made for the express purpose of paying the running expenses of the boat, strictly so called, and therefore decide that a lien attaches to that loan."

The italics are mine in these quotations, and are intended to emphasize the fact that the court says the purpose for which the advances were made gave the lien, and that the lien attached to the loan. His ruling as to admitting and rejecting liens for money advanced was affirmed by Justice MATTHEWS in 18 Fed. Rep. 265.

I need not review the other cases cited by the counsel, as we do not think they sustain, or tend to sustain, his view, unless it be the cases in 1 and 2 Low.

In the case of *The A. R. Dunlap*, 1 Low. 350, the court was discussing the meaning of the then recent case of *Pratt v. Reed*, 19 How. 359, and dissented from the doctrine that a material-man must bring himself within the rule applied to a lender on bottomry; that is, the material-man was bound to show not only that the supplies were necessary for the ship, or appeared to be so, but that the master had not, or appeared not to have, funds of the owner in hand to pay for them, and also that the owners had no personal credit on which they could be procured at the place where they were furnished. The learned Judge LOWELL, after indicating an opinion that the question of the credit of the owners of the vessel should not be material as to material-men who furnished supplies, or made repairs, in a foreign port, says:

"The general rule in this country is that the person who advances money to pay the debts which are liens on the ship has himself a lien for his reimbursement, (*Thomas v. Osborn*, 19 How. 22; *The Gustavia*, Blatchf. & H. 189;) and this is now the law of England, with some refinements and distinctions not necessary to be here examined. Perhaps the rule has grown out of the doctrine of subrogation; but, whether so or not, the lender of money has not usually any more ample remedy than the material-men themselves would have had. See *Davis v. Child*, Davis, 71."

This case of *Davis v. Child* is reported in 2 Ware, 78, and the question there was whether or not one who furnishes money to be expended in repairing a vessel, or in furnishing her with provisions, or fitting her for sea, has the same privileges against the vessel which is allowed the material man, or the mechanics who perform the labor. The court (Judge WARE) says:

"The authorities are entirely conclusive. The lender is considered as trusting to the ship as well as the owners, and by the loan itself he acquires a privileged hypothecation, which is as sacred in every respect as that which is created by an instrument of bottomry, except that he is not entitled to maritime interest."

There certainly is nothing in this quotation, or in other language used in this opinion, which intimates that, unless the money loaned is actually used in paying the lien claims, no lien exists or is created; on the contrary, the court distinctly says that by the loan itself he acquired a privilege of hypothecation as sacred in every respect as that created by a bottomry bond, except as to maritime interest. The rights of a lender on a bottomry bond are very ably and clearly determined by Judge STORY in *The Fortitude*, 3 Sum. 229. *The Tangier*, 2 Low. 7, was a contest between the lenders of money to a captain who, the owners insisted, had been discharged by them as master before the loan was made to him. The court (Judge LOWELL) discusses the question whether there should be any difference between the rights of a lender of money to buy supplies or make repairs, and of one who loans money to pay for the supplies or repairs after they are furnished or made. He concludes there should be no difference in their rights. He then says the libelants claim a lien upon another and distinct ground, that of subrogation. He discusses at some length the doctrine of subrogation, as it appeared that the

money which was loaned the master of the vessel was used by him in paying off the crew. The opinion closes thus:

"It is impossible upon the evidence to say that the master was actually deprived of command so early as the answer represents it; but if he were, and the owners intrusted him with the duty of entering the vessel and paying off the crew, it will hardly do to say that he was not their agent for those purposes as fully as if they had never removed him at all. If his agency had ceased, the equitable doctrine of subrogation might be invoked. Either way the libelants must succeed."

It is thus seen that the equitable doctrine of subrogation is not invoked to sustain the libelant's lien for the money which he had advanced to the master of the vessel as master, but only to sustain the lien in the event he had ceased to be the master of the vessel when the loan was made to him by the libelants.

These two cases of Judge LOWELL are the only American cases which seem to intimate that the right of subrogation is the basis of a maritime lien of a lender of money either to buy or pay for supplies or materials necessary for the navigation of a vessel. We have seen that when that distinguished jurist has applied the equitable doctrine of subrogation it has not been as the basis of the general powers of the master of a vessel as the agent of the owners, but to sustain a lien for money advanced to a vessel and paid to the crew, in the event the agency of the master, as master, had at the time ceased.

The counsel suggests that there is no reported case in which a maritime lien on a vessel for money advanced to purchase necessary supplies, or to pay for them after they were purchased, has been sustained, unless the money was actually used for the purpose for which it was borrowed. I do not remember such a case; but it is equally true that no case can be cited except *The Wyoming* in which there has been a claim for a maritime lien for money advanced to the captain of a vessel to purchase necessary supplies, etc., or pay for those already purchased, and the lien defeated because, and only because, the money had not been actually used by the captain or other officers of the vessel to buy or pay for the necessary supplies, etc., for which it was borrowed by him and loaned by the claimant of a lien. The absence of such cases only proves the rarity of the misconduct of captains of vessels in the distribution of money thus borrowed. The fact that, when the circumstances are such as to authorize a captain of a vessel to create a tacit hypothecation of his vessel for advances of money, he also becomes bound personally to the lender for the advances prevents any misuse of the money should he be inclined to do so. The right of the master of a vessel to tacitly hypothecate his vessel for money advanced, under certain circumstances and surroundings, has been expressly recognized. *Thomas v. Osborn*, 19 How. 28; *Davis v. Child*, 2 Ware, 78; *The William & Emmeline*, Blatchf. & H. 66. If, however, a lender of money to the master of a vessel in a foreign port is only to have such maritime liens as his money in the hands of the captain buys, either by the purchase of necessary supplies, etc., for the vessel, or the payment of supply and other bills which already have a maritime lien, then the circumstances under which

the money is loaned to the captain is of no moment, and his authority to hypothecate the vessel for money advanced the vessel, except on a bottomry bond, is practically denied.

If subrogation to the maritime liens of others is the only privilege which the lender of money to a vessel in a foreign port has, it cannot be said that he gets a maritime lien for the money at all. The money loaned does not create the lien upon this theory, but only gives the captain of the vessel, who is the agent of the owners of the vessel, the money with which to buy lien claims against the vessel for the benefit of the lender of the money.

This theory is, we think, directly in opposition to the language of the supreme court in *Thomas v. Osborn*, 19 How, 28, in which the court, by Justice CURTIS, say:

"We understand it to be definitely settled. * * * that by the law of England the master of a ship has not power to create a lien on the vessel as security for the payment for repairs and supplies obtained in a foreign port save by a bottomry bond; that he can only pledge his own credit and that of his owners, but cannot, by any act of his, give to the creditor security on the vessel, while at the same time the personal liability of the owners continues. * * * These decisions rest merely upon the want of authority in the master, according to the law of England, to create by his own act an absolute hypothecation of the vessel as security for a loan. But the maritime law of the United States is settled otherwise in harmony with the ancient and general maritime law of the commercial world. The master of a vessel of the United States, being in a foreign port, has power, in a case of necessity, to hypothecate the vessel, and also to bind himself and owners personally for repairs and supplies; and he does so without any express hypothecation, when, in case of necessity, he obtains them on the credit of the vessel without a bottomry bond. * * * It is not material whether the hypothecation is made directly to the furnishers of repairs and supplies, or to one who lends money on the credit of the vessel, in a case of necessity, to pay such furnishers."

The court distinctly recognizes the right of the captain of a vessel to hypothecate his vessel in that case either to furnishers of supplies and repairers or to one who lends money to pay such furnishers, and there is no intimation that the lender of money only gets a hypothecation of the vessel if the money thus borrowed is used to pay for supplies and repairs, and then to the extent only of the lien which the furnishers and repairers would have had if their debts had not been paid.

This theory of subrogation must lead to the denial of the captain's right to create tacit maritime liens on his vessel for money advanced to him under any circumstances, or to declare that the money, when advanced to a captain, only creates a maritime lien where and to the extent it is actually used by the captain for necessary repairs and supplies of the vessel. In this latter proposition, the captain, who is selected by the owners of the vessel as their agent, becomes the agent of the lender of the money to buy for him maritime liens as against his vessel and the owners, whose agent he is, and whose interest he was selected to represent. This, we think, cannot be; and it must be maintained either that a captain has no authority under any circumstances to hypothecate his vessel for money borrowed, except on a bottomry bond, or that, if the facts and circumstances surrounding a captain and his vessel authorize

the borrowing of money on the credit of his vessel, what he afterwards does with the money is not material to the creation of a maritime lien. Subrogation is not the basis of the maritime liens given a lender of money to the captain of a vessel, and such a doctrine is not sustained either by reason or authority.

The libelants, M. Nippert & Co., have a maritime lien on the tow-boat Williams, her tackle, etc., for their entire advances, except the \$2,000 sent to the Grand Lake Coal Company, and may have an order withdrawing from the registry the amount of their said advances, with interests and costs.

THE JACOB BRANDOW.

SCHIAFFINO *v.* THE JACOB BRANDOW.

(District Court, D. South Carolina. July 3, 1889.)

TOWAGE—DUTIES AND LIABILITIES OF TUGS.

A tug, with a bark in tow, the master of the latter having been expressly instructed to follow the course of the tug, proceeded obliquely across a stream to within a short distance of the bank, then changed its course, and, without further direction to the bark, proceeded parallel with the bank. The bark, though in full sight of the tug's change of course, continued on the oblique course, and ran ashore. *Held*, that the tug was not liable for the damages.

In Admiralty. Libel for damages caused by negligence of tug.

J. P. K. Bryan, for libelant.

J. N. Nathans, for respondent.

SIMONTON, J. The Cassabona came to this port with a cargo of sulphur for the Etiwan Phosphate Company. The company engaged the tug Brandow to tow the bark up Cooper river, to its works on Ship-Yard creek. This creek—about 150 feet wide—runs into Cooper river between mud-banks, which are covered with salt marsh to the water's edge. It has several bends in it. Just before the Etiwan landing is reached, there is a considerable bend. In order to pass it, vessels go nearly to the opposite bank, coming into full view of the landing. There they change their course obliquely across the creek, and, approaching the bank at a point about 700 feet from the landing, proceed on a course parallel to the bank of the creek, straight to the landing. When the tug took hold of the bark her master instructed the interpreter who had been engaged to translate his orders that the bark must follow the course of the tug. He then, with a tow-line 180 feet long, proceeded up Cooper river with the bark, and turned into and up Ship-Yard creek. During the towing, the master of the bark, with his interpreter, stood on the forward part of the bark, in easy hearing distance. The tug-master gave such orders as he deemed necessary, which were at once interpreted to the master. The latter extended them to the men at the wheel,—the mate and a seaman. No orders were given but such as came from the tug. Nothing of importance happened until the last bend was reached. This bend was on their left. The tug, in advance, drawing some nine feet of water,

rounded the bend as has been described. Then she changed direction. The bark, following, approached the opposite bank, and when she had approached sufficiently near she got orders from the tug to change direction, and was put on the course obliquely across the creek. When the tug got within between 15 and 20 feet of the bank it straightened out on the course parallel to the bank, going to the landing. The bark pursued her oblique course without change, and approached the marsh within 15 feet. The tug-master, observing this, called out: "Where are you going? Have you no rudder on that bark? Port." Attempting to obey this order, the bark found herself aground. The tug, not being able to pull her off, proceeded to the landing and procured two lighters, which she towed along-side the bark. She then left for Charleston, and never came back. The bark, fearing a careen, put out four lines, which parted. The next afternoon, at high water, she got off with her own appliances, having been ashore 24 hours. She reached the landing, and discharged cargo. Neither the master of the bark nor his interpreter had ever been up the creek. The tug-master knew it well. This action is for damages sustained by reason of the negligence of the tug-master. The contract was between the Etiwan Company and the tug. The action is not on the contract. It proceeds upon the duty imposed by law upon the tug not to cause injury to her tow. *The M. J. Cummings*, 18 Fed. Rep. 178. The responsibility of a tug to her tow cannot be better expressed than in the language used by the supreme court in *The Margaret*, 94 U. S. 494:

"The tug was not a common carrier; * * * she was not an insurer. The highest possible degree of skill and care were not required of her. She was bound to bring to the performance of the duty she assumed reasonable skill and care, and to exercise them in everything relating to the work until it was accomplished. * * * The tug was the dominant mind and will in the adventure. It was the duty of the brig to follow her guidance, to keep as far as possible in her wake, and to conform to her directions. The exercise of reasonable skill and care within this sphere was incumbent on the tow."

That is to say, both the tug and the tow must exercise reasonable care and skill. The former dominates, guides, and directs. The latter follows her guidance, keeps in her wake, and conforms to her directions. When the tug and tow had rounded the bend, the former gave the order which changed the direction of the bark obliquely across the creek. She followed this direction, and kept it, notwithstanding that it carried her certainly into the bank. She could see that the tug had straightened her course parallel to the bank. She was under specific directions to follow in the wake of the tug. She was not a barge not manned, blindly following the impulse of the tow-line. She had an intelligent master, mate, and an experienced crew. She steered well. While the tug was bound to exercise reasonable skill and care, she had the right to expect corresponding care and skill on the part of the tow. She was not bound to repeat positive orders; nor, when they were in the open creek, past the bends, was she bound to exercise unnecessary vigilance to see that the tow was in her wake. The tow did not follow this direction. In consequence of her negligence in this regard she took the bank. The libel is dismissed.

*In re NEAGLE.**(Circuit Court, N. D. California. September 16, 1889.)*

1. UNITED STATES COURTS—JURISDICTION—HABEAS CORPUS.

Under the provisions of sections 751-753, Rev. St., the courts of the United States and their judges have jurisdiction; upon a writ of *habeas corpus*, to inquire into the cause of the imprisonment of the petitioner; and if, upon such inquiry, he is found to be "in custody for an act done or omitted, in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom, or under what authority, the process under which he is held may have issued; the constitution, and laws of the United States made in pursuance thereof, being the supreme law of the land.

2. SAME.

In the exercise of this jurisdiction, there is no conflict of authority between the state and the United States. The laws of the United States being the supreme law of the land, the authority of the state, in such cases, is subordinate, and that of the United States paramount.

3. CONSTITUTIONAL LAW—STATE LAWS.

A state law which contravenes a valid law of the United States is void. In legal contemplation, there can no more be two valid conflicting laws, operating upon the same subject-matter, at the same time, than, in physics, two bodies can occupy the same space at the same time.

4. SAME—LAWS OBSTRUCTING UNITED STATES OFFICER.

The United States is a government, with authority extending over the whole territory of the Union, acting upon the states, and the people of the states. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No state can exclude it from exercising those powers, obstruct its authorized officers, against its will, or withhold from it the cognizance of any subject which the constitution has committed to it.

5. SAME.

The constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts to enforce rights derived thereunder is as extensive as the territory to which they are applicable.

6. SAME—RIGHT OF NATIONAL GOVERNMENT TO PRESERVE ORDER.

The national government has power to command obedience to its laws, to preserve order, and to keep the peace, in matters affecting national interests, and no person or power in the land has a right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.

7. SAME—PROTECTION OF JUDGES.

It is within the power of the government of the United States to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. It is therefore empowered to protect the lives of the judges of its courts from assault and assassination, on account of their judicial decisions, by desperate, disappointed litigants, not only while actually holding court, but while such judges are traveling through their circuits for the purpose of holding courts at the different places therein appointed by law for that purpose.

8. POWERS OF UNITED STATES MARSHAL.

An assault upon, or an assassination of, a judge of the United States court, while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the United States marshal or his deputies to prevent, as a peace-officer of the national government.

9. SAME.

By section 788, Rev. St., and the several provisions of the statutes of California prescribing the duties of sheriffs, by that section made applicable to
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marshals. the United States marshal is made a peace-officer, and, as such, he is authorized to preserve the peace so far as a breach of the peace affects the authority of the United States, and obstructs the operations of the government and its various departments. The courts of the United States must be enabled fully to perform all the functions imposed upon them by the constitution and laws, without hindrance or obstruction, and they have the inherent power to protect themselves by and through their executive officers, under the direction and supervision of the attorney general and the president, against obstruction and hindrance in the performance of their judicial duties.

10. **SAME—HOMICIDE BY MARSHAL—HABEAS CORPUS—JURISDICTION.**

Where a deputy United States marshal, acting under instructions from his superior officers,—the United States marshal and the attorney general,—in protecting the life and person of a justice of the supreme court of the United States from a murderous assault, made on account of his judicial decisions, at the hands of a dissatisfied litigant, finds it necessary to take the life of the assailant, and is arrested by the state authorities, and held upon a charge of murder for such act, the United States circuit court may, upon *habeas corpus*, discharge such United States officer from the custody of the state authorities, upon it being shown that the homicide was necessary, or that it was reasonably apparent to the mind of the deputy-marshal, at the time and under the circumstances surrounding him, that the killing was necessary in order to protect and defend the justice from great bodily injury, or to save his life.

11. **SAME.**

The homicide in such case, if an offense at all, is an offense under the laws of the state, and only the state can deal with it, in that aspect. It is not claimed to be a crime punishable under the laws of the United States. But the homicide, when necessarily committed by a deputy-marshal in the performance of his duty, in protecting the life and person of a justice of the United States supreme court from assault and violence because of his judicial decisions, is an "act done in pursuance of a law of the United States," and is not and cannot, therefore, be an offense against the laws of the state, no matter what the statute of the state may be; the laws of the United States being the supreme law of the land.

12. **SAME.**

It is the exclusive province of the United States courts to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore the prerogative of the national courts to construe the national statutes, and determine, upon *habeas corpus*, whether a homicide for which the petitioner is charged with murder by the state authorities was the result of an "act done in pursuance of a law of the United States;" and, when that question has been determined in the affirmative, the prisoner will be discharged, and the state has nothing more to do with the matter.

13. **IMPLIED POWERS OF THE NATIONAL GOVERNMENT.**

All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the various departments of the government, without which the government could not perform functions necessary to its existence. The exercise of such powers is, nevertheless, in pursuance of the laws of the United States.

14. **SAME—STATUTES—CONSTRUCTION**

When statutes confer powers, impose duties, and provide for the accomplishment of various objects, they are necessarily couched in general terms, but they carry with them, by implication, all the powers, duties, and exemptions necessary to accomplish the objects thereby sought to be attained.

15. **ACTS OF HEADS OF GOVERNMENTAL DEPARTMENTS.**

The acts of the heads of departments of the United States government, in the line of their duties, are, in contemplation of law, the acts of the president himself.

16. **HOMICIDE—KILLING IN DEFENSE OF ANOTHER.**

A party resisting a murderous assault, where several lives are in danger, being in the best position to judge as to the dangers and requirements of the occasion, is the one to determine when the proper moment has arrived, in self-defense, to slay his assailant, in order to be justified by the law; and if he acts in good faith, with reasonable judgment and discretion, the law will

justify him, even though he errs. Where several lives are in danger from the assault of a powerful, infuriated, desperate man, common prudence would dictate that the party assailed should fire a second or two too soon, rather than a fraction of a second too late.

Habeas Corpus.

This is an application for the discharge of David Neagle upon a writ of *habeas corpus*. It arises out of the following facts: On the third of September, 1888, certain cases were pending in the circuit court of the United States for the Northern district of California, between Frederick W. Sharon, as executor, against David S. Terry and Sarah Althea Terry, his wife, and between Francis G. Newlands, as trustee, and others, against the same parties, on demurrers to bills to revive and carry into execution the final decree of the court in the suit of *William Sharon v. Sarah Althea Hill*, and were decided on that day. That suit was brought to have an alleged marriage contract between the parties adjudged to be a forgery, and obtain its surrender and cancellation. The decree rendered adjudged the alleged marriage contract to be a forgery, and ordered it to be surrendered and canceled. The decree was rendered after the death of William Sharon, and was therefore entered as of the day when the case was submitted to the court. By reason of the death of Sharon, it was necessary, in order to execute the decree, that the suit should be revived. Two bills were filed,—one by the executor of the estate of Sharon; and the other, a bill of revivor and supplemental by Newlands, as trustee, for that purpose. In deciding the cases, the court gave an elaborate opinion upon the questions involved, and, while it was being read, certain disorderly proceedings took place, for which the defendants, David S. Terry and his wife, were adjudged guilty of contempt, and ordered to be imprisoned. The following is an accurate statement of those proceedings, slightly condensed from the opinion of the court delivered on the subsequent application of David S. Terry to have the order of commitment revoked. For the whole proceeding, see *In re Terry*, 36 Fed. Rep. 419.

Shortly before the court opened, the defendants came into the courtroom, and took their seats within the bar at the table next to the clerk's desk, and almost immediately in front of the judges; the defendant David S. Terry being at the time armed with a bowie-knife, concealed on his person, and the defendant Sarah Althea, his wife, carrying in her hand a small satchel, which contained a revolver of six chambers, five of which were loaded. The court at the time was held by the justice of the supreme court of the United States allotted to this circuit, who was presiding, the United States circuit judge of this circuit, and the United States district judge of the district of Nevada, called to this district to assist in holding the circuit court. Almost immediately after the opening of the court, the presiding justice commenced reading its opinion in the cases mentioned, but had not read more than one-fourth of it when the defendant Sarah Althea Terry arose from her seat, and asked him, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled. The presiding justice replied:

"Be seated, madam." She repeated the question, and was again told to be seated. She then cried out, in a violent manner, that the justice had been bought, and wanted to know the price he held himself at; that he had got Newlands' money for his decision, and everybody knew it,—or words to that effect. It is impossible to give her exact language. The judges and parties present differed as to the precise words used, but all concurred as to their being of an exceedingly vituperative and insulting character. The presiding justice then directed the marshal to remove her from the court-room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect. The marshal thereupon proceeded towards her to carry out the order for her removal, and compel her to leave, when the defendant David S. Terry rose from his seat, evidently under great excitement, exclaiming, among other things, that "no living man shall touch my wife," or words of that import, and dealt the marshal a violent blow in his face. He then unbuttoned his coat, and thrust his hand under his vest, where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The marshal then removed Mrs. Terry from the court-room. Soon afterwards Mr. Terry was allowed to rise, and was accompanied by officers to the door leading to the corridor on which was the marshal's office. As he was about leaving the room, or immediately after stepping out of it, he succeeded in drawing his knife, when his arms were seized by a deputy-marshal and others present, to prevent him from using it, and they were able to take it from him only after a violent struggle. The petitioner, Neagle, wrenched the knife from his hand, while four other persons held on to the arms and body of Terry, one of whom presented a pistol to his head, threatening at the same time to shoot him if he did not give up the knife. To these threats Terry paid no attention, but held on to the knife, actually passing it during the struggle from one hand to the other. Mr. Cross, a prominent attorney, who on that occasion sat next to Mrs. Terry, a little to her left and rear, testifies that, just before she arose to interrupt Justice Field, she nervously worked at the clasp of a small satchel about nine inches long, and tried to open it; and not succeeding, in consequence of her excitement, she hastily sprang to her feet, and interrupted the justice, as hereinbefore stated. Knowing that she had before drawn a pistol from a similar satchel in the master's room, he concluded at this time that she was trying to get her pistol out, and he consequently held himself in readiness to seize her arm as soon as it should appear, and endeavor to prevent its use until he could get assistance, his right arm being partially disabled. For one occasion in the master's office, see *Sharon v. Hill*, 11 Sawy. 123, 24 Fed. Rep. 726. At this time Mrs. Terry sat directly in front of Justice Field and the circuit judge, less than four yards from either. A loaded revolver was afterwards taken from this satchel by the marshal. For their conduct and resistance to the execution of the order of the court, the defendants, Sarah Althea Terry and David S. Terry, were adjudged guilty

of contempt, and ordered to be imprisoned, the former for thirty days, and the latter for six months.

In consequence of the imprisonment which followed, various threats of personal violence to Justice Field and the circuit judge were made by Terry and his wife. Those threats were that they would take the lives of both of those judges. Those against Justice Field were sometimes that they would take his life directly; at other times, that they would subject him to great personal indignities and humiliations, and, if he resented it, they would kill him. These threats were not made in ambiguous terms, but openly and repeatedly, not to one person, but to many persons, until they became the subject of conversation throughout the state, and of notice in the public journals. Reports of these threats through the press, and through reports of the United States marshal and United States attorney, reached Washington, and in consequence of them the attorney general thought proper to give instructions to the marshal of the United States for the Northern district of California to take proper measures to protect the persons of those judges from violence at the hands of Terry and his wife. On the return of Justice Field from Washington to attend his circuit in June last, the probability of an attack by Judge Terry upon him was the subject of conversation throughout the state, and of notices in some of the journals in the city of San Francisco. It was the general expectation that, if Judge Terry met Justice Field, violence would be attempted upon the latter. In consequence of this general belief and expectation, and the fact that the attorney general of the United States had given instructions to the marshal to see that the persons of Justice Field and of the circuit judge should be protected from violence, the marshal of the Northern district appointed the petitioner in this case, David Neagle, to accompany Mr. Justice Field while engaged in the performance of his duties, and while passing from one district to another within his circuit, so as to guard him against the threatened attacks. He was specially commissioned as a deputy by Mr. Franks, whose instructions to him were that he should protect Justice Field at all hazards, and, knowing the violent and desperate character of Terry, that he should be active and alert, and be fully prepared for any emergency, but not to be rash; and, in case any violence was attempted from any one, to call upon the assailant to stop, and to inform him that he was an officer of the United States. Judge Terry was a man of great size and strength, who had the reputation of being always armed with a bowie-knife, in the use of which he was specially skilled, and of showing great readiness to draw and use it upon persons towards whom he entertained any enmity, or had any grievance, real or fancied.

On the 8th of August, 1889, Justice Field left San Francisco for Los Angeles, in order to hear a *habeas corpus* case which was returnable before him at that city on the 10th of August, and also to be present at the opening of the court on the 12th. He was accompanied by Deputy-Marshal Neagle, the petitioner. Justice Field heard the *habeas corpus* case on the 10th of August. On the 12th of August he opened the circuit court, Judge Ross sitting with him, and he delivered on the lat-

ter day an opinion in an important land case, and also an opinion in the *habeas corpus* case. On the following day the court heard an application for an injunction in an important water case from San Diego County. No other cases being ready for hearing before the circuit court, he took the train on Tuesday, the 13th, at 1:30 o'clock in the afternoon, for San Francisco, where he was expected to hear a case then awaiting his arrival immediately upon his return, being accompanied on his return by Deputy-Marshall Neagle. On the morning of the 14th, between the hours of 7 and 8, the train arrived at Lathrop, in San Joaquin county, which is in the Northern district of California, a station at which the train stopped for breakfast. Justice Field and the deputy-marshal at once entered the dining-room there to take their breakfast, and took their seats at the third table in the middle row of tables. Justice Field seated himself at the extreme end, on the side looking towards the door. The deputy-marshal took the next seat on the left of the justice. What subsequently occurred is thus stated in the testimony of Justice Field:

"A few minutes afterwards, Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly, and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was, 'There is Judge Terry and his wife.' He remarked: 'I see him.' Not another word was said. I commenced eating my breakfast. I saw Judge Terry take his seat. In a moment or two afterwards I looked round, and saw Judge Terry rise from his seat. I supposed at the time he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came round back of me,—I did not see him,—and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard 'Stop! stop!' cried by Neagle. Of course, I was for a moment dazed by the blows. I turned my head round, and I saw that great form of Terry's, with his arm raised, and his fists clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, 'Stop! stop! I am an officer.' Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around, and saw Terry on the floor. I looked at him, and saw that peculiar movement of the eyes that indicates the presence of death. Of course, it was a great shock to me. It is impossible for any one to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected, and I was. I looked at him for a moment, then rose from my seat, went around, and looked at him again, and passed on. Great excitement followed. A gentleman came to me whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said: 'What is this?' I said: 'I am a justice of the supreme court of the United States. My name is Judge Field. Judge Terry threatened my life, and attacked me, and the deputy-marshal has shot him.' The deputy-marshal was perfectly cool and collected, and stated: 'I am a deputy-marshal, and I have shot him to protect the life of Judge Field.' I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterwards the deputy-marshal said to me: 'Judge, I think you had

better go to the car.' I said: 'Very well.' Then this gentleman, Mr. Lidgerwood, said: 'I think you had better;' and with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The marshal went with me, remained for some time, and then left his seat in the car, and, as I thought, went back to the dining-room. (This is, however, I am told, a mistake, and that he only went to the end of the car.) He returned, and either he or some one else stated that there was great excitement; that Mrs. Terry was calling for some violent proceedings. I must say here that, dreadful as it is to take life, it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that, had the marshal delayed two seconds, both he and myself would have been the victims of Terry."

In answer to a question whether he had a pistol or other weapon on the occasion of the homicide, Justice Field replied: "No, sir. I have never had on my person, or used, a weapon since I went on the bench of the supreme court of the state, on October 13, 1857, except once." That was on an occasion when he crossed the Sierra Nevada mountains, in 1862. "With that exception, I have not had on my person, or used, a pistol or other deadly weapon."

Mr. Neagle, in his testimony, stated that, before the train arrived at Fresno, he got up and went out on the platform, leaving the train, and there saw Judge Terry and his wife get on the cars; that when the train arrived at Merced he spoke to the conductor, Woodward, and informed him that he was a deputy United States marshal; that Judge Field was on the train, and also Judge Terry and his wife, and that he was apprehensive that when the train arrived at Lathrop there would be trouble between those parties; and inquired whether there was any officer at that station, and was informed, in reply, that there was a constable there; that he then requested the conductor to send word to the officer to be at Lathrop on the arrival of the train, and that he also applied to other parties to induce them to endeavor to secure assistance for him at that place, in case it should be needed. The deputy-marshal further stated that, when the train arrived at Lathrop, Justice Field went into the dining-room, he accompanying the justice; that they took seats at a table; that, shortly after they were seated, Judge Terry and his wife entered the dining-room, his wife following him several feet in the rear; that, when the wife reached a point nearly opposite Justice Field, she turned around, and went out rapidly from the room, and, as appeared from what afterwards followed, she went to the car to get her satchel. When she returned from the car, the satchel was taken from her, and it was found to contain a pistol—revolver—containing six chambers, all of which were loaded with ball. This pistol lay on the top of the other articles in the satchel. The witness further stated that Judge Terry passed down, opposite Justice Field, to a table below where they were sitting; that in a few minutes, while Justice Field was eating, Judge Terry rose from his seat, went around behind him,—the justice not seeing him at the time,—and struck him two blows, one on the side, and the other on the back, of the head; that the second blow followed the other immediately; that one was given with the right hand, and the other

with the left; that Judge Terry then drew back his hand, with his fist clenched, apparently to give the justice a violent blow on the side of his head, when he (Neagle) sprang to his feet, calling out to Terry: "Stop! Stop! I am an officer;" that Terry bore at the time on his face an expression of intense hate and passion, the most malignant the witness had ever seen in his life, and that he had seen a great many men in his time in such situations, and that the expression meant life or death for one or the other; that as he cried out those words: "Stop! Stop! I am an officer," he jumped between Terry and Justice Field, and at that moment Judge Terry appeared to recognize him, and instantly, with a growl, moved his right hand to his left breast, to the position where he usually carried his bowie-knife; that, as his hand got there, the deputy-marshal raised his pistol, and shot twice in rapid succession, killing him almost instantly. He further stated that the position of Judge Field was such—his legs being at the time under the table, and he sitting—that it would have been impossible for him to have done anything, even if he had been armed; and that Judge Terry had a very furious expression, which was characterized by the witness as that of an infuriated giant. He also added that his cry to him to stop was so loud that it could be heard throughout the whole room, and that he believed that a delay in shooting of two seconds would have been fatal both to himself and Justice Field.

The facts thus stated in the testimony of Justice Field and the petitioner were corroborated by the testimony of all the witnesses to the transaction. The petitioner soon afterwards accompanied Justice Field to the car, and while in the car he was arrested by a constable, and at the station below Lathrop was taken by that officer from the car to Stockton, the county-seat of San Joaquin county, where he was lodged in the county jail. Mr. Justice Field was obliged to continue on to San Francisco without the protection of any officer. On the evening of that day, Mrs. Terry, who did not see the transaction, but was at the time outside of the dining-room, made an affidavit that the killing of Judge Terry was murder, and charged Justice Field and Deputy-Marshal Neagle with the commission of the crime. Upon this affidavit, a warrant was issued by a justice of the peace at Stockton against Neagle, and also against Justice Field. Subsequently, after the arrest of Justice Field, and after his being released by the United States circuit court on *habeas corpus* upon his own recognizance, the proceeding against him before the justice of the peace was dismissed, the governor of the state having written a letter to the attorney general of the state, declaring that the proceeding, if persisted in, would be a burning disgrace to the state, and the attorney general having advised the district attorney of San Joaquin county to dismiss it. There was no other testimony whatever before the justice of the peace, except the affidavit of Sarah Althea Terry, upon which the warrant was issued.

In the suit of William Sharon against Mrs. Terry in the circuit court of the United States, it was adjudged that the alleged marriage contract between her and Sharon, produced by her, was a forgery, and it was

held that she had attempted to support it by perjury and subornation of perjury. She had also made threats during the past year, and up to the time of the shooting of Judge Terry, that she would kill the circuit judge and Justice Field, and she repeated that threat up to the time she made her affidavit for the arrest of Justice Field and Neagle; and that she had made such threats was a notorious fact in Stockton and throughout the state. The petition was accordingly presented, on behalf of Neagle, to the circuit court of the United States, for a writ of *habeas corpus* in this case, alleging, among other things, that he was arrested and confined in prison for an act done by him in the performance of his duty, namely, the protection of Mr. Justice Field, and taken away from the further protection which he was ordered to give to him. The writ was issued, and upon its return the sheriff of San Joaquin county produced a copy of the warrant issued by the justice of the peace of that county, and of the affidavit of Sarah Althea Terry, upon which it was issued. A traverse to that return was then filed in this case, presenting various grounds why the petitioner should not be held, the most important of which were that an officer of the United States, specially charged with a particular duty, that of protecting one of the justices of the supreme court of the United States while engaged in the performance of his duty, could not, for an act constituting the very performance of that duty, be taken from the further discharge of his duty, and imprisoned by the state authorities; and that when an officer of the United States, in the discharge of his duties, is charged with an offense consisting in the performance of those duties, and is sought to be arrested, and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer, and the fact there inquired into. The attorney general of the state appeared with the district attorney of San Joaquin county, and contended that the offense of which the petitioner is charged could only be inquired into before the tribunals of the state. The question of the jurisdiction of the national tribunal to interfere in the matter was elaborately argued by counsel; the attorney general of the state and Mr. Langhorne appearing with the district attorney of San Joaquin county on behalf of the state, and Mr. Carey, United States attorney, and Messrs. Herrin, Mesick, and Wilson appearing on behalf of the petitioner. The latter did not pretend that any person in this state, high or low, who committed a crime, might not be tried by the local authorities, if it were a crime against the state; but that when, in the performance of his duties, that alleged crime consisted in an act which is deemed a part of the performance of a duty devolved upon him by the laws of the United States, it was within the competency of the national tribunals to determine, in the first instance, whether that act was a duty devolving upon him, and, if it was a duty devolving upon him, the officer had committed no offense against the state, and was entitled to be discharged.

John T. Carey, U. S. Atty., Richard S. Mesick, Samuel M. Wilson, Wm. F. Herrin, W. L. Dudley, C. L. Ackerman, J. C. Campbell, and H. C. McPike, for petitioner.

G. A. Johnson, Atty. Gen., J. P. Langhorne, and Avery C. White, Dist. Atty., for respondent.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

SAWYER, J., (SABIN, D. J., *concurring*.) The petitioner has sued out a writ of *habeas corpus*, returnable before the court, alleging that he is unlawfully deprived of his liberty and imprisoned by virtue of a warrant issued by a justice of the peace of San Joaquin county, in this state, charging him with a felonious homicide, while the act thus characterized was a lawful act performed in the discharge of his duties as an officer of the United States; and the first question presented is whether this court has jurisdiction to inquire into the truth of that allegation.

Upon the question of jurisdiction, section 751, Rev. St., provides that "the supreme court and the circuit and district courts shall have power to issue writs of *habeas corpus*;" and section 752 further provides that "the several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." There is no limit in these provisions to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person. But section 753 prescribes some limitations, among which is "that the writ shall not extend to a prisoner in jail, * * * unless he is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court thereof, or in custody in violation of the constitution, or of a law or treaty of the United States," and this legislation, in the language of the chief justice, in *McCardle's Case*, 6 Wall. 325, 326, in commenting upon the same provisions in a prior act, "is of the most comprehensive character. It brings within the *habeas corpus* jurisdiction of every court, and of every judge, every possible case of privation of liberty, contrary to the national constitution, treaties or laws. It is impossible to widen this jurisdiction." And again, in *Ex parte Royall*, 117 U. S. 249, 6 Sup. Ct. Rep. 734, the supreme court says:

"As the judicial power of the nation extends to all cases arising under the constitution, the laws and treaties of the United States; as the privilege of the writ of *habeas corpus* cannot be suspended unless when in cases of rebellion or invasion, the public safety may require it; and as congress has power to pass all laws necessary and proper to carry into execution the powers vested by the constitution in the government of the United States, or in any department or officer thereof; no doubt can exist as to the power of congress thus to enlarge the jurisdiction of the courts of the union, and of their justices and judges. That the petitioner is held under the authority of a state cannot affect the question of the power or jurisdiction of the circuit court, to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the constitution. The grand jurors who found the indictment, the court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all equally with individual citizens, under a duty, from the discharge of which the state could not release them, to respect and obey the supreme law of the land, 'anything in the constitution and laws of any state to the contrary notwithstanding,' and that equal power does not belong to the courts and judges of the several states;

that they cannot under any authority conferred by the states, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government acting under its laws, results from the supremacy of the constitution and laws of the United States. *Ableman v. Booth*, 21 How. 506; *Tarble's Case*, 13 Wall. 397; *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. Rep. 544. We are, therefore, of opinion that the circuit court has jurisdiction upon writ of *habeas corpus* to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the constitution."

In the exercise of this jurisdiction there is no conflict between the authority of the state and of the United States. The state in such cases is subordinate, and the national government paramount. "The constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes obedience, whether in his individual or official capacity." *Siebold's Case*, 100 U. S. 392. See, also, *Tennessee v. Davis*, Id. 257, 258. The exclusive authority of the state to determine whether an offense has been committed against the laws of the state is now earnestly pressed upon our attention. In *Siebold's Case* the court says:

"It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his state government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the state governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties than is proper to be exercised towards the state governments. Its powers are limited in number, and clearly defined, and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the national and state governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other." 100 U. S. 394. See Id. 266, 267.

This court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or omitted in pursuance of a law of the United States," then he is in custody in violation of the constitution and laws of the United States, and he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued—the constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the state of California, and the state, only,

can deal with it, *as such, or in that aspect*. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle, was an "act done * * * in pursuance of a law of the United States," within the powers of the national government, then it *is not*, and it *cannot* be, an offense against the laws of the state of California, no matter what the statute of the state may be, the laws of the United States being the supreme law of the land. A state law, which contravenes a valid law of the United States, is, in the nature of things, necessarily void—a nullity. It must give place to the "supreme law of the land." In legal contemplation, there can no more be two valid laws, which are in conflict, operating upon the same subject-matter, at the same time, than, in physics, two bodies can occupy the same space at the same time. But, as we have seen by the authorities cited, it is the exclusive province of the judiciary of the United States, to, ultimately, and, conclusively, determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the national courts to, conclusively, construe the national statutes, and determine, whether the homicide in question, was the result of an "act done in pursuance of a law of the United States," and, when that question has been determined in the affirmative, the petitioner must be discharged, and the state has nothing more to do with the matter. All we claim, is, the right to determine the question, was the homicide the result of "an act done in pursuance of a law of the United States?" and if so, discharge the petitioner. As incidental to, and involved in, that question, it is necessary to inquire, whether the act of the petitioner, was performed under such circumstances as to justify it. If it was, then, he was in the line of his duty. If not, then, he acted outside his duty. We do not make the inquiry, at all, for the purpose of determining, whether the act was an offense, or justifiable under the statutes of the state. We do not assume to consider the case, in that aspect, at all. We simply determine, whether it was an act, performed in pursuance of a law of the United States. Nor do we act, in this matter, because we have the slightest doubt, as to the impartiality of the state courts, and their ability, and disposition, to, ultimately, do exact justice to the petitioner. We have not the slightest doubt, or apprehension in that particular; but, there is a principle involved. The question, is, has the petitioner *a right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority, and duty, a *further right*, to be protected, by that sovereignty, whose servant he is, and whose laws he was executing? If he has that right, then, there is no encroachment upon the state jurisdiction, and this court must, necessarily, entertain his petition, and determine his rights under it, and under the laws of the United States. It has no discretion. It cannot decline to hear him without an utter disregard of one of the most important duties imposed upon it by the constitution, and laws of the United States. What the state tribunals might, or might not, do, in this particular instance, is not a matter for a moment's consideration.

The question, is, what are the rights of the petitioner, as to having his case heard, and disposed of, in the courts of the sovereignty, whose

servant he is, and whose laws he was employed in executing. If he has a right to be heard in this court, then, we must hear him, willing, or unwilling. There is no alternative. Whether the writ should issue, in this case, was not a question of "expediency," and whether the petitioner shall be discharged, or remanded, is not a question of "policy," or "comity," as suggested in some quarters. It is a question of *personal right, and personal liberty*, arising under the constitution, and laws of the United States, which the court cannot ignore. There is a class of cases, of which *Ex parte Royall* is an example, in which the court may exercise a discretion, as to the *time* of interference, but, in our opinion, this is not one of them. *Ex parte Royall*, 117 U. S. 251, 6 Sup. Rep. 734. But, if it rests in our discretion to discharge, or remand, the petitioner to the state courts, to be, there, first tried for an offense against the state, while we are satisfied, that he is entitled to be discharged, to what useful end would he be sent back, since, upon being tried, and convicted, he would still be discharged by the national courts on *habeas corpus*, if the act should appear to them to have been performed in pursuance of a law of the United States? This would be, but to put the state to *great, useless expense*, and subject the petitioner, if guilty of no offense, to unjust imprisonment, in violation of his legal rights, until his trial could be had, and his writ of *habeas corpus* afterwards, again, sued out, heard and decided, when the result, in all probability, would, at last, be the same. Evidently, public justice demands, that the case should be "summarily" decided, now, as required by section 761, Rev. St. The court has no right to trifle with the petitioner's constitutional rights by, unnecessarily, subjecting him to unjust imprisonment, great expense, and vexatious delays. In case of a remand, and conviction, the national courts must hear and decide the case, at last. Far better for all concerned, that they should decide it, now, and, forever, end it. We have no desire to usurp a jurisdiction, that does not belong to us. We have enough to do, in exercising the admitted jurisdiction conferred upon us, without seeking to enlarge it in the smallest particular, but we must perform our duty, as we understand it, be the consequences, what they may.

The statutes of the United States, also make, ample provision for giving full effect to the jurisdiction of this court, in cases where the petitioner alleges, that he is restrained of his liberty, in violation of the constitution, or of a law of the United States, in section 766, which reads as follows, to-wit:

"Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any state court, or by or under the authority of any state, for any matter so heard and determined, or in process of being heard and determined, under such writ of *habeas corpus*, shall be deemed null and void."

It is, therefore, only necessary, in order to dispose of the case, to inquire, and ascertain, whether the petitioner is in custody for an act done in pursuance of a law of the United States.

As we have seen from the statement of facts, Mr. Justice Field, of the United States supreme court, allotted to the Ninth circuit, was traveling, officially, from one part of his circuit to another, in pursuance of the requirements of the statutes of the United States, for the purpose of holding a circuit court. By reason of threats against his life, made by dissatisfied litigants, generally, known, and published in the newspapers, and brought to the knowledge of the United States marshal for the northern district of California, and by him called to the attention of the attorney general of the United States, that officer directed the marshal to furnish the justice with protection, while thus engaged in the performance of his judicial duties, on the circuit. The marshal, deeming it proper, furnished the necessary protection, by assigning that duty to the petitioner, who was a United States deputy-marshal. The claim, is, that the petitioner, as such deputy-marshal, was affording the only protection practicable to Justice Field, in the lawful discharge of his duty, when the homicide was committed, and that the killing was necessary for the preservation of the lives of both Justice Field, and himself, at the time the fatal shot was fired. The homicide was committed at Iathrop, and not upon land purchased by the United States with the consent of the state for the needful uses of the United States, in pursuance of article 1, § 8, of the constitution. Conceding the points to be as stated, do they present a case of an act performed in pursuance of a law of the United States, subject to their jurisdiction and to the jurisdiction of this court, and, is the petitioner held under an arrest on a charge of murder by the state, "in custody in violation of the constitution or laws of the United States," within the meaning of the statute?

It is urged, that, since the homicide was committed in the state at large, and not in the court-house, or upon land within the exclusive jurisdiction of the United States, the question, as to whether the homicide is murder, is a question arising, exclusively, under the laws of the state, and, that it can be investigated, and determined by the state courts, alone. It is admitted on the part of the state, that the United States have exclusive jurisdiction over the custom-house block, and, "over all places purchased by the consent of the legislature of the state, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," in pursuance of section 8, art. 1, of the national constitution, and that, the state has no jurisdiction, whatever, of any offense committed in such places. But it is contended, that the United States have no jurisdiction of offenses committed outside the lands so purchased, in other portions of the state, but, that, in the state at large, the jurisdiction of the state is exclusive. This proposition, like most others urged by those, who insist on extreme state rights doctrines, wholly ignores the principle, that there can be no legal conflict, or inconsistency, in matters wherein the state is subordinate, and the United States are paramount—where the constitution, and laws of the United States, are the supreme law of the land. We have, already, seen, that, although in certain cases, the courts of the United States have jurisdiction to discharge on *habeas corpus*, prisoners held in custody by the state

courts, in violation of the constitution, and laws of the United States, yet, that, the state courts "cannot, under any authority conferred by the state, discharge from custody, persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the general government, acting under such laws," and, that this "results from the supremacy of the constitution and laws of the United States." This principle, established in the *Booth* and *Turble Cases*, was recently properly recognized by the supreme court of California, when upon the return of the writ of *habeas corpus* in *Terry's Case*, it appearing, that he was in custody by virtue of a judgment of the United States circuit court, it declined to require the sheriff to produce his body. As the powers and duties of the state and national courts, are by no means reciprocal, in this class of cases, so, they are not reciprocal, in the matter of territorial jurisdiction mentioned, as claimed on the part of the state. The constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts, to enforce rights derived thereunder, is as extensive, as the territory to which they are applicable.

In *Siebold's Case*, the supreme court, in reply to an argument in favor of a wide extension of state rights, uses the following language, peculiarly applicable to the point now under consideration:

"Somewhat akin to the argument which has been considered is the objection, that the deputy-marshals authorized by the act of congress to be created and to attend the elections are *authorized to keep the peace*; and that this is a duty which belongs to the state authorities alone. It is argued *that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the states*. Here, again, we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This, necessarily, involves the power to command obedience to its laws, *and hence the power to keep the peace to that extent*. This power to enforce its laws, and to execute its functions in all places does not derogate from the power of the state to execute its laws, at the same time, and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the constitution itself show which is to yield. 'This constitution, and all laws which shall be made in pursuance thereof, shall * * * be the supreme law of the land.'" 100 U. S. 394, 395.

And again:

"The argument is based on a strained and impracticable view of the nature and powers of the national government. *It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have the power to command obedience, to preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.*" Id. 396.

The power to keep the peace is a police power, and the United States have the power to keep the peace in matters affecting their sovereignty. There can be no doubt, then, that the jurisdiction of the United States is not affected, by reason of the place,—the locality,—where the homicide occurred. If the locality is a necessary element of jurisdiction, a majority of the offenses created by the statutes, would be out of their jurisdiction, and the statutes creating such offenses, would be nullities, and practically useless. For example, for a quarter of a century, the United States courts in this state, were held in rented buildings owned by private parties. They had no jurisdiction over them under the provision of section 8, art. 1, of the national constitution; and no jurisdiction other, than, that had over other portions of the country to which the constitution and its laws extended. Had an assault been committed in open court, upon the judge, in one of these buildings, and the assailing party been slain by the marshal in protecting the judge, under circumstances excusing, or justifying, the homicide, would it be pretended, that the court would have no jurisdiction to protect him from interference by the state government? Or, have the United States, and their courts, no jurisdiction over the offense of resisting a United States marshal in the lawful execution of the process of the courts? or over the crime of counterfeiting the coin, or forging the bonds, or other securities of the United States, or other offenses against the laws, unless the offense is committed in a place under the exclusive jurisdiction of the United States? Such a claim would be preposterous.

In the case of *Tennessee v. Davis*, the defendant was indicted for murder in killing one, Haynes, while he was engaged in discharging his duties as a deputy-collector of internal revenue of the United States, and, which killing Davis claimed was in self-defense. The case was removed to the circuit court of the United States, under section 643, Rev. St. It was contended, that this act was an encroachment upon state rights, since it took away the right of the state, to determine, and execute its own criminal laws; and, was, therefore, unconstitutional. The supreme court sustained the act. It was held "that the United States is a government with authority extending over all the territory of the Union, acting upon the state, and the people of the state." In deciding the case, the court said:

"As was said in *Martin v. Hunter*, 1 Wheat. 363, the 'general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the states. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offense against the laws of the state, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection; if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a state may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The state court may administer not only the laws of the state, but equally federal

law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, a case can be brought into the United States court for review, *the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested.* We do not think such an element of weakness is to be found in the constitution. The United States is a government with authority extending over the whole territory of the union, acting upon the states and upon the people of the states. While it is limited in the number of its powers, so far as its *sovereignty* extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." *Tennessee v. Davis*, 100 U. S. 262, 263.

These expositions of the territorial extent of the jurisdiction of the general government, are authoritative, and conclusive; and the result, is, that wherever the constitution and laws of the United States operate, at all, the state laws in conflict with them, are subordinate, and, those of the United States are supreme, and paramount. Numerous cases are reported in the books, wherein parties arrested for offenses under the state laws, for acts performed in the discharge of duties imposed by the laws of the United States, have been discharged from imprisonment on *habeas corpus* by the United States courts, in consonance with these principles, now, authoritatively, established by the supreme court of the United States, in the cases cited, and others in the same line. Thus, in *Ex parte Jenkins*, and others, deputy United States marshals, who were arrested on the warrant of a justice of the peace in Pennsylvania, for shooting and wounding a negro, who resisted an arrest attempted under a warrant issued by the United States court for a fugitive slave, Mr. Justice GRIER of the United States circuit court, took jurisdiction and discharged the petitioners, under the act of 1835, since carried into the Revised Statutes, as part of section 753, under which this case arises. After their discharge, they were arrested again, in a suit by the negro for trespass, upon a warrant issued by a judge of the supreme court of Pennsylvania, and again discharged on *habeas corpus* by the United States circuit court. After this they were indicted for the shooting, and wounding of the negro, by the grand jury of Luzerne county, and a third time released on *habeas corpus*. 2 Wall Jr. 521 *et seq.* In the first of these cases Mr. Justice GRIER observes.

"What, then, have we power to do on the return of the writ? The writ of *habeas corpus* is a high prerogative writ known to the common law: the great object of which is the liberation of those who may be in prison without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. It brings the body of the prisoner up, together with the cause of his commitment. The court can, undoubtedly, inquire into the sufficiency of that cause. * * * Warrants of arrest issued on the application of private informers, may show on their face a *prima facie* charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present—A. tells B. that he has seen C. kill D. B. runs off to a justice, swears to the murder boldly; without any knowledge of the facts, and takes out a warrant for C., who is arrested and imprisoned in consequence thereof. C. prays a *habeas*
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corpus, and shows that he was the sheriff of the county, and hanged D. in pursuance of a legal warrant. If a court could not discharge a prisoner in such a case because the warrant was regular on its face the writ of *habeas corpus* is of little use. The authority conferred on the judges of the United States by this act of congress gives them all the power that any other court could exercise under the writ of *habeas corpus*, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned 'by any authority,' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may *acknowledge their utter impotence to protect him?* * * *

In *Ex parte Robinson*, Mr. Justice McLEAN held that "a writ of *habeas corpus* may issue to relieve an officer of the federal government who has been imprisoned under state authority for the performance of his duty." 6 McLean, 355. In the course of the decision the learned justice observes:

"It is a general principle of law, to which I know of no exception, that the laws of every government shall be construed by itself; and such construction is acted upon by 'the judiciary of all other countries. By the federal constitution the judicial power of the United States is declared to be vested in one supreme court, and in such inferior courts as the congress may from time to time order and establish.' Under this provision the judiciary of the Union gives a construction to the laws which is obligatory on the state tribunals. The constitution again declares: 'The constitution, and laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.' " Id. 362.

Thus, it is the exclusive prerogative of the national courts to, finally, determine, whether an act performed by one of the officers of the United States, and, especially, an officer of the court itself, is done in pursuance of a law of the United States, or whether, when under arrest for acts performed in connection with his office, he is "in custody in violation of the constitution, or, of a law of the United States."

In the case of *U. S. v. Jailer of Fayette County*, 2 Abb. (U. S.) 265, a special deputy United States marshal was arrested, under the state laws, on a charge of murder, for a homicide committed by him in attempting to arrest one, Cull, upon a warrant issued by a commissioner of the United States circuit court, for offenses charged to have been committed under the internal revenue laws. Upon the hearing, the United States circuit court found, that, the homicide was committed in the performance of "an act done in pursuance of a law of the United States, or of a process of a court or judge of the same," and discharged the petitioner. The question of the jurisdiction of the court, and the facts, were, elaborately, discussed. So, in *Re Ramsey*, 2 Flip. 451, the prisoner was a deputy United States marshal, in custody by order of a state court, on a charge of murder, the homicide having been committed in an attempt to arrest, upon a warrant issued by the United States courts, the party

slain. The court found that the act was done in pursuance of a law of the United States; that petitioner was justified in the act which he performed, and discharged him. See, also, to the same effect, *In re Neill*, 8 Blatchf. 167; *In re Farrand*, 1 Abb. (U. S.) 140; *Case of Electoral College*, 1 Hughes, 571; *In re Hurst*, 2 Flip. 510; and cases collected in 29 Myer's Fed. Dec. 677. Thus it appears to be settled, beyond controversy, that, where a party is in custody by state authority, for an act done, or omitted to be done, in pursuance of any specific provision of a statute of the United States, imposing a duty upon him, or for an act performed justifiable by the circumstances of the case, in order to enable him to perform that duty, or in the execution of any order, or process, or decree, of a court of the United States, or of a judge thereof, the courts of the United States have jurisdiction to discharge him on *habeas corpus*, under section 753 of the Revised Statutes. In such a case, the laws of the United States are supreme, and the act cannot be an offense against the laws of the state, and, as we have before seen, whether an act is performed in pursuance of a law of the United States, is a question exclusively for the United States courts to, authoritatively, and, conclusively, determine. They must interpret finally the laws of the United States. With their decision the state cannot interfere. When the United States courts have spoken on the subject, the state has nothing more to do with it.

The only remaining questions to determine are: (1) Was the homicide, now in question, committed by petitioner, while acting in discharge of a duty imposed upon him by the constitution, or laws of the United States, within the meaning of section 753 of the Revised Statutes? (2) Was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time, and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

It is urged that there is no statute, which, specifically, makes it the duty of a marshal, or a deputy-marshal, to protect the judges of the United States courts, while out of the court-room, traveling from one point to another in the circuit, on official business, from the violence of litigants, who have become offended at adverse decisions made by such judges in the performance of their judicial duties, and that marshals, or deputies, so engaged, are not within the provisions of section 753 of the Revised Statutes. It will be observed, that the language of the provision of section 753, is, "an act done * * * in pursuance of a law of the United States," not in pursuance of a statute of the United States. The statutes of Congress, in their express provisions, do not present all the law of the United States. Their incidents and implications are as much a part of the law as their express provisions. When they prescribe duties, provide for the accomplishment of certain designated objects, or confer authority in general terms, they carry with them all the powers essential to effect the ends designed. Says the supreme court in *Tennessee v. Davis*, 100 U. S. 264, quoting with approbation from Chief Justice MARSHALL:

"It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of congress to imply, without expressing, this very exemption from state control. * * * The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. *It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of congress.* It is incidental to, and is implied, in the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone—that is, the judicial power is the instrument employed by the government in administering this security."

If the officers referred to in the preceding passage are to be protected, while in the line of their duty, without any special law, or statute, requiring such protection, are not the judges of the courts—the principal officers in a department of the government second to no other—also to be protected, and are not their executive subordinates—the marshals, and their deputies—to be shielded from harm by the national laws, while honestly engaged in protecting the heads of the courts from assassination? When it was argued in *Siebold's Case*, that, it was not in the power of the United States to authorize the United States marshals to "*keep the peace*" at congressional elections, "*that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belonged exclusively to the state,*" we have seen the answer of the supreme court to that argument, in cases where the rights and interests of the United States government were involved in the matter of keeping the peace. "We hold it to be an incontrovertible principle," said the court, "that the government of the United States, may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent." And again:

"Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call upon the nearest constable for protection? Must they rely upon him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and by-standers to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation." *Id.* 395, 396.

In this particular case, the petitioner, long before he reached Lathrop, endeavored, through the conductor of the train, and the proprietor of the eating-house, at that place, to have "*a constable*" in readiness, on the arrival of the train, to *keep the peace*, but without success. When too

late to prevent the tragedy, the constable appeared, and arrested the petitioner, for performing the duty, which it is, now, claimed, devolved, exclusively, upon himself, or, some other peace-officer of the state. Had the United States, in this instance, relied upon another government—the state of California—to keep the peace, as to one of their most venerable, and distinguished officers—one of the judges of their highest court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed; and there would, now, in all probability, be a vacancy on the bench of one of the most august judicial tribunals in the world, and the deceased—the would-be assassin—might, perhaps, be a tenant of the Stockton jail, to be disposed of by another government. The case affords a striking illustration of the necessity for the United States to protect their own officers, while in the discharge of their duties, and, by such protection, protect the nation itself. The result was, that, instead of arresting the conspirator in the contemplated murder—the wife of the deceased, armed with a loaded revolver, till relieved of it by a citizen—threatening death to Justice Field, calling upon the by-standers to aid her, and attempting to enter the car, with the avowed purpose of compassing his death, the officer of the United States, assigned by his government to the special duty of protecting the justice's life against these very parties, while in the actual performance of the duties, so assigned him, was, himself, arrested, without warrant, and disarmed by an inferior officer of the state, and interrupted in the discharge of those momentous duties, thereby, leaving his charge helpless, and without the protection provided by the government he was serving, at a time when such protection seemed most needed. Had Neagle been a deputy-sheriff of San Joaquin county, assigned, by his superior, to this very duty of protecting the life of Justice Field, under the state laws, and, in the performance of his duties, committed the homicide in all other respects under precisely the same circumstances, would he have been arrested by the constable of Lathrop, without a warrant, and disarmed with such inconsiderate haste, and, thereby, prevented from further performing his duty to protect the life and person of Justice Field, leaving him to pursue the remainder of his journey without protection? Yet the constable was informed, that Neagle was acting as a deputy United States marshal, under the orders of his superiors, for the protection of the life and person of a justice of the supreme court of the United States.

We do not wish to be regarded as, now, calmly, and, deliberately, looking back upon the scene, and sitting in judgment upon the action of the constable, or as passing censure upon his zeal. He, doubtless, in the emergency, where time for consideration was short, and the facts not fully appreciated, acted according to the best dictates of his judgment, necessarily, hastily formed. But when the state now comes in, after an arrest upon a warrant issued upon such flimsy testimony as that presented, and, deliberately, claims the exclusive right to sit in judgment upon the acts of the United States deputy-marshal, performed not upon his own interpretation of the law, but upon that of the attorney general

of the United States, who may be presumed to possess some knowledge of his powers and duties, it is well to consider the circumstances from a stand-point presenting a view of both sides of the question. In matters of the public peace, in which the national government is concerned, the marshals and deputy-marshals, within the scope of their authority, are *national peace-officers*, with all the statutory and common-law powers appertaining to peace-officers. Is not the national public peace involved, when a deadly assault is, unexpectedly, made upon a judge in open court, in which the marshal, and his deputies, seeing the assault, are both authorized, and bound, on their own motion, without any previous order, or command, to interpose, and use sufficient force to quell the disturbance, and subdue the parties making it? Yet where is there any specific provision of the statute imposing that duty upon them? The marshal is required to attend court, but it is not provided, what he shall do in court. To what end shall he be in court, if not to keep order, and, if necessary, to protect the judges from violence, by force, or any practicable means? But there is no statute requiring it in terms. The general duties of marshals are provided for in section 787, which reads as follows:

"It shall be the duty of the marshal of each district to attend the district and circuit courts when sitting therein, and execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

There is no more authority specifically conferred upon the marshal by this section to protect the judge from assassination, in open court, without a specific order, or command, than there is to protect him out of court, when on the way from one court to another, in the discharge of his official duties. And the assassination in court, as well as out of it, might well be accomplished before the judge would be aware of his danger, and before it would be possible to give a command or order to the marshal for his protection. The authority exists in the one case, as in the other, from the nature of the office, and the powers arising under the common law, recognized and in use in the country, and in the nature of things, inherent in the office. The very idea of a government composed of executive, legislative and judicial departments, necessarily, comprehends, the power to do all things through its appropriate officers, and agents, within the scope of its general governmental purposes, and powers, requisite to preserve its existence, protect it, and its ministers, and give it complete efficiency in all its parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect by its all-powerful arm all the other departments, and the officers, and instrumentalities, necessary to their efficiency, while engaged in the discharge of their duties. In language attributed to Mr. ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling judicial authority, but for its intrinsic, sound, common sense:

"The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgment of its courts, are, equally, and at all times, and in all places, sufficient to protect the individual judge who, fearlessly and conscientiously in the discharge of his duty, pronounces those judgments."

Our jurisprudence is derived from, and founded upon, that of England, and our judges, and officers are substantially the same. They have corresponding duties imposed upon them, and inherently possess corresponding executive powers, to enable them, to effectively perform their duties. From the foundation of our government, many of their common-law duties have been performed, and common-law powers exercised without specific or statutory direction, and without question; and the common-law principles governing them, except so far as inapplicable, or modified by statute, still remain in force. The observation of the supreme court of California, in the *Estate of Apple*, 66 Cal. 434, 6 Pac. Rep. 7, in which state a Code has been adopted with respect to the common law not abrogated or modified by the Code, is applicable here. Said the court:

"The Code establishes the law of this state respecting the subjects to which it relates; but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the Code. When the Code speaks, its provisions are controlling, and they are to be liberally construed, with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed having been abolished here; but where the Code is silent, the common law governs."

So here, where the duties of the marshal are not limited, or specifically defined, by the statute, we must look to the powers and duties of sheriffs, at common law for them, so far as those duties come within the purposes, and powers of the national government. There are many acts, and duties, daily performed by the marshals, and by other officers, that are not specifically pointed out, or defined by the statute. The marshals are in daily attendance upon the judges, and performing official duties in their chambers. Yet no statute, specifically, points out those duties, or requires their performance. Indeed, no such places as chambers for the circuit judges, or circuit justices, are mentioned at all in the statutes. The judges' chambers do not appear to have any "local habitation." The justices of the supreme court at Washington have, in fact no chambers, otherwise, than, as they study, and do their work out of court, at a room in their own residences. We have in the San Francisco courthouse rooms that we call chambers, in which the work of the judges out of court is, in part, but not wholly, performed. We apprehend that the marshal would as clearly be authorized to protect the judges here, in chambers, as in the court-room. All business done out of court by the judge is called "chamber business." But it is not necessary to be done in what is usually called, "chambers." Chamber business may be done, and often is done, on the street, in the judge's own house, at the hotel where he stops, when absent from home, or it may be done *in transitu*, on the cars, in going from one place to another, within the proper jurisdiction to hold court. Mr. Justice Field could, as well, and as author-

itatively, issue a temporary injunction, grant a writ of *habeas corpus*, an order to show cause, or do any other chamber business for the district in the dining-room at Lathrop, or in the cars, as at his chambers in San Francisco, or in the court-room. He could have made a writ of *habeas corpus* returnable before himself on the car, and lawfully heard and decided the case while on his passage to San Francisco. The chambers of the judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the judge, and to suitors—places, where the judge at proper times can be readily found, and the business conveniently transacted. But the chambers of the judge, as a legal entity, are something of a myth. For the purposes of jurisdiction, the chambers of the judge are wherever he happens to be in his circuit or district, when the exigencies of the case call for the transaction of chamber business, and a judge is as clearly engaged in the discharge of the duties of his office, when going from one place of holding court to another, for the purpose of holding court, and just as much entitled to protection from his own government against murderous or other assaults, from desperate suitors, on account of his judicial action, as when actually engaged in business at chambers, or in holding court.

In England, whence we derive our jurisprudence, the high sheriff of the shire was the keeper of the king's peace—that is to say, the keeper of the peace of the sovereignty which the king represents. So here, I take it, under the authorities cited, the marshal is the keeper of the peace of the government of the sovereignty he serves, within the scope of the supreme powers of that government. In England, in early days, it was the duty in every shire of the sheriffs not only to attend the courts, but to attend the judges through their circuits. They met the judges at the border of the shire, and attended them until they left it at the border of another. Dalt. Sher. c. 98, p. 369, (published in 1682.) See, also, 40 Alb. Law J. 161. Such is, also, understood to have been the practice in early days in a number of the states. From the advancing state of civilization, this practice has, doubtless, generally become unnecessary for the safety of the judges, and it has fallen into desuetude. But it does not follow, that the power to thus protect them has been abolished, or become extinguished. It simply remains latent, or dormant, ready to be called into action, whenever the exigencies of the case, or times, require it. And how could there possibly be a more urgent occasion for reviving the practice, and calling it into action, than the recent journey of Justice Field to Los Angeles, and return on official business?

Upon general, immutable principles, the power must, necessarily, be inherent in the executive department of any government worthy the name of government, to protect itself in all matters to which its authority extends, and this, necessarily, involves the power to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. In the national government of the United States, the judiciary constitutes one of its most important branches. Unlike the judiciary of other nations, it is invested with the jurisdiction

to pass, finally, and, conclusively, upon the powers of the legislative and executive departments of the government, and to confine them within their constitutional limits. It is, therefore, the balance-wheel of the national government, that keeps it running, regularly, and, smoothly, within its proper domain. Impotent, indeed, must be the executive branch of the government, if it is not empowered to protect the lives of the judges of the highest branch of its judiciary, from assault and assassination, on account of their judicial decisions, by desperate disappointed litigants, while passing from point to point within their territorial jurisdiction, in the discharge of their high functions, and duties. We cannot think the power can be wanting, even if there were no constitutional, or statutory provision, governing the case. It seems impossible, that the national government should be left to the mercy, goodwill, or complacency of the state, to afford that protection to its judges, that the United States, if worthy to be called a nation, are bound themselves to furnish.

As a further example of laws, not ordained by specific statutory enactments, see those respecting punishment for contempts. For 40 years after the organization of the national government, down to 1831, there was no statute which, specifically, defined contempts of court. *Ex parte Robinson*, 19 Wall. 510; *Ex parte Terry*, 128 U. S. 302, 303, 9 Sup. Ct. Rep. 77; *Ex parte Savin*, 131 U. S. 275, 9 Sup. Ct. Rep. 699. But the courts, nevertheless, exercised the power, necessarily, from the nature of things inherent in every court, to protect itself, its dignity and its officers, by the punishment of many acts as contempts of their authority; and, they determined for themselves, what acts should constitute contempts. The first specific act upon the subject passed by congress, was not an act enlarging the power of the court, but it was, on the contrary, a restriction of the powers already exercised within certain defined limits. The act was passed at the instance of Senator Buchanan, to limit the power of the courts, theretofore, exercised, to punish for contempts, as a sequel to the impeachment of a United States judge for the district of Missouri. The act was passed March 2, 1831, and is entitled, "An act declaratory of the law concerning contempts of court." 4 U. S. St. at Large, 487. The first section does not *grant* the power to punish for contempts, but expressly recognizes the existing power, and, in express terms, thereafter, limits the power to certain enumerated cases. In order that those who were before subject to punishment for contempt should not escape the penalties due their acts, section 2 of the statute makes certain acts, before punishable as contempts, offenses against the laws of the United States, punishable by the less summary, and more deliberate proceeding on indictment and trial by a jury. Many of the acts under that act, still recognized as punishable as contempts, as being necessary to the prompt and summary vindication of the authority of the court, are, also, indictable offenses under other statutes. In *Ex parte Robinson*, 19 Wall. 510, the court expresses a doubt, as to the power of congress to thus limit the authority of the supreme court to punish for contempts which derives its jurisdiction directly from

the constitution. Yet, there is no express provision in the constitution conferring jurisdiction to punish contempts. It is treated as a power necessarily inherent in the court, requiring no express authority.

This statute of 1831 has been carried into the Revised Statutes, section 1 of that act having been re-enacted in section 725 of the Revised Statutes, giving it a granting, as well as a restricting, form, but in no sense changing its purpose or meaning. And section 2 is now found in section 5399 of the Revised Statutes, as a part of the criminal code of the nation. Did anybody ever doubt, or does anybody now doubt, that the power of the United States courts to punish contempts, without any statutory definition of contempt, from the organization of the government down to 1831, was just as ample, and that it was just as much a part of the law of the United States, inherently, vested in the courts, as it was after the passage of the act of 1831, or as it is now under the same provisions carried into the Revised Statutes? Or did anybody doubt the authority of the courts to determine what acts constituted a contempt? Yet there was no specific provision of the statutes defining contempts. It was a power, however, necessarily, inherent in the courts. It is involved in the very idea of a court, having power to administer the laws of the land. It would be impossible for courts to perform their functions and administer the laws without it. And as so inherent, the power to punish various acts not mentioned as such, for contempt, was as much a part of the law of the United States as if ordained by a specific provision of the statute of the United States, and the authority of the marshal to protect the judges, is a cognate power, also necessarily inherent in the office he holds. Thus there is much law of the United States, not now found, in terms, in the statutes, but as valid and binding upon the people, and upon the states, as if it were, specifically, and, definitely, therein expressed. See *U. S. v. Hudson*, 7 Cranch, 32-34; *In re Meador*, 1 Abb. (U. S.) 324; *In re Buckley*, 69 Cal. 18, 10 Pac. Rep. 69.

But we are not without constitutional, and statutory provisions, broad enough, and, specific enough, as we think, to cover the case. The national constitution, providing a government for 65,000,000 of people, covers but a very few pages, but it seems to be amply sufficient for the purposes intended. Article 2, section 1 of the national constitution, provides that, "The executive power shall be vested in a president of the United States of America." In prescribing the duties of the president, in the terse but comprehensive language of section 3, art. 2, it provides that "he shall take care that the laws be faithfully executed." These provisions make him the executive head of the nation, and give him all the authority necessary to accomplish the purposes intended—all the authority, necessarily, inherent in the office, not otherwise limited. Congress, in pursuance of powers vested in it, has provided for seven departments, as subordinate to the president, to aid him in performing the executive functions conferred upon him. Section 346, Rev. St., provides that, "one of the executive departments shall be known as the 'Department of Justice,'" and, that, there shall be "an attorney general, who shall be the head thereof." He has general supervision of the executive branch of the

national judiciary, and section 362 provides as a portion of his powers and duties, that "the attorney general shall exercise general superintendence and direction over the attorneys and marshals of all the districts of the United States, and territories, as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the attorney general an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the attorney general may direct." Section 788, Rev. St., provides that "the marshals and their deputies *shall have, in each state, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof.*" By section 817 of the Penal Code of this state, the sheriff is a "peace-officer." By section 4176, Pol. Code, he is "*to preserve the peace,*" and, "*prevent and suppress breaches of the peace.*" The marshal is, therefore, in accordance with the decision of the supreme court already referred to, and under the provisions of the statute above cited, "*a peace-officer,*" so far as keeping the peace in any matter wherein the national powers of the United States are concerned, and as to such matters he has all the powers of the sheriff, as a peace-officer under the laws of the state. He is, in such matters, "*to preserve the peace,*" and "*prevent and suppress breaches of the peace.*" An assault upon, or an assassination of, a judge of the United States court, while engaged in any matter pertaining to his official duties, on account, or by reason of his judicial decisions, or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction, and power of the marshal, or his deputies to prevent as a peace-officer of the national government. Such an assault is not merely an assault upon the person of the judge, as a man. It is an assault upon the national judiciary, which he represents, and through it an assault upon the authority of the nation itself. *It is, necessarily, a breach of the national peace.* As a national peace-officer, under the conditions indicated, it is the duty of the marshal, and his deputies, to prevent a breach of the national peace by an assault upon the authority of the United States, in the person of a judge of its highest court, while in the discharge of his duty. If this be not so, in the language of the supreme court, before cited, "Why do we have marshals, at all?" What useful functions can they perform in the economy of the national government?

The constitution of the United States provides for a supreme court, with jurisdiction more extensive, in some particulars, than that conferred on any other national judicial tribunal. If the executive department of the government cannot protect one of these judges, while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the court may be killed, and the court, itself, exterminated, and the laws of the nation by reason thereof, remain unadministered, and unexecuted. The power and duty imposed on the president to "take care that the laws are faithfully executed," necessarily, carries with it all power, and authority necessary to accomplish the ob-

ject sought to be attained, and, certainly, the power and duty to protect from the deadly assaults of desperate suitors, the lives of the judges of the highest court in the nation, while engaged in the lawful discharge of their duties.

As we have before seen, neither constitution nor statutes can, or do, anticipate and point out, specifically, every possible right or duty to be covered and secured. They must, necessarily, be general. In the passage already cited from *Tennessee v. Davis*, the supreme court, in speaking of certain officers, says:

"It has never been doubted, that all who are employed in them are protected while in the line of their duty; *and yet this protection is not expressed in any act of congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.*" 100 U. S. 265.

And in *U. S. v. Macdaniel*, 7 Pet. 14, similar views were expressed. Said the court:

"A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he *must show a statutory provision for everything he does. No government could be administered on such principles. * * * There are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government.*"

These observations are especially, and forcibly applicable to the terse but very comprehensive provisions of the constitution, and of the several statutes cited, as to the powers and duties of the president, the attorney general, and marshals.

The act of the attorney general, in directing the United States marshal to protect the life of Mr. Justice Field against the assaults of the deceased, and his wife, is, in legal contemplation, the act of the president. The president speaks, and acts, through the heads of the several executive departments in relation to subjects, which appertain to their respective duties. They are but the subordinates of the president, wielding his power. *Wilcox v. Jackson*, 13 Pet. 513; *U. S. v. Cutter*, 2 Curt. 617. In the former case, relating to a reservation of land by the secretary of war, the court said:

"Now although the immediate agent in requiring this reservation was the secretary of war, yet we feel justified in presuming that it was done by the approbation and direction of the president. The president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties."

See, also, 7 Op. Atty. Gen. 480, 481; Id. 453-479; *Confiscation Cases*, 20 Wall. 108, 109; *U. S. v. Eliason*, 16 Pet. 291.

By section 788, Rev. St., and the several provisions of the statutes of California herein cited, the United States marshal is made a peace-officer, and, as such, he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States, and obstructs the operations of the government, and its various departments. The courts must, from the nature of things, be enabled fully to perform all their functions, imposed upon them by the constitution, and laws, without hindrance, or obstruction, and they must have the inherent power to protect themselves by, and through, their executive officers, under the direction, and supervision of the attorney general, and the president, against obstruction, and hindrance in the performance of their judicial duties. An assault upon a judge in court, or a judge, out of court, while in the performance of his duty, induced by his judicial action, and *intended, or calculated to obstruct him in, or deter him from, a free and full discharge of his duty, is a breach of the national peace affecting the sovereignty of the nation, and tending to obstruct and impair the operations and efficiency of one of the most important departments of the government.* As such, it is the duty of the United States marshal, under the police powers of the nation, so conferred upon him, by the statutes cited, and as a national peace-officer, to prevent such breach of the peace. Under the state laws deputy-sheriffs, when occasion requires, constables, and police-officers of cities, are assigned to certain districts, to watch over the safety of the citizens, and to guard, and protect their persons and property from assault, destruction or injury, *in short to prevent the commission of crimes, etc.* These officers, in cities, are found everywhere, night and day, guarding the citizen and his property from injury. So the attorney general, under the provisions of the statute cited, and the president under the provisions of the constitution, requiring him to see, that the laws are faithfully executed, are authorized, and empowered, to direct the assignment by the marshal, of any deputy to perform any special national police duty, within his jurisdiction, arising out of the statutes, whether by express provision, or necessary implication, and under any power, necessarily, inherent in the president, and government, in order to give full effect and efficiency to the government, or any of its departments. It has never, so far as we are advised, been doubted, that a marshal, or deputy-marshal is authorized to protect a judge, and preserve order, in open court, even by the use of force, without any special order, or command, as a part of the duties necessarily inherent in his office; yet, as we have already seen, there is no more specific statutory authority for so preserving order, and protecting the judge, in court, than for performing the same duty, under proper conditions, for a judge engaged in performing his duties, of whatever nature out of court.

It is argued by one of the counsel on behalf of the state, that these matters pertain, exclusively, to the peace of the state, and that the state has, not only, power to preserve the public peace, but, that it is amply capable of performing this service; that it is its duty to do it; that the threats of the deceased were matters of public notoriety; and, that, by calling the powers of the state into action, Justice Field's life might have

been protected by the state, and there would have been no necessity, whatever, for what is called on the part of the state, the illegal action of the United States marshal. It may be conceded, and it is undoubtedly true, that it was an imperative duty of the state to preserve the public peace, and to amply protect the life of Mr. Justice Field, *but it did not do it*. Where would Mr. Justice Field have been to-day, had he relied, solely, upon the state to perform her conceded imperative duty? Not having performed that obligation, while on his journey in discharge of his judicial duties, does a complaint now come with a good grace from the state, against the United States for performing it for her, as well as for the national government, by protecting one of their most distinguished judicial functionaries, through one of their own officers, in the only manner in which it could have been, effectively, performed?

In the present case, and on this official journey, there was a necessity for the kind of protection afforded Mr. Justice Field, for no other kind would have been adequate. The occasion required a preventive remedy. The use of the state police force, would have been impracticable, as the powers of the sheriff would have ended at the borders of his county, and of other township, and city peace-officers, at the boundaries of their respective townships, and cities. Only a United States marshal, or his deputy, could exercise these official functions throughout the United States judicial district, and as we have seen, the powers exercised concern matters affecting the peace of the national government, and if the national government has no authority to act in the premises, it, certainly, ought to have such power. The only remedy suggested, on the part of the state, was, to arrest the deceased, and hold him to bail to keep the peace under section 706, of the Penal Code, the highest limit of the amount of bail being \$5,000. But, although the threats are conceded to have been publicly known, in the state, no state officer took any means to provide this flimsy safeguard.

Perhaps counsel intended to intimate that it was not the duty of the state, but of Mr. Justice Field, himself, to set in motion proceedings under the law furnished by the state, to put the decedent under bonds to keep the peace. Has it come to this, then, that a justice of the supreme court of the United States, when in obedience to the behests of the law, he comes to California to perform his judicial duties, must submit to the humiliation of immediately, upon his arrival, stealing away to some justice of the peace, and instituting proceedings to bind over to keep the peace, vindictive, and dangerous litigants who have threatened his life? But what security to Mr. Justice Field, would a bond of \$5,000 afford against resolute, violent and desperate parties, for whom the penalties for murder have no deterring power? The United States marshal, the United States attorney for the district of California, the attorney general of the United States at Washington, and the mass of the people of California thought that the exigencies of the occasion required something more, and the result fully justified their view of the matter. Although no adequate means of protection were afforded by the state on his late official journey, and Mr. Justice Field would, in all probability, not now

be among the living, had not the petitioner, by the wise forethought of the attorney general, been detailed to protect his life, yet the fact of the failure of the state to perform its duty, does not afford any reason for taking the petitioner out of the custody of the state, unless, in committing the homicide, he was engaged in the performance of "an act done * * * in pursuance of a law of the United States," and the killing was justifiable. The failure to perform its duty would not, alone, oust the jurisdiction of the state, if it be exclusive. But since the possible remedy mentioned under the state law was alluded to by counsel, as ample, we refer to it, as illustrating the necessity for a speedy amendment of the laws of the United States, if they are now so defective, as to afford no protection to the United States judges, in the performance of their high functions. It is apparent to us, if he is not now so protected, that the distinguished justice allotted to the Ninth circuit, and also his associates, should have thrown over them the protecting ægis of the laws of that government, which he has so long, faithfully, and efficiently served.

After mature consideration, we have reached the conclusion, that the homicide in question, was committed by petitioner, while acting in the discharge of a duty imposed upon him by the constitution, and laws of the United States, within the meaning of the provisions of section 753 of the Revised Statutes.

It only remains to inquire, secondly, was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time and under the circumstances, then existing, that the killing was necessary, in order to a full and complete discharge of such duty? The answer to this proposition is, really, included in the answer to the last, but we desire to make some observations bearing, especially, upon it. The attorney general and counsel for the state declined to discuss the question, as to whether the homicide was justifiable, because, in their view, this is a question solely for the state court, the case, as claimed by them, not being within the provisions of section 753 of the Revised Statutes, and, therefore, not within the jurisdiction of this court. Holding, as we do, that the case falls within those provisions, so far as the petitioner was authorized to act, by the constitution and laws of the United States, it becomes necessary to determine whether the homicide was justifiable. For, if it was malicious, wanton, or reckless, without any reasonable apparent necessity, in order to fully and properly perform his duty of protecting Justice Field, then, it was an act performed beyond, and outside his duty, and he is amenable to the state courts. The facts set forth in the petition, and in the traverse to the return of the sheriff, are fully, and, satisfactorily, proved by the testimony, and, whether we determine the case upon demurrer to the traverse, or upon the whole case, as presented in the record, and evidence, the result must be the same. Were the question of justification to be determined by the laws of the state of California, or in the state court, there could be no ground for doubt. Says the Penal Code: "Homicide is also *justifiable* when committed by any person when resisting any attempt to murder any per-

son, * * * or to do some great bodily injury upon any person." Section 197, Pen. Code. But we shall consider the question without reference to the statute of California.

It is unnecessary to repeat the facts in full. When the *deceased* left his seat, some 30 feet distant, walked, *stealthily*, down the passage in the rear of Justice Field, and dealt the unsuspecting jurist two preliminary blows, doubtless, by way of reminding him that *the time for vengeance* had at last come, Justice Field was, already, at the traditional "wall" of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When, in a dazed condition, he awoke to the reality of the situation, and saw the stalwart form of the deceased, with arm drawn back for a final mortal blow, there was no time to get under, or over, the table, had the law, under any circumstances, required such an act for his justification. Neagle could not seek a "wall" to justify his acts, without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, "Stop! Stop! I am an officer," and saw the powerful arm of the deceased drawn back for the final deadly stroke, instantly, change its direction to his left breast, apparently, seeking his favorite weapon, the knife; and at the same time heard the half-suppressed, disappointed, growl of recognition of the man, who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife, at the court-room, a year before, the supreme moment had come; or, at least, with abundant reason, Neagle thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal *consensus* of public opinion of the United States, seems to justify the act. On that occasion, a second, or two seconds, signified, at least, two valuable lives, and a reasonable degree of prudence would justify a shot one, or two, seconds too soon, rather than a fraction of a second too late. Upon our minds the evidence leaves no doubt, whatever, that the homicide was fully justified by the circumstances.

We have seen in an eastern law journal, but with its disapproval, some adverse criticism upon the action of the petitioner, attributed to a quarter, ordinarily, entitled to great consideration, and respect. But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3,000 miles away, looking backward over the scene, to determine the exact point of time, when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, the proper time would never come. Neagle on the scene of action, facing the party making a murderous assault, knowing, by personal experience, his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms; his readiness to use them, and his angry, murderous threats; and seeing his demoniac looks, his stealthy assault upon Justice Field, from behind,

and, remembering the sacred trust committed to his charge,—Neagle, in these trying circumstances, was the party to determine, when the supreme moment for action had come; and if he, honestly, acted, with reasonable judgment, and discretion, the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case, and say that he fired the smallest fraction of a second too soon? In our judgment he acted, under the trying circumstances surrounding him, in good faith, and with consummate courage, judgment, and discretion. The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense,—commendable. This being so, and the act having been “done * * * in pursuance of a law of the United States,” as we have already seen, it cannot be an offense against, and the petitioner is not amenable to, the laws of the state. Let him be discharged.

MISSISSIPPI MILLS v. COHN *et al.*

WOOD *et al.* v. SAME.

(Circuit Court, W. D. Louisiana. July Term, 1889.)

1. COURTS—FEDERAL JURISDICTION—SUITS BY ASSIGNEES.

Complainants, as the assignees of a judgment obtained in the state court by a citizen of the same state as the defendant in the judgment, sue in equity proceeding, by way of a creditors' bill, to enforce said judgment against the insolvent debtor's property. *Held*, that the assignor could not have sued in original proceedings in this court, and that his assignees cannot do so, under the act of 1888.

2. CREDITORS' BILL—ADEQUATE REMEDY AT LAW.

The allegations in the bill, and the evidence administered by complainants, show that the property which they seek to hold liable for their claims, other than that of the judgment mentioned, is the property, in law and in fact, of Cohn, their insolvent debtor; that title was taken in Mrs. Steinhardt's name for a fraudulent purpose, and Cohn's money paid for the property in question. *Held* that, if their allegations are true, they have an adequate remedy at law in an execution against the property, treating the sales to Mrs. Steinhardt as mere simulations; that no purpose is disclosed in the bill or evidence of complainants to present a cause for a revocatory action; that the pending suit is one in declaration of simulation, which involves title as between Cohn and Mrs. Steinhardt to the property sought to be subjected to Cohn's debts, and cannot be heard in equity.

(*Syllabus by the Court.*)

In Equity.

W. G. Wyly and John T. Ludeling, for complainants.

C. J. Boatner and A. H. Leonard, for defendants.

BOARMAN, J. These suits were consolidated for final hearing. Complainants are citizens, one of Mississippi, the other of Missouri. They are judgment creditors of S. Cohn, and are seeking in equity proceed-

ings, by way of a creditors' bill, to subject certain property which they allege belongs to Cohn, an insolvent, to the payment of his creditors. An exception applying to both suits was filed. The exception denies the jurisdiction of the court, because the cause presented in either of the bills cannot be heard in equity; that complainants have adequate remedy at law. This exception was overruled, at a previous term, with the understanding suggested by the court, in consequence of the ambiguities in the language of the bills, that the exception would be considered again when the causes came on for final hearing. At a later time, in the suit of Wood & Lee, an exception, applying only to that case, was filed by defendants, and assigned, by consent, to be disposed of in hearing the bill. In that exception is denied the jurisdiction of the court, whether in equity or at law, to hear or try that part of the bill which seeks to enforce the judgment assigned to complainant by Newman, a citizen of Louisiana. In this denial of jurisdiction, it is contended that the assignor could not have sued originally in this court to enforce his judgment, and for that reason his assignees cannot maintain this suit. The bill of Wood & Lee, in addition to their claim against Cohn for merchandise sold to him, shows that they own, hold, and sue on a judgment against Cohn, a citizen of Louisiana, for \$24,000, which was assigned to them by Newman, a citizen of Louisiana. The bill and answer clearly submit to this court an issue of law and fact, made up between complainants and defendants, as to the legality of the said judgment, and as to their right, in equity proceedings, under the charges of the bill, to have certain property which they allege to be Cohn's subjected to the payment of the Newman judgment.

It is contended by complainants that the purpose and scope of these suits is to subject an insolvent debtor's property to the payment of his creditors, and the court has jurisdiction of this suit, originally instituted here, to decree that the insolvent Cohn's property should be subjected to the payment of the Newman judgment, assigned, as said judgment was, to complainants, as well as to any other judgments against Cohn. Under the proviso in the jurisdictional act of 1888, this contention is not well founded. The fact that the complainants are endeavoring to proceed against an insolvent in a creditors' bill does not enlarge the jurisdiction granted in the act. If Newman, a citizen of Louisiana, still held and owned the judgment, he could not enforce it in this court by original proceedings against Cohn, a citizen of the same state. It may be, as is contended for by complainants, if the Mississippi Mills should succeed in their purpose to have Cohn's property, which is the common pledge of his creditors, subjected, by final judgment, to the payment of his debts, that the owners of the Newman judgment would have ample remedy, in equity, to secure substantial recognition and enforcement of the judgment, against Cohn's property. But whatever may be the ultimate remedy of complainants as to this Newman judgment against Cohn, as beneficiaries in the effect of a decree subjecting and holding the insolvent Cohn's property for the payment of his creditors, it appears that complainants, the assignees of said judgment, are limited to such pro-

ceedings as the assignor, Newman, could have begun or maintained in this court; and for this reason Wood & Lee's suit, as it relates to the Newman judgment, should be dismissed. The other charges therein will be disposed of in passing upon the exception in Mississippi Mills case. In that case, as well as in the bill of Wood & Lee, it is alleged, that a certain judgment, and certain sales, transfers, etc., of property, had by defendants *inter sese* were fraudulent simulations. Quoting from the bill and brief of counsel for complainants, it appears that the adjudications of the brick store and lots to Mrs. Steinhardt was a mere sham, to give an apparent title to Mrs. Steinhardt, while the said Simon Cohn continues to be the real owner; "* * * that Mrs. Steinhardt never paid a dollar for said property, and that her pretended ownership is a simulation and fraud to shelter it from his creditors; * * * that all the sales to Mrs. Steinhardt were, in reality, purchased by Simon Cohn, and the price of each and every sale was paid with money of Cohn's, and said property should be declared Cohn's, and subjected to the payment of the judgments against him; * * * that the effect of said simulated and fraudulent acts has been to injure complainants, and to prevent execution of their said judgment against the property of S. Cohn; * * * that all property standing in Mrs. Steinhardt's name, and all business carried on by Cohn under her name, is in fact Cohn's property."

The allegations recited, show unmistakably that the property in question, though held in the name of Mrs. Steinhardt, is, in law and fact, the property of Cohn. They show, substantially, that the transfers and transactions by which the property was taken and held in the name of Mrs. Steinhardt were caused, had, and entered into between and by the defendants for the purpose of fraudulently screening it from Cohn's creditors; that it was not intended by any of the defendants that the ownership of the property should be vested in any one but Cohn, the notoriously insolvent debtor. Complainants conclude their allegations with the prayer that said sales, transfers, etc., be declared fraudulent simulations. They pray, further, that said property be declared to be the property of Cohn, and that it, in these proceedings, be subjected to the payment of his debts.

It will be observed that the bills in no way affect the vendors of Mrs. Steinhardt. So far as they are concerned, her title to the property conveyed by them is complete, and she is the real owner thereof. What effect this fact would have in a revocatory action, brought in equity, need not now be discussed. The argument of complainants, in illustrating their allegations, and the evidence administered by them to show the nature and history of the sales, etc., to Mrs. Steinhardt, treat and consider Mrs. Steinhardt, not as the real owner of the property which is subject, in equity and law, to their claims or judgments, but they treat and consider her as a person interposed fraudulently by Cohn between himself and the several vendors who sold to Mrs. Steinhardt for the purpose of holding Cohn's property in her name, so that it cannot be reached by his creditors. While treating and considering her as just stated, they never for a moment cease to urge that the property is, in

their belief, in law and in fact owned by Cohn. In illustrating their opinion, belief, and contention, they say that Mrs. Steinhardt knew of Cohn's fraudulent purposes; that the money paid her vendors was Cohn's money, and she never intended or expected to be or become the owner of the property by reason of such sales to her; that the property became at once the property of Cohn, and is now subject to his debtors' rights therein. The allegations, though not free from ambiguities, show that the Mississippi Mills suit and the Wood & Lee suit, so far as we are now considering the latter, do not present a suit in equity proceedings for the purpose of revoking or setting aside a real thing to a fraudulent sale, as to certain creditors of Cohn, and to subject the property therein sold to the payment of the insolvent's debts. Such a cause would be known in our state law as a revocatory action. On the contrary, the bills show that these allegations show cause for an action in declaration of simulation. If it be true that Cohn, notwithstanding the said purchases, transfers, etc., were ostensibly made by Mrs. Steinhardt, and the title of record is in her name, is the real owner of the property now sought to be subjected to the payment of Cohn's debts, the complainants have a well-known and adequate remedy at law to make the property liable for their claims.

The issues made up by the pleadings and evidence involve, fundamentally, the title to, or the real ownership of, the property in question. The complainants charge that Cohn, in fact and law, is the owner thereof. The defendants deny his ownership, and contend that the sales were real sales to Mrs. Steinhardt. Such issues are not determinable in this court, in equity proceedings. The complainants' bill is ambiguous in its language, but the evidence admitted from them shows no purpose on their part to avail themselves of the equitable remedy to cause or have a real sale set aside, and have the property therein administered and sold in equity proceedings, for the benefit of an insolvent debtor's creditors; because, or for the reason, or on the ground, that such property is held, claimed, or owned by the real vendee thereof in such a way, and under such circumstances, as, in equity, should subject it to the payment of claims against Cohn. In the view and purpose of complainant's charges, Cohn now owns the property, and they have not presented, or sought to present, such an action as should be heard in equity, and it is ordered that their suit be dismissed.

*In re SHANER.**(Circuit Court, W. D. Virginia. August 30, 1889.)*

1. VIRGINIA COUPONS—FINES.

Virginia coupons, which by law are receivable in payment of all debts, fines, dues, and demands of the state, must be received in payment of a fine imposed by a criminal court of the state.

2. HABEAS CORPUS—JURISDICTION.

The federal courts have no jurisdiction to grant a *habeas corpus* upon petition alleging that the prisoner is held under the *capias* of a state court issued upon a judgment that has been vacated.

Petition for Writ of *Habeas Corpus*.

W. W. Larkin, for petitioner.

Rufus A. Ayers, Atty. Gen., for respondent.

BOND, J. The petitioner states in his petition that he is a citizen of Virginia, residing in the city of Lynchburg, and that he is illegally held in a jail of that city by Mat J. Day, the sergeant and jailer of that place; that he is so held on a *capias*, issued by the judge of the corporation court of said city, demanding payment of a fine of \$200, and \$45.50 costs, imposed upon him by that court for a common assault, of which he stands convicted therein.

The petition alleges that Shaner has again and again tendered genuine coupons cut from the bonds of the state of Virginia, which coupons are receivable by law for payment of all debts, fines, dues, and demands of the state; and that his custodian has refused to receive them, as by law he ought, in payment thereof, which conduct on the part of the sergeant impairs the obligation of the contract heretofore made by the state with the holders of such tax-receivable coupons, and is in violation of the constitution of the United States. The return to the writ made by the sergeant admits the facts to be as stated, except that it does not admit or deny the genuineness of the coupons tendered. *Prima facie* the obligations of the state are genuine, and unless proof is offered to the contrary they will be held to be so. This case represents no new feature. The court of appeals of Virginia having decided that a fine imposed by a criminal court of the state is a debt or demand due the state, a tender of coupons made by law receivable for such fine must be received in payment thereof. We have again and again so decided, and would be glad to know that such decision is accepted as a determined fact in future cases without the necessity of repeating it monthly at the expense of the state. From the fines imposed and the *capias* issued on the judgment set forth in his petition, the petitioner must be discharged, upon his leaving with the sergeant the coupons tendered.

But the sergeant sets out in his return that he holds the prisoner upon two other writs of *capias* issued by the county court of Campbell county, and asks that the prisoner may be continued in jail on these for the fine imposed by said court, he having tendered no coupons in payment

thereof. The petitioner alleges that in these two cases last mentioned he has filed *supersedeas* bonds which vacate those judgments until another hearing can be had, and that the judge of Campbell county court has approved his *supersedeas* bonds. Whether or not a *supersedeas* bond is a substitute for a bail-bond when a motion for a new trial is pending or has been granted, or what effect it has under the criminal procedure in Virginia, is not a federal question. Writs of *habeas corpus* in the federal courts extend to no case except where a prisoner is in custody under or by authority of the United States, or in violation of its constitution or some law made in pursuance thereof. Shaner is to be discharged upon his petition here from the custody of the sergeant under the *capias* by which he is held, because the state of Virginia contracted with him that she would receive such coupon in payment of her demands. Not to do so is to impair the obligation of her contract, which by the constitution of the United States, to which she submitted as paramount law when she entered the Union, it is forbidden her to do.

The other question has nothing in it of a federal character, and if the petition had included the writs of *capias* from Campbell county, which it does not, and those alone, we should have had no jurisdiction in the matter. The prisoner is discharged from custody under the writs of *capias* for fines where he has tendered coupons in payment, and the sergeant will hold him, so far as this jurisdiction is concerned, under the writs he holds from the court of Campbell county. And the costs are upon the defendant.

SKINNER v. VULCAN IRON-WORKS.

(Circuit Court, E. D. Illinois. July 22, 1889.)

PATENTS FOR INVENTIONS—INFRINGEMENT—ACCOUNTING.

Where a decree has been rendered in a suit for infringement of letters patent, awarding an injunction and an accounting, on a reference to a master to compute the damages, the question of the validity of the claims of complainant's patent alleged to have been infringed cannot be considered.

In Equity. Bill for injunction.

Coburn & Thacher, for complainant.

Offield & Towle, for defendant.

BLODGETT, J., (*orally*.) This is a bill for an injunction and accounting by reason of the alleged infringement of letters patent No. 185,458, granted to complainant in December, 1876, for a "steam pile-driver," and patent No. 273,904, on the same subject, granted to the complainant on the 13th of March, 1883. The case was heard on pleadings and proofs, and a decree rendered, awarding to the complainant an injunction and an accounting. The case went to a master for an accounting,

and the master has filed his report, finding that the damages sustained by the infringement of the patent amount to \$2,883.31 in the aggregate.

There is no contest over the damages as to seven of these machines, it being conceded that the royalty which the defendant had been paying upon machines under a license to use these two patents is a fair compensation for the damages sustained by the construction of these seven machines, and, therefore, as to \$1,183 of the damages reported there is no contest. But the controversy in the case is over thirteen machines made after the expiration of the license to use these patents, and which the defendant constructed under a patent which had been granted to another patentee for a pile-driver. The master has found that these thirteen machines infringe one claim of each of the complainant's patents, and I, after an examination of the proof submitted, concur with the conclusions of the master in that regard. An elaborate brief is filed by the defendant in which the validity of these claims is called in question, but that question I do not consider as open upon the consideration of damages, and, if it were, I see no reason for changing the ruling made at the hearing of the case. The master's report is confirmed, and the full amount of damages awarded, \$2,833.31, and the costs in the case.

THE MASCOTTE.

SHAW v. THE MASCOTTE.

(District Court, S. D. Florida. June 26, 1889.)

1. PILOTAGE—HALF PILOTAGE—SPEAKING VESSEL.

It is the duty of a pilot, in speaking a vessel for pilotage, to use such signals as are ordinarily in use to denote the presence of a pilot and the offer of services, in order to inform the master of his character, and give him an opportunity to accept or reject them. Such signals should be made seasonably, so that the officers of the vessel may see them. In the absence of such signals, the burden is upon the pilot to show that his hail and offer were heard and understood.

2. SAME.

Where the pilot left his pilot-boat anchored two and a half miles from the channel, and came with a small boat, showing no light, until within from one to three hundred feet of the steamer, and no flash-light until the steamer had passed and left him abaft the beam, so that such flash was not seen by any of the officers of the steamer, nor the pilot's hail heard by those on the steamer, *held*, there was no such speaking as would entitle him to pilotage.

(*Syllabus by the Court.*)

In Admiralty. Libel for half pilotage for not accepting services of a pilot.

L. W. Bethel, for libellant.

G. Bowne Patterson, for respondent.

LOCKE, J. This is the third suit for half pilotage against this vessel, the Mascotte, wherein the same principles and questions are involved. In the first two cases no opinions were filed, but the conclusions of law and fact briefly stated from the bench, and are merely referred to here to show the opinions upon the different state of facts found in the three cases. The act of Florida of February 27, 1872, provides that all steamers or vessels entering or leaving any port of this state shall pay to the pilot who shall first speak said steamer or vessel the regularly established rates of pilotage, but that all vessels carrying the regular United States mails shall pay half pilotage only. The Mascotte carried the regular mail, and would therefore pay no more when employing a pilot than when spoken and not accepting his services. The question in these several cases is what constitutes "a speaking" of a vessel, within the contemplation of the law, and was this vessel spoken on the several occasions?

The relations existing between the masters of vessels and pilots under the so-called "Compulsory Pilotage Laws" are peculiar. It has been frequently held that although not, strictly speaking, a penalty for not employing a pilot, it is a gratuity, with no direct benefit rendered or service demanded, and therefore requires a strict construction as against the pilot. The pilot's and master's duty are reciprocal,—the pilot to be there and offer his services, and the vessel to pay whether his services are accepted or not. But, in order to justly demand of the master of a vessel a compensation for being on hand and offering his services, the pilot should offer them in a way which would not only be an offer on his part, but which must be so made as to be understood as such by the master. The simple term "speaking," without further construction or explanation, cannot be accepted as expressing the will, intention, or design of the legislature. The pilot might speak a vessel, and ask any number of questions. What port she is from? what was her cargo? or, how long they had been on the voyage? any of which would be a speaking, but no one would for a moment consider that this was such a speaking as is contemplated or required. The statutes of different states use different language in providing for the speaking of a vessel by a pilot. In New York, the term "offering his services" or "tendering his services" is used. In Pennsylvania, he "shall offer himself." The vessels going up the Delaware river must pay half pilotage for "refusing or neglecting" to take a pilot. In North Carolina the vessel "pays pilotage for refusing to take a pilot;" and in Louisiana, for "refusing to take a pilot when one offers." But there can be no question but what the legislatures of all states had one idea in common, and meant a plain and distinct offer by the pilot of his services, so made that the master of the vessel could have it within his power to employ or refuse him. Anything less than that would lead to an injustice and hardship that no court could sustain without the most positive enactment.

I have been referred to one case in which the construction of the term "speaking" has been attempted, but which has left the question in but little better condition, if any, than before. *The Ullock*, 19 Fed. Rep. 207.

In that case the pilot commissioners declared that the speaking of a vessel or the offer of a pilot's services on the bar should be construed to mean either the usual form of hailing, or the usual code of signals, without declaring what the usual code of signals was understood to be; but the commissioner, in testifying, stated that he understood the offer to be customarily made in the day-time by "putting her head down towards the ship, and showing a blue flag," and "at night by burning a flare." That case was determined upon the fact that the pilot-boat was beyond the distance which had been determined by the commissioners, so that the question as to the usual code of signals was not involved; and what the learned judge would have held necessary under other circumstances is uncertain. But it is stated in the opinion that the usual signals by which an offer of pilot service is made in the day-time is a flag at the mast-head, in this country the modification of the country's flag known as the "jack," and that "the burning of flare-ups or a flashing light, over the side of the boat at short intervals, is also the customary method of making an offer of pilot services at night," but whether an offer, where these customary methods are disregarded, would be considered sufficient, is uncertain. These ordinary customs and rules or regulations, whether established by use for an indefinite period of time or direct legislation, show plainly that one thing has been aimed at,—the distinguishing of pilot-boats as a class from any other class of vessels. In most ports of importance they are licensed, numbered, and their numbers painted on their sails. They have their distinguishing flag, the jack, by day, and their distinguishing light, the flash, unlike any other class of vessels, by night. These are the ordinary distinguishing marks for which every master looks when desiring one.

The "speaking" it could never have been intended should be left to the uncertainties of the human voice. Nor could every master be presumed to stop and pay attention to the hail of every small boat in entering a port, to ascertain if it is a pilot offering his services, unless there is some distinguishing signal. It is true, as was remarked by the learned judge in *The Alcalde*, 30 Fed. Rep. 133, that "it mattered not to the master to whom the pilot offered his services on the pilot-ground how he got there. He may have trusted to a canoe, or even swam out. If he is on the ground, and ready and capable of taking charge of the vessel, that is all the master can require." But the master is entitled to the full knowledge and information that it was a pilot speaking for pilotage, and where the question is whether there had been a sufficient speaking and offer of services, when the testimony shows the hail was not heard on board, I am satisfied that the visible surroundings of the pilot should have much weight in determining it. And one speaking from a regular pilot-boat, with a jack flying by day at a mast-head, and flash-light at night, would be recognized, when the canoeist or swimmer would be disregarded.

Where the pilot uses all the usually accepted and ordinary means of conveying information of his character, the burden of proof is on the master who claims that the speaking, hailing, or offering was not sufficient to give him the necessary knowledge; but where all the ordinary

and generally accepted means are neglected, or, as it appears in this case, an attempt made to conceal the character of the pilot, until speaking alone might betray it, the burden is upon the pilot to show satisfactorily that the master understood him, and had an opportunity to accept or reject his services.

In the first case mentioned (*Acosta v. The Mascotte*) it appears that the pilot-boat was anchored in or near the channel, at night, without any light, but that the pilot went off on a small boat, and, as the steamer came by, hailed it. The master said that he saw a vessel anchored there without any light, and so reported to the officers of the customs, upon arriving in port, but that he had no knowledge that it was a pilot-boat; that he saw a small boat, but heard no hail, nor did the officer on the bridge, the lookout, or the quartermaster know of the steamer's having been spoken by a pilot. The small boat had a plain white light, which it showed a short time before the steamer passed.

In the second case, (*Shaw v. The Mascotte*), the pilot-boat lay in back of Sand Key, with an anchor light up, but showing no other light, and when the *Mascotte* was seen coming the pilot went off in a small boat, some over a mile, to speak her. This small boat was seen in the channel, and, just as the steamer approached, showed a lantern. The pilot says he put his hat over it occasionally to make it a flash-light, and hailed the steamer as she passed; but all of the witnesses, officers and men, on the deck of the steamer, testify that they heard no hail, nor anything that could be understood, and that they had no knowledge that it was a pilot. In these cases, I considered that there had been a willful concealment of the character of the pilot-boat, and that the evidence was not enough to show the bringing home to the master the knowledge of the offer of his services sufficiently to compel the payment of the compulsory pilotage, and therefore dismissed the libels.

In this case a new question of fact arises. The pilot-boat was anchored back of the Eastern dry-rocks, two and a half miles from the channel where the steamer was expected, and a dingy-boat, with a pilot and two men, sent out from Sand Key light, a light-house station about half way between where the pilot-boat was lying and the channel where the steamer was expected. The pilot says he had a bright white light,—a lantern,—which he showed all the time, and a flash-light, which he showed just as he came to the steamer. He says the white light was a lantern which he held in his hand so it could be seen all around; that the flash was a regular flash-light; that he displayed it once, dipping it down two or three seconds, so as to make it show plainer; that the steamer was passing when he last displayed it. He says he was about 100 feet off the steamer's port bow when he first showed the flash-light. Weltus, one of the pilot's crew, with him in the boat, says they went off in the boat, and stopped until the steamer came up abreast of them. Then they spoke her. The captain held the lantern up in his hand. The flash-light was used once,—dipped once and shown twice. He says they were 100 or more feet away when they displayed these lights. Williams, another of the crew, testifies to the

same. The master of the Mascotte says, as they were coming to the westward of Sand Key, he saw nothing but the three light-houses until he saw a dark object in the water; that he thought it might be the Western dry-rocks; that he took his glasses and saw it was a row-boat; that he saw a man take a light from the bottom of the boat and hold it up, but he heard nothing; that there was no light shown until the boat was abeam of the ship; that when he first saw the boat it was two points forward of the beam, but there was no light there; that he was on the bridge, and could have heard anything said, but heard nothing; that there was no pilot-boat in sight or light seen on any vessel; that all the light he saw was the one the man took up from the bottom of the boat, and held up; this was not until the boat was abeam of the ship; that there was no flash shown, that he saw. The second officer of the Mascotte says that he was on the bridge with the captain; that the captain saw the boat first; that it was just a little ahead on the port bow; just as they got up very nearly abreast of the boat, a little forward of the beam, he saw a white light; saw no light before; this was the only light he saw; that he was looking at it continuously, and, had there been a flash-light, he would have seen it; that after it went abaft the beam he did not turn to look at it; that he looked at it all the time until it got abeam; that he did not know that there was a pilot there. The watchman on the port bow says he saw something black, about 100 or 150 yards on the port bow; when it got abreast of the beam he saw a bright white light; there was no other light; no flash-light; that he looked at it continuously until it was abaft the beam; then he did not see it any more; that he did not hear any hail from the boat. The light-keeper at Sand Key says he saw the boat when near the Mascotte; that he saw the light; a white light first; then a flash-light; then the Mascotte hid the lights, and, as she passed, he saw the lights again; that he was about one and a quarter or one and a half miles distant; that he first saw the lantern light, then the flash, before the Mascotte and boat came together; that he saw the flash-light again; he cannot say whether once or twice after the Mascotte passed.

In this condition of the testimony, what can be accepted as the true state of facts? When was the flash-light shown? for, viewed from the standpoint of the respondent, this may be considered an important question in the case. According to the testimony of the pilot and crew, it was off the bow, or where it must have been seen by the officers of the steamer; but they swear positively that there was no flash shown—nothing but a white lantern light—until the boat had passed abaft the beam. Their business was forward, and not aft, and they naturally paid no attention to what they had passed, and therefore saw no flash. The testimony is directly contradictory in this respect, and where has been the mistake, if any? I thought at first that the testimony of the light-keeper at Sand Key would determine the question, but, upon considering the course the vessel was steering, and the direction the light-house bore from her, it appears that a light could be seen from the light-house in a range forward of the bow of the steamer when abaft her beam, if

the light was as far from the steamer as those on the steamer testify; or that the steamer would not necessarily shut out the light, until it had passed quite a little distance ahead of it. So this testimony can have no conclusive weight, and the question of the probabilities of error must be considered. The testimony of the officers of the steamer that there was no flash shown while the boat was in their sight is so direct and positive, and they so entirely disinterested, as far as any profit or advantage could come to them, and otherwise apparently entitled to the utmost confidence, that it should require fully as positive and direct testimony on the opposite side to overcome the strong presumption of the truth of their statements. The pilot says that he spoke the steamer, and received no answer; that they heard people talking on deck; that he showed the lantern and the flash-light when they were off the port bow. Weltus says that they waited until the steamer came up abreast of them, when they spoke her, and the captain held the lantern up in his hand, and showed the flash. Williams says that they were about 100 feet from the Mascotte when they showed the lantern and the flash-light. The pilot also stated, before any question of the time when the lights were shown had arisen, that when the flash was being shown the second time the steamer was passing them. If there could be any question of judgment as to the position of the boat to the steamer, those on board the steamer could judge more accurately than those in the boat. I can come to but one conclusion,—that the pilot permitted the steamer to approach as near as he considered safe in order to speak her; then displayed the lantern, and as soon as he could displayed the flash-light; but that from some accident, loss of matches, or other cause there was a delay in lighting the torch until the steamer, going very rapidly, had passed and left them abaft the beam. I have no doubt but what they commenced to make a display of the torch when, perhaps off the bow, but I am satisfied it was not finally displayed until too late to be seen by the master or officers. I cannot give a shadow of truth to the entire testimony by any other supposition, and am not able to bring my mind to disbelieve the testimony of those on the steamer that there was no flash-light within their sight.

What is the legal effect of this condition of facts? I am satisfied the flash-light was not displayed until the boat was so far abaft the beam of the steamer that the master did not see it. Nor was it flashed so that with due diligence he could have seen it. The rule for the lights of a pilot-boat (article 11, § 4233, Rev. St.) is a flash-light every 15 minutes. The usual signal as recognized in *The Ullock*, and with which I heartily concur, is a flash at frequent intervals. The pilot says he saw the steamer coming some 15 miles off; but, making all allowance, she must have been in sight from half to three-quarters of an hour at the least, and no light was shown, according to his own statement, until he was within about 100 feet, or, the statement of those on the steamer, 100 yards; and I am satisfied no flash—the light to distinguish the boat as containing a pilot—was shown until she was too far abaft the beam to be seen by those in charge of the steamer. The flash was to denote the character of the boat, and should have been shown from the small boat, if that

had been taken for the service, as well as from the large one, and in season to show his presence. I do not consider the claim for pilotage against any vessel entering one of the larger ports of our country, made under the same circumstances, speaking from a small dingy-boat, with no distinguishing marks or signals, would be entitled to any consideration, and the argument that the master should have presumed it was a pilot because it was not probable that any other small boat would be out there at that time of the night cannot be accepted. I do not consider the libellant used the ordinary customary signals in time to make his presence and character known to the respondent; and the testimony is positive that the hail was not heard on board, and there was therefore no legal and sufficient speaking to justify judgment. The libel is therefore dismissed.

WELDT v. THE HOWDEN.

(District Court, S. D. California. September 11, 1889.)

1. PILOTS—PORTS.

A vessel lying under the protection of Point Fermin, which is a well-defined headland on the northerly side of the bay of San Pedro, will be held to be within that bay in the absence of any legally defined limits thereof.

2. SAME.

Where it appears that such bay and the port of Wilmington have always been locally regarded as identical, and that congress, by legislation, has recognized San Pedro as a port, and changed its name to that of the port of Wilmington, and referred to the bay as the bay of Wilmington, such bay will be held a port, within Pol. Code Cal. § 2436, providing for compensation to pilots at "ports," irrespective of its merits as a harbor.

In Admiralty. Libel to recover half pilotage.

Stephen M. White, for libellant.

Mortimer & Harris, for respondent.

Ross, J. At the times stated in the pleadings, the libellant was a duly licensed pilot "for the port of Wilmington and bay of San Pedro," and, as such, spoke the British bark Howden, bound for San Pedro, and tendered his services as pilot. His services being declined by the master of the bark, libellant commenced the present proceeding, claiming to be entitled to half the usual rate of pilotage by virtue of section 2436 of the Political Code of California, which provides, among other things, that pilots for all of the ports of this state other than San Francisco, Mare island, Benicia, and Humboldt bay, are entitled to receive for piloting every vessel into or out of port the sum of eight dollars per foot draught, and that, when the person commanding any vessel refuses to take a pilot, the pilot first offering his services is entitled to half pilotage.

That the state has the right to impose half pilotage on foreign vessels entering the ports of the state, and declining the services of a pilot, was

decided by Judge HOFFMAN in *Alameda v. Neal*, 31 Fed. Rep. 366, and his ruling was affirmed on appeal by Mr. Justice FIELD, 32 Fed. Rep. 331. In the present case that right is conceded by the respondent, but the defense is made—*First*, that the Howden was not bound for and did not enter the port of Wilmington or the bay of San Pedro; and, *second*, that if she did enter the bay, that that bay is not a port within the meaning of the pilot laws; that the only port at that point on the coast is the port of Wilmington, and that the port of Wilmington and the bay of San Pedro are not one and the same, but on the contrary, that they are two totally distinct geographical places.

The case shows that the limits of the bay of San Pedro have never been defined by any competent authority; nor is the line that separates the bay from the ocean attempted to be delineated upon the United States coast survey chart. Indeed, it may not be an easy matter to define it for the reason that while upon the northerly side of the bay there is a well-defined headland, called "Point Fermin," there is none to the southward within such a distance as that it may be reasonably said to have any connection with the bay of San Pedro. In the absence of any legally defined limits to the bay, I think it fair to hold that all vessels that lie under the protection of Point Fermin are within the bay of San Pedro; and that the Howden was in that position I think appears from the evidence.

The bay of San Pedro and the port of Wilmington, it seems from the evidence, have always been locally known and regarded as one and the same. Originally, all vessels coming into those waters discharged their cargo at San Pedro, and from there the freight was sent by wagon to Los Angeles. San Pedro was, and is, a little settlement or town on the bay of that name. In 1852, Gen. Phineas Banning was conducting the principal business there, and as he was located on the government reservation at that place he was required to move off. Somewhere about the latter part of 1853 he removed his business from San Pedro and established it at Wilmington, which is situated on an inlet a few miles further inland. Not only have the bay of San Pedro and the port of Wilmington been locally regarded as one port or harbor, but that they are and have been so regarded by congress is clearly shown from the following legislation: By an act approved September 28, 1850, the town of San Pedro was constituted a port of delivery in the collection district of San Diego. 9 U. S. St. 508. By an act approved August 3, 1854, the collection district of San Pedro was created, and San Pedro was made the port of entry for said district. 10 U. S. St. 345. By an act approved June 2, 1862, the collection district of San Pedro was abolished, and the same was attached to the district of San Francisco. 12 U. S. St. 411. By section 2582 of the Revised Statutes, the state of California was divided into two collection districts, the first being the district of San Diego, in which San Diego was made the sole port of entry, and San Pedro and Santa Barbara ports of delivery. By an act approved June 6, 1874, the name of the port of San Pedro was changed to that of Wilmington. 18 U. S. St. 61. By an act approved June 10, 1880, the

privilege of immediate transportation was extended to various named ports; among others, to that of Wilmington. 21 U. S. St. 174. And by an act approved June 16, 1882, the collection district of Wilmington was created, in which Wilmington, on the bay of Wilmington, was made the sole port of entry. 22 U. S. St. 105. By the legislation referred to not only did congress recognize the fact that there was a port at San Pedro, but by changing the name of the port of San Pedro to that of Wilmington and by referring to the bay of San Pedro as the bay of Wilmington, it gave unmistakable evidence that it regarded the one as identical with the other. Whether or not the port is a good and safe harbor does not affect the question. It is a place for which many vessels are bound, and at which it is usual for them to load and unload; and it is the place for which the Howden was bound, and at which she discharged her cargo.

In my opinion the libelant is entitled to half the usual rate of pilotage, as provided by section 2436 of the Political Code of California; and accordingly a decree will be signed for libelant, with costs.

WHEATON v. CHINA MUT. INS. Co.

(District Court, S. D. New York. April 3, 1889.)

1. MARINE INSURANCE—LIABILITY FOR GENERAL AVERAGE.

The schooner *F.*, loaded with cargo on a voyage from Baltimore to Stonington, having stranded, was rescued by salvors, and repaired at Philadelphia, where the losses were adjusted. On advice of the owners of the cargo, the insurers, though refusing to accept abandonment, assented to its conveyance to Providence, there being no sale for it at S., paying the extra price for additional carriage, and superintending the sale in the owners' interest. The insurers alleged that the signature to the general average bond by their special agent was unauthorized. *He'd.*, that they were liable to the owners of the *F.*, and that it was immaterial under the stipulation, except as to costs, whether the bond was taken to be that of the insurers or the owners of the cargo.

2. SAME—BASIS OF CONTRIBUTION.

As the voyage was completed at Providence, the sale of the cargo there, less the additional expenses, was rightly taken as a basis for contributing value.

In Admiralty.

Wing, Shoudy & Putnam, for libelant.

Lester W. Clark, for respondent.

BROWN, J. The schooner *Fessenden*, on a voyage from Baltimore to Stonington, Conn., with a cargo of coal, stranded through perils of the seas. She was rescued by salvors, and a general average adjustment thereafter made whereby there was found due from the cargo the net sum of \$639.90. The respondents were insurers of the cargo, and though they refused to accept an abandonment tendered by the cargo-owner, they

superintended the management of the cargo for his interest. The adjustment was made at Philadelphia, and the vessel was repaired there. The coal being damaged, and the owner reporting that there was no market at Stonington for damaged coal, by his advice, in which the underwriters concurred, the cargo was taken to Providence, R. I., where the voyage was completed, instead of at Stonington. The insurers paid the extra price of five cents per ton for the additional carriage. The average bond was signed in the name of the respondents by a special agent of the company at Philadelphia, without its authority, as the respondents contend, and by a misinterpretation of the written instructions which had been forwarded to him by their general agents at New York.

Under the stipulation between the parties it becomes immaterial, except as to the costs of the action, whether the bond is to be taken as the bond of the respondents or the bond of the owner, whom the respondents insured. In either event, whatever sum is found due for general average must, without dispute, be ultimately paid by the respondents; and the respondents and their agents have throughout taken upon themselves the care of the cargo-owner's interests. Under these circumstances the valuation of the vessel for the purpose of general average must be taken as provided in the bond; for the instrument is the bond either of the insurers or of the insured; and in either case, under the stipulation, that is controlling.

I am satisfied that the average adjusters rightly adopted the price obtained for the coal at Providence, less the charges and expenses. The voyage not being abandoned, but being completed by the ship, the price at the place of destination is the basis to be taken for the contributing value. By reason of the want of any proper market at Stonington, the original destination, the port of Providence was agreed on as the substituted destination, and there the voyage was completed, and the cargo delivered to the owner, and sold. The price obtained there, less the charges and extra expense of going to that port, properly becomes the basis of the contribution by the cargo. The evidence does not establish any agreement prior to the execution of the bond that the value of the cargo was to be taken at a less sum. The other objections to the adjustment are not sustained by the evidence. The adjustment is therefore upheld. But considering the doubt that exists as to the technical signature of the bond, and the probably contrary understanding of the somewhat ambiguous terms in which the instructions to the special agent were conveyed, I think, under the stipulations of the parties, the judgment should be for the libelants for \$639.90, the amount claimed, with interest, but without costs.

AMES *et al.* v. CHICAGO, S. F. & C. RY. CO. *et al.* WITTEN v. SAME.
WAKEFIELD v. SAME.

(Circuit Court, E. D. Missouri, N. D. September 30, 1889.)

1. REMOVAL OF CAUSES — SEPARABLE CONTROVERSY — RAILROAD COMPANIES — MECHANICS' LIENS.

Rev. St. Mo. 1879, § 3206, which gives contractors and material-men a lien on a railroad for work and labor done and for materials furnished, provides that in suits by a subcontractor to enforce a lien it shall be optional with him to make or not to make the contractor a party defendant. When the contractor is made a party, the statute contemplates a personal judgment against him as in ordinary cases, with a conditional clause that, if sufficient property of his is not found, the residue be made out of the property charged. When he is not made a party, there is only a special finding of the amount due, and a judgment that it be made out of the property charged. *Held*, that when the contractors are made parties there are not two separate causes of action, and hence the controversy between the plaintiff and the railroad company is not a separable one within the meaning of the act of 1887, § 2, cl. 3.

2. SAME.

The fact that in order to obtain a lien against the property of the company the plaintiff is required to show that he filed a notice of his lien in the proper county in the proper time, in addition to showing that he is entitled to a judgment against the contractor, does not make the controversies separable.

3. SAME.

Nor is it important that the contractor has not been served with summons, and has not appeared, as the right of removal must be tested solely by the case made by the complaint.

4. SAME.

Rev. St. U. S. § 737, authorizing the court to proceed to the trial of the suit between the parties properly before it, when there are several defendants, and one or more of them are neither inhabitants of nor found within the district, and do not voluntarily appear, does not relate to the removal of causes.

On Motions to Remand.

Miller, Leman & Chase and Berry & Thompson, for plaintiffs.

Gardiner Lathrop and Ben Eli Gutherie, for defendants.

THAYER, J. These cases are alike, and present the same question for determination. They were removed to this court from the circuit court of Macon county, Mo., under the third clause of the second section of the judiciary act of March 3, 1887, and in this court motions to remand have been filed. The plaintiffs in the respective cases brought suits in the circuit court of Macon county, Mo., against the Chicago, Santa Fe & California Railway Company, and several other foreign corporations, and also against Williams, McRitchie, Nichol & Williams, to enforce a mechanic's or contractor's lien against the property of the railway company situated in the state of Missouri. Williams, McRitchie, Nichol & Williams were original contractors with the railway company for building certain sections of its road in Missouri. The plaintiffs in these suits were respectively subcontractors with Williams, McRitchie, Nichol & Williams for doing portions of the work undertaken by the latter firm. The plaintiffs in the several suits are residents and citizens of the state of Missouri; all of the defendants, including the railway company, are

non-residents of the state. The amount involved in each case exceeds \$2,000. If a removal had been applied for in time by all of the defendants, no reason is apparent on the face of the record why the cases might not have been removed to this court under the second clause of section 2 of the act of March 3, 1887. As the cases stand, however, on petitions for removal preferred by the railway company, which merely allege that there is a separable controversy which is wholly between the railway company, a citizen of Illinois, and the respective plaintiffs, citizens of Missouri, the only question for consideration is whether the record shows any such separable controversy existing in the several suits between the respective plaintiffs and the railway company as brings the cases within the third clause of the second section of the act in question.

It is now well settled that the third clause of section 2 of the act of March 3, 1887, concerning removals, applies only to that class of cases where there are two or more separable controversies involved in a suit, one of which is wholly between citizens of different states. To authorize a removal under that clause the action must be one capable of separation into two or more separate and distinct controversies or suits. Judge BREWER so held in *Telegraph Co. v. Brown*, 32 Fed. Rep. 337, after a very full and careful review of all the adjudged cases; citing, among others, *Barney v. Latham*, 103 U. S. 205; *Hyde v. Ruble*, 104 U. S. 407; *Corbin v. Van Brunt*, 105 U. S. 576; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. Rep. 171; *Ayres v. Wiswall*, 112 U. S. 190, 5 Sup. Ct. Rep. 90. Accepting that as a correct postulate, the inquiry is whether there are two or more controversies involved in each of these suits, or only a single controversy. The law of the state of Missouri which gives contractors and material-men a lien on a railroad for work and labor done thereon, and for materials furnished therefor, provides that any person owning or operating a railroad to which a lien applies shall be made a party defendant in all suits to enforce the lien, but that in case of a suit by a subcontractor to enforce a lien it shall be optional with him to make or not to make the person with whom he contracted a party defendant to the suit. Rev. St. Mo. 1879, § 3206. In the event that a subcontractor makes the person or persons with whom he contracted a party defendant to a suit to enforce a lien, and personal service is obtained, the law contemplates a personal judgment against such defendant or defendants, as in ordinary law cases, with a clause added to the judgment that, if no sufficient property of such defendants is found to satisfy the debt, the residue be levied out of the property chargeable with the lien. If the original contractor is not made a party defendant to a suit by a subcontractor, and does not appear and defend, or personal service on him is not obtained, the statute seems to contemplate only a special finding of the amount due on the demand, and a judgment that it be levied out of the property chargeable with the lien. *Id.* §§ 3208-3213, inclusive. In the light of these statutory provisions, can it be said that in the cases at bar, wherein the subcontractors have made the original contractors parties defendant with the railway company whose property is to be charged with a lien, that

there are two separate controversies or causes of action, one existing between the plaintiffs and the original contractors, and another between the plaintiffs and the railway company? I think not. It has several times been held that where the cause of action sued upon is several as well as joint, and the plaintiff elects to sue two or more defendants jointly, a non-resident defendant, being so sued with other defendants, who are residents of the same state with the plaintiff, cannot remove the cause to the federal court on the ground of a separable controversy existing in the case. *Pirie v. Tvedt*, 115 U. S. 43, 5 Sup. Ct. Rep. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. Rep. 730; *Railroad Co. v. Ide*, 114 U. S. 55, 5 Sup. Ct. Rep. 735; *Putnam v. Ingraham*, 114 U. S. 57, 5 Sup. Ct. Rep. 746. In the present cases it may be conceded that the defendants are not sued upon an alleged joint liability. The demand sought to be enforced against each defendant is the same, and up to a certain point the proof relied upon to support the demand, as against each defendant, must be the same. To entitle the plaintiffs to a lien against the property of the railway company, they must first establish that they are respectively entitled to a personal judgment against Williams, McRitchie, Nichol & Williams, with whom they contracted. If they fail in that respect, the liens fall without reference to any other proof. Furthermore, in a suit by a subcontractor merely to enforce a lien against the property of a railway company, the persons with whom he contracted are by the terms of the Missouri statute proper parties defendant, although not necessary parties. It is true that, in order to obtain a lien against the property of the railway company, the plaintiffs must show that they filed a notice of their lien in the proper county, and in due time, in addition to showing that they are entitled to a judgment as against the original contractors; but the fact that such additional proof is requisite to secure a lien, does not establish that the suits involve separate and distinct controversies, within the meaning of the act concerning removals. It merely shows that the railway company may have a defense to the suit in addition to those that can be made by its co-defendants, the original contractors; but it has several times been held by the supreme court of the United States that different defenses existing in favor of several defendants to a suit, do not create separable controversies within the meaning of the statute. *Hyde v. Ruble*, 104 U. S. 407; *Railroad Co. v. Ide*, *supra*; *Sloane v. Anderson*, *supra*; *Pirie v. Tvedt*, *supra*; *Putnam v. Ingraham*, *supra*; *Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. Rep. 1265; *Insurance Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733.

The lien which plaintiffs seek to establish against the property of the railway company is merely an additional security which the law gives for a debt that is primarily due from Williams, McRitchie, Nichol & Williams, with whom the plaintiffs contracted. To obtain the benefit of that security, plaintiffs must prove some facts beyond what are necessary to secure a judgment against the principal debtor; that is to say, they must show that within 90 days after the debt accrued they filed a statement of the demand in the office of the circuit clerk of a certain

county. Rev. St. Mo. 1879, § 3202. But the necessity of proving more facts to warrant a recovery against one defendant than is necessary to warrant a recovery against a co-defendant, cannot be accepted as a test to determine whether a cause of action is divisible. It often occurs in practice, where the cause of action is single, that proof sufficient to establish the liability of one defendant is not sufficient to establish the liability of another. In *Ayres v. Wiswall*, *supra*, which was a suit to foreclose a mortgage on certain lands, and afterwards to obtain a personal judgment for any deficiency against the mortgagors and certain grantees of the mortgagors, who had bought subject to the mortgage, Chief Justice WAITE, in holding that the case disclosed no separable controversy, called attention to the fact that the debt sued for was a unit; that whatever sum was due from one defendant was due from all; and that there could not be a decree against a part of the defendants for one sum and against the rest for another. The same remarks are applicable to the cases at bar. The demands sued for in the several suits are not separable into parts, as in *Barney v. Latham*, 103 U. S. 213, 214, so that one portion of the demand may properly be recovered from the railway company, and another portion from Williams, McRitchie, Nichol & Williams. The demand is indivisible, and whatever defense to the same releases the original contractors necessarily discharges the railway company.

Again, in the case of *Insurance Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. Rep. 733, it was held that where the relief sought against one of several defendants was merely incidental to the main purpose of the suit, the fact that such incidental relief related to only one of the defendants did not make it a separable controversy in the sense of the removal act. The principle of that decision seems fairly applicable to the cases at bar. The main purpose of these suits is to establish the existence of an indebtedness on the part of Williams, McRitchie, Nichol & Williams. The relief sought against the railway company may be regarded as merely incidental to the main purpose of the suit, inasmuch as plaintiffs only seek to charge the debt shown to be due from the original contractors as a lien on the property of the railway company. If they fail in proving any such indebtedness, there is no pretense that the relief sought against the railway company can be granted.

Counsel for the railway company call attention to the fact that Williams, McRitchie, Nichol & Williams have not been served with summons in the several cases, and that they have not as yet appeared to the action. This suggestion, however, is unimportant, as it has been expressly ruled that the right of removal on the ground of a separable controversy must be tested solely by the case made by the plaintiff in his complaint, and is unaffected by the fact that one of the defendants is in default when a removal is sought, or has even suffered final judgment to go against him. *Putnam v. Ingraham*, *supra*; *Brooks v. Clark*, 119 U. S. 509, 7 Sup. Ct. Rep. 301; *Pirie v. Tvedt*, *supra*. While the question involved in these motions is not entirely free from doubt, yet I am of the opinion, for the reasons before indicated, that the cases do not in-

volve a separable controversy, and that they were not removable on that ground.

It is further suggested by counsel for the railway company that jurisdiction of the suits may be entertained under and by virtue of the provisions of section 737, Rev. St. U. S., which provides that—

“When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of, nor found within, the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process, nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement, or objection to the suit.”

The answer to this suggestion is that section 737 does not relate to the removal of suits from a state to a federal court. It is the old act of February 28, 1839, (volume 5, U. S. St. at Large, 321,) and was passed to enable the federal courts to proceed with the hearing of suits properly brought against several defendants who were jointly liable, when, by virtue of the fact that some did not reside in the state, process could not be served on all the joint obligors. Conk. Pr. (3d Ed.) 152-154. The section in question has no application to a case until it is properly lodged in the federal court, either by being brought therein originally, or by having been removed from a state court under some provision of law authorizing the removal. The present suits were not lodged in this court under the provision of any act authorizing a transfer, and they are accordingly remanded to the circuit court of Macon county, Mo.

CARSON & RAND LUMBER CO. v. HOLTZCLAW.

(Circuit Court, E. D. Missouri, N. D. September 30, 1889.)

REMOVAL OF CAUSES—LOCAL PREJUDICE.

In an action by a foreign corporation for the price of lumber sold, defendant counter-claimed for services rendered, and for damages for breach of contract. In support of a petition for removal to the federal court plaintiff filed an affidavit signed by several citizens of the county in which defendant resided, stating in general terms that from prejudice and local influence the plaintiff could not obtain a fair trial in that county, or in the judicial district. The facts stated in the affidavit were that defendant had a large and influential business connection in the county and district, and that the counties had had more or less litigation in their corporate capacity, which had excited a prejudice against non-resident corporations. This affidavit was controverted by one signed by numerous citizens of the vicinity. *Held*, that the petition would be denied.

On Petition for Removal. For opinion on application to strike petition for removal from the files, see *ante*, 578.

Sears & Guthrie and *James C. Davis*, for petitioner.

B. R. Dysart, Berry & Thompson, and Anderson & Schofield, for defendant.

THAYER, J. In the case of *Short v. Railroad Co.*, 33 Fed. Rep. 114, Judge BREWER held that the act of 1867 concerning the removal of causes from a state to a federal court on the ground of "prejudice and local influence" was superseded and repealed by implication by the provisions on the same subject contained in the second section of the act of March 3, 1887. He further held that when an application is made for removal under the latter act on the ground of "prejudice or local influence" it should be addressed to the federal court in the first instance, and that, inasmuch as the law provides that "it shall be made to appear" to that court that prejudice or local influence exists, it is the duty of that court to hear evidence *pro* and *con*, if necessary, (either oral testimony or affidavits,) and to decide thereon as to the existence of such prejudice or influence, before entertaining jurisdiction of the case on its merits. To the same effect is the decision of Justice HARLAN in *Malone v. Railroad Co.*, 35 Fed. Rep. 625, and of Judges WALLACE and LACOMBE in *Amy v. Manning*, 38 Fed. Rep. 868, 536, and of Judge BUNN in *Southworth v. Reid*, 36 Fed. Rep. 451. At variance with these decisions are the decisions in *Whelan v. Railroad Co.*, 35 Fed. Rep. 849; *Fisk v. Henarie*, 32 Fed. Rep. 425; and *Huskins v. Railway Co.*, 37 Fed. Rep. 504. Judges JACKSON, DEADY, and KEY hold that an affidavit by a non-resident suitor, alleging in the words of the statute "that from prejudice or local influence he will not be able to obtain justice in the state court," is sufficient to authorize a removal to the federal court, and that such allegation cannot be traversed by the person or persons against whom a removal is sought. In this district the decision of Judge BREWER must be accepted as the correct interpretation of the act of March 3, 1887, until the supreme court of the United States decides differently. In accordance with these views, on the 4th of June last, I gave the resident suitor, (Mr. Holtzclaw) leave to file affidavits in opposition to those filed by the non-resident in support of its petition for removal. *Vide ante*, 578. The affidavits on both sides have now been examined, with the result that the court is not satisfied that a right of removal exists. The suit is one in which the Carson & Rand Lumber Company sue for the value of lumber sold and delivered to Holtzclaw. The defendant has interposed a counter-claim for services rendered, and for damages sustained by reason of breach of contract. The suit is not one in which the public can be presumed to take any special interest, nor is it one calculated to excite any local prejudice, or affect any local interest. An affidavit signed by several citizens of Macon county, Mo., where the suit is pending, has been filed, stating in general terms that from prejudice and local influence the lumber company will not be able to obtain a fair trial in Macon county, or in any county in that judicial circuit to which the case can be removed. This can be regarded in no other light than an expression of the opinion of the several affiants. The facts stated in the affidavit on which such opinion is based are (1) that Richard Holtzclaw has been a resident of Macon county for some years, and has a large and influential business

acquaintance in that and adjoining counties; and (2) that Macon county and other adjoining counties have had more or less litigation in their corporate capacities, and that such litigation has excited a prejudice against non-resident foreign corporations. On the other hand, an affidavit signed by numerous citizens of the county is filed, which alleges in substance that no prejudice exists against the lumber company, and that Holtzclaw has no such influence in Macon county and the adjoining counties as would prevent a fair trial of the case in question. It is sufficient to say that the petitioner's proofs are utterly insufficient to establish that such a prejudice exists among the inhabitants of several populous counties, or that Holtzclaw has such a dominating influence over such inhabitants, that petitioner cannot obtain a fair trial of the suit in question. The integrity and fairness of the people of an entire judicial district, consisting of several counties, cannot be impeached by such general averments as these. It is by no means probable that the condition of public sentiment is such that in a business controversy between an ordinary foreign business corporation and a citizen of Macon county, the judicial tribunals of that and the adjoining counties would be unable to administer justice fairly. If that is the condition of affairs in the locality in question, the petitioner ought to be able to show with more clearness the cause of the prejudice that exists against it and that prevents it from obtaining justice, as well as the secret of the undue influence which the defendant exercises over the people of the community. The petition for removal is dismissed at petitioner's cost, and an order of removal denied.

CHAFFIN *et al.* v. HULL *et al.*

Circuit Court, E. D. Missouri, E. D. September 26, 1889.)

1. EQUITY PLEADING—MULTIFARIOUSNESS.

In a proceeding in which a deed which conveyed a life-estate to grantee with remainder to her heirs, but which intended to convey the fee-simple to the grantee, was corrected, the heirs were not parties. Subsequently the land was conveyed in fee by the grantee to complainants' ancestor, who made several attempts to obtain releases from the heirs, the grantee having died, all of which was well known to his agent, one of the defendants, who managed the property, and after said ancestor's death continued to occupy the same confidential relations to complainants; said defendant entered into a conspiracy with two others, and procured deeds from the heirs for their respective interests to one of said conspirators, and by collusion procured the dispossession of complainants. The bill, after alleging these facts, prayed the court to adjudge that the decree reforming the deed concluded the heirs, and operated with the subsequent conveyance to complainants' ancestor to vest the full legal title in them; or that it might decree a reformation of that deed, making it operative as a transfer of the fee; or that the court might decree that the transactions between said defendant and his co-conspirators were in breach of the fiduciary relations existing between him and complainants, and that the title thereby acquired was acquired in trust for complainants. *Held*, that the bill was not multifarious.

2. SAME—PARTIES.

In such an action, the grantor and grantee's trustee in the corrected deed are not indispensable parties.

In Equity. On demurrer to bill.

Cunningham & Eliot, for complainants.

Taylor & Pollard and *Joseph S. Laurie*, for defendant.

Before BREWER and THAYER, JJ.

BREWER, J. This is on a demurrer to the amended bill. The facts as alleged are these: In 1840, one William Myers was the owner of the property in question. For a consideration of \$4,000 paid by Elijah Curtis, a deed was executed by Myers and wife to one Samuel Russell in trust for Mrs. Curtis. The deed, as drawn and executed, vested a life-estate in Mrs. Curtis, and the remainder in her right heirs. It was so drawn and executed through a mistake of the draughtsman; the intent of all the parties being that the fee should be vested, and not a life-estate, and that Russell, who so held the title as trustee for Mrs. Curtis, could with his *cestui que trust* convey the fee. After the deed had been so executed and recorded, and, in 1843, the mistake having been discovered, proceedings were had in the circuit court of St. Louis county to correct that deed. A decree was entered that it be reformed so as to express the intent of the parties, and vest a fee instead of a life-estate. To that proceeding Mr. and Mrs. Curtis, Mr. Russell, the trustee, and Mr. and Mrs. Myers, the grantors, were parties. The heirs of Mrs. Curtis were not made parties. By subsequent conveyances the title, vested in Mrs. Curtis and Mr. Russell, her trustee, passed to one Edward Chaffin in 1850. He entered, took possession, and remained in possession until his death in 1883. Thereafter the present complainants holding under his will took possession and retained it until 1886. Mr. Curtis, the husband of Mrs. Curtis, the party who paid the money, died in 1843, but Mrs. Curtis lived until 1884, when she died, leaving no children. Mr. Chaffin during his possession became aware of the fact that, inasmuch as the heirs of Mrs. Curtis were not made parties to that decree of reformation, they had at least an apparent title to the remainder. During the years of his possession, at least during the last few years of his possession, he himself having removed to Massachusetts, he employed Leon L. Hull, one of the defendants, as his agent to look after the property, to pay taxes and insurance, to rent the property, and have general charge thereof as his agent. During the years of that relationship he communicated to Mr. Hull his doubts as to the completeness of his title as disclosed by the record, and made several efforts, through him, to ascertain the residence and names of the right heirs of Mrs. Curtis, with a view of obtaining from them releases of their apparent title to the remainder. Mr. Hull was fully possessed of information in this respect from Mr. Chaffin, his principal. On the death of Mr. Chaffin, these complainants, finding Mr. Hull in possession as agent, continued him in that position, and he assumed the same confidential relations to them that he had had to Mr. Chaffin. After the death of Mrs. Curtis, in 1884, Mr. Hull, the agent, conspiring with one William Clark and one Samuel Hermann, proceeded to hunt up the right heirs of Mrs. Curtis and obtain deeds from them, the deeds being made to William

Clark, one of the conspirators, of their respective interests in the remainder. While apparently continuing as the agent and representative of these complainants, in pursuance of this conspiracy, he caused legal proceedings to be instituted, which, being carried on collusively, terminated in the dispossession by the defendants of these complainants, and the transfer of possession to Clark, one of the conspirators. This was accomplished in 1886. The charge is that these arrangements and transactions between Clark, Hull, and Hermann were a part of a conspiracy, and were a breach of the trust relations existing between the complainants and Hull. All these facts being stated in the bill, the prayer is that this court shall decree that the decree of the St. Louis circuit court reforming that deed concludes the right heirs of Mrs. Curtis, and operated to vest the full legal title in Mrs. Curtis and her trustee, and these complainants claiming under her; or, if the court cannot so decree, that it now decree a reformation of that deed, correcting the mistake, and making the deed to-day operative as a transfer of the fee, and therefore cutting off all interests in the remainder in the heirs of Mrs. Curtis or their grantees; or, failing that, that the court decree that the transactions by which Leon L. Hull, with his co-conspirators, obtained the legal title to the remainder were in breach of the fiduciary relations existing between Hull and the complainants, and therefore that the title which they acquired was acquired in trust for the complainants. To that bill a demurrer has been filed, and the first proposition of the defendants is that the bill is multifarious, in that it rests first upon a title obtained by a correction of the deed, a source of title of necessity implying that the right heirs never had any actual equitable right or interest in the remainder, and that the deeds from them to the conspirators, (defendants,) while apparently conveying the full title, in fact transferred only the naked legal title, the real equitable interest all the while being in these complainants; while, on the other hand, it makes as a basis of relief a claim that, the full legal and equitable title having passed by that deed to the right heirs, these conspirators acquired that title in fraud of fiduciary obligations to complainants, and therefore in trust for them. There is thus an apparent antagonism between the two claims,—one resting upon the proposition that the right heirs had no equitable interest and title to the remainder, and the other that they did have full equitable as well as legal title. My Brother THAYER and I had a very pleasant discussion of that question yesterday afternoon, in which we examined the authorities at great length. Distinct and independent causes of action cannot be conjoined in the same suit; and yet it has been said by the supreme court, and is the voice of many authorities, that no fixed rule can be laid down as to the matter of multifariousness; that each case must stand upon its peculiar facts, and while independent causes must not be joined in one bill, neither should a defendant be unnecessarily burdened with two suits.

Now in this cause the complainants are all interested in the one result; the defendants also are all jointly interested. There is no difference of interest between any two of the complainants or any two of the defend-

ants. The ultimate result sought to be reached by the bill upon which ever claim it may be obtained is the same, to-wit, a decree that the complainants are the owners of the full equitable title; that the defendants hold the legal title, and hold that title in trust for the complainants, and ought to be divested of it, and ought to surrender possession, and ought to account for rents and profits. So, there being a unity of interest in the parties complainant and the parties defendant, a single property the subject-matter of litigation, and a single ultimate purpose the object of the suit, we have concluded that in the interests of justice and equity, and a speedy settlement of the title to that property, the court is justified in holding that the bill is not multifarious. It is a part of the prayer of the bill that this court shall decree that that decree in the St. Louis circuit court binds the right heirs of Mrs. Curtis, and operates as against them and these defendants to vest the full title in complainants. We are clearly of the opinion that that decree did not so operate; that the court cannot so decree. They were not parties to it, and whatever title the heirs had, they acquired not through Mrs. Curtis, but as purchasers. It is no objection to a bill in equity that it has what is called a double aspect; that is, asking one relief, and, failing that upon the facts stated, another relief.

So far as the special objection is made that indispensable parties are not before the court, to-wit, Myers, the grantor of the deed of 1840, Russell, the trustee, and the heirs of Mr. Curtis, it is enough to say that they are not indispensable parties. They were parties or in privity with parties to that proceeding in the state court, and by that decree all their rights, and all claims that they might have adverse to the claim of complainants, were settled and determined.

It is also alleged in this bill that a suit is pending in the state court, and the prayer is that this court enjoin the prosecution of that suit. That question has already been determined by Judge THAYER, who held that this court would not interfere with that prior suit, and with that ruling I have no disposition to differ.¹

I think that is all that I need say. The demurrer to the bill will be overruled, and defendants will be given until the November rules to answer.

THAYER, J. In this matter I desire to say in my own behalf that the bill unquestionably states two distinct grounds for equitable relief. In the first place complainants seek to establish their title and right to the possession of a certain piece of property by the reformation of a deed under which defendants claim and hold possession. In the second place, they charge the defendants with having acquired the title which they now hold by acts that were constructively fraudulent, and on that ground they ask a decree adjudging that the defendants hold the property as trustees for the complainants. Because complainants seek relief on two distinct and independent equitable grounds, the bill under some circum-

¹No opinion filed.

stances might be adjudged multifarious. But it is apparent that the parties proceeded against are proper parties to the bill considered in either aspect, and that none of the defendants can say that they are called upon to answer charges in which they have individually no concern.

Furthermore, while two grounds of relief are stated, yet the relief sought in each instance affects the title to one and the same piece of property, and concerns all of the defendants. If we should hold the bill to be multifarious, and compel the complainants to elect on which ground they will stand and proceed to trial, I can see no reason why they might not file a second bill, if defeated on the first, alleging in such second suit the same cause of action that we compel them to abandon in this. Defendants must, in any event, as it appears to me, meet the averments of the bill in both of its aspects, either in this suit, or in another suit.

If the bill is retained in its present form, I cannot see that it will occasion any confusion in putting in the proofs, or interfere with the orderly conduct of the trial, or put the defendants to any disadvantage. If it shall appear that the form of the bill has enhanced the costs unnecessarily, we can easily regulate that matter by appropriate orders at the conclusion of the case. Inasmuch as it is largely discretionary with the court whether it will permit two or more independent grounds of equitable relief to be stated in the same bill, and inasmuch as courts are very much governed in the exercise of that discretion by considerations of convenience, I think that for the reasons thus briefly outlined we are justified in holding that different grounds of relief have not been improperly united in the present case, and that the bill is not multifarious.

MURDOCK v. CITY OF CINCINNATI *et al.*

(*Circuit Court, S. D. Ohio, W. D. September 24, 1889.*)

MUNICIPAL CORPORATIONS—ASSESSMENT—NOTICE.

A special assessment without notice to the property owner and opportunity to be heard is wanting in "due process of law," though neither the city nor state laws require such notice, and its enforcement will be enjoined.

In Equity. Application by James Murdock, Jr., for a preliminary injunction restraining the board of public affairs of the city of Cincinnati from enforcing a special assessment.

Rankin D. Jones, for complainant.

Theo. Horstman, for defendant.

JACKSON, J. In this cause, now before the court on application for a preliminary injunction, it appears from the allegations of the bill that complainant has had no notice of, nor any opportunity to be heard in

relation to, the assessments made by the board of public affairs of Cincinnati against his several lots described in the bill; that no provision was made in any of the ordinances or resolutions or acts of said city of Cincinnati, or of its officers or boards, giving to property owners the right and opportunity to be heard in respect to the amount of the special assessments complained of; and that no such provision (as complainant alleges) exists in any of the laws of the state applicable to said city and the assessments in question. Under such circumstances the court is of the opinion, in conformity with its holding in the case of *Scott v. City of Toledo*, 36 Fed. Rep. 385, that the assessments made against complainant's lots are wanting in "due process of law," and that, upon the showing presented by the bill, an order should be granted restraining the city of Cincinnati, its officers and agents, from enforcing, or the taking of any steps to enforce, the assessments complained of until the further order of this court herein. This temporary restraining order is in no way to interfere with the rights of the city of Cincinnati or of its board of public affairs to make a reassessment against complainant's lots, on account of the improvements referred to in the bill, in any proper and lawful manner, which will afford him notice of, or an opportunity to be heard in respect to, such reassessment. Nor is the restraining order, now granted upon the case, made by the bill alone to preclude the city of Cincinnati from answering and disputing the allegations of the bill, or from showing that complainant has waived his right to notice of, or opportunity to be heard in respect to, said assessments.

Should the city of Cincinnati, after full opportunity to contest the truth of the objections presented by the bill to the validity of the assessments complained of, fail or decline to do so, then complainant may renew his motion for a preliminary injunction. If, however, the city should answer and controvert the case made by the bill, the restraining order may, upon its motion, be discharged. A restraining order as above indicated and directed will be issued by the clerk of this court to the defendants.

BANNON v. BURNES *et al.*

(Circuit Court, W. D. Missouri, W. D. September 2, 1889.)

1. MUNICIPAL CORPORATIONS—TAXATION—SALE FOR NON-PAYMENT.

A city charter (charter of Kansas City, § 50, art. 6) provided that if realty could not be sold for the amount of taxes, interest, and cost, the city auditor should, if so directed, bid it off to the city for that amount, and make a record of the fact of the sale to the city. No certificate was to issue upon such sale, but any person might thereafter pay to the collector the sum so bid, and receive a certificate, which should be assigned to him by the city auditor, which certificate should vest all the interest of the city in the realty, and entitle such person to the same rights and privileges as if he had purchased the same at a tax-sale. *Held*, that the bidding in by the city constituted a public sale for taxes within the meaning of the section conferring upon the au-

ditor power to offer at public sale property on which taxes were due, and in the absence of any express authority in the charter, the auditor had no power to subsequently offer it for sale.

2. SAME—CONCLUSIVENESS OF DEED—DUE PROCESS OF LAW.

The defect in the title is not cured by a provision of the charter declaring the tax-deed, regular in form, conclusive evidence of almost every essential fact, except that proof might be made that the taxes had been paid, or the property was exempt, or had been redeemed. If the property was sold at the first sale, the auditor had no jurisdiction over it, and it would be taking property without due process of law to make tax-deeds conclusive evidence of facts essential to jurisdiction.

3. SAME—PROPERTY CEDED TO UNITED STATES.

Laws Mo. 1870, p. 353, gave the consent of the state to the acquisition by the United States of land in Kansas City for the erection of a post-office, and declared that the land when acquired, should, so long as it remained the property of the United States, be exonerated from all taxes, assessments, and other charges levied or imposed under the authority of the state. By the charter of Kansas City the lien for city taxes attaches on January 1st, but the levy is not made until the third Monday in April. *Held*, that land so acquired by the United States between January and April was not subject to taxation by the city.

At Law. Ejectment.

Johnson & Lucas, for plaintiff.

L. C. Krauthoff, for defendants.

PHILIPS, J. This is an action of ejectment to recover possession of lot 62 in Swope's addition to the city of Kansas, Mo. This lot is the north end of the site on which is constructed the United States custom-house, post-office, and court-house. The defendants are the surveyor of the port and custodian of the custom-house building, and other government officials occupying offices in said building. The plaintiff claims title under a tax-deed from the collector of Kansas City, dated November 6, 1885, predicated on a sale made January 4, 1884, for the payment of taxes claimed to be delinquent for the year 1879. At the time said taxes became delinquent, Malvina D. Hughes was the owner of said property, and on the 9th day of April, 1879, she conveyed the same by warranty deed to the United States, for a valuable consideration, to be used and occupied by it for a United States custom-house, post-office, court-house, and other like public business. The cause was submitted to the court for trial without the intervention of a jury. The facts in evidence, so far as they are material, will appear in the following discussion. Various objections are urged by counsel for the government against the validity of the tax-deed. Without considering and determining others, we pass at once to the consideration of one of gravest importance. The record evidence shows that at the tax-sale held in said city in October, 1879, this property, after due steps taken thereto, was put up for sale for delinquent taxes of 1879, and was bid in by the city auditor for the city, pursuant to directions from the city comptroller. Section 50, art. 6, of the city charter provides, in substance, that if any real property cannot be sold for the amount of taxes, interest, and cost, the city auditor shall, if directed by the comptroller, bid it off to the city for such amount. Thereupon the city auditor shall make a record of the same in a book of sale, by stating such fact of a sale to the city, and the date of the same. No

certificate, however, shall be issued on such sale; but any person may thereafter pay to the city collector the sum so bid, including costs, etc., and receive from the collector a certificate dated the day when it is issued, describing the property, etc., which certificate, before it shall be of any validity, shall be assigned to such person by the city auditor, who shall note the same on his book of sales, and such certificate, so assigned by the city auditor, shall vest all the interest of the city in or to such real property in such person; and such certificate shall be assignable to the same extent and in like manner as certificates given to purchasers at tax-sales, and shall entitle such person to the same rights and privileges thereunder as if he had purchased the same at a tax-sale.

The question arises, by what authority of law was this property again advertised and sold to plaintiff in 1884? There does not appear in the charter any express provision for readvertising and selling as delinquent land so bought in by the city. As the whole authority of the city collector to take any action or step towards the sale of the citizen's property and the divestiture of his title comes from the legislative grant of the sovereign, the state, any such course as was pursued in this case should be clearly marked out in the charter, or appear by necessary implication. The charter does specify what the city may do with the property so bought in by it. Said section 50 provides for its transfer by assignment to any one who will pay the amount of the bid, with penalties, costs, etc.; and section 76 provides for suit by the city, whereby the equity of redemption of the owner may be cut off, and for the absolute sale *in rem* under special execution. It is not to be concealed that other provisions of the charter seem to contemplate that all unpaid taxes from year to year shall be carried on the land-tax books, so as to show all the antecedent unpaid taxes, and for what year delinquent. But all these general provisions precede and lead up to the section directing the public sale for such delinquent taxes. Section 42 declares that "on the first Monday in October in each year the city collector shall offer at public sale, at his office, in the city of Kansas, all real property on which taxes or special assessments shall remain due and unpaid, and such sale shall be made for and in payment of the total amount of taxes and special assessments, interests, and costs, due and unpaid on such real property." Then follows section 43, which prescribes with much particularity what the notice of sale shall contain. It shall contain "the several parcels of real property to be sold, and all delinquent taxes and assessments thereon, and such real property as has not been advertised and sold for the taxes of any previous year or years," etc. Section 50 clearly treats the buying in by the auditor for the city as a sale; for it expressly declares that when any real property shall be bid off for the city, it shall be the duty of the city auditor to make a record of the same in a book of sales, by stating such fact of sale to the city. And as further proof, by the latter part of this section, provision is made for any stranger taking the benefit of the sale by paying to the city collector, not the taxes, etc., yet due and unpaid, but "a sum of money equal to the amount of all taxes, interests, and costs" on such property at the time of such payment; and the certificate to be

given to such assignee of the city "shall vest all the interest of the city in or to such real property in such person." "All the interest of the city," as here expressed, necessarily implies that the city acquired such interest as a purchaser at such land-tax sale. It could have no other assignable interest. And the fact that the holder of a certificate of payment of taxes to the city collector is placed upon the same plane of right as the original purchaser at public sale, being entitled at the end of the prescribed period to an absolute deed, forcibly demonstrates that in contemplation of the charter the bidding in for the city constitutes a sale; and therefore this lot could not be readvertised and sold, because it could not be said, as required in said section 43, that it was "such real property as has not been advertised and sold for the taxes of any previous year." If after this "bid in" for the city some third party had paid to the city the sum equal to the taxes, etc., and received the prescribed certificate, and it had ripened into a right to a deed, such deed, to be of any validity, would have to recite that this property was sold at public sale and for the payment of taxes. Section 65, art. 6, of the Charter; *Sullivan v. Donnell*, 90 Mo. 282, 2 S. W. Rep. 264; *Hopkins v. Scott*, 86 Mo. 140. Consequently and necessarily the bidding in by the city constitutes a public sale for taxes, as prescribed in section 42 of the charter. The power to so advertise and sell is conferred alone by said section 42, except in the instance where the land for the lack of any bidder may not be sold at all. Section 75. Once exercised by the delegated agent, the power to advertise and sell was exhausted, and the agency therefor ceased. Any reassertion of such power must have for its warrant express authority. We fail to find it in terms in the charter.

Plaintiff's tax-title, therefore, must fail, unless, as suggested in the argument, the imputed infirmity be helped by the provision of section 64 of said article of the charter, which declares that the tax-deed, made after the prescribed form, shall be conclusive evidence of almost everything essential to its validity, except that proof may be made that the taxes were paid before sale, or that the property was not subject to this taxation, or that it had been redeemed, or the money tendered. It is to be conceded that the provisions of this charter respecting the validity of such deeds are very sweeping. And while the courts should treat with great respect the enactments of the legislative department of government, yet the courts, which stand as the last resort of the citizen, and the sworn guardian of his property rights, cannot fail to recognize that there are some things which even the legislature cannot do. It cannot take the citizen's private property, even for public use, without due process of law. It cannot prescribe a method by, and the conditions on which, property may be sold for taxes, and by the same act declare that when sold the deed shall be good, although the prescribed method was not pursued and the required conditions of sale were not regarded; especially where such conditions are precedent facts essential to confer jurisdiction on the body or person undertaking to sell. Due process of law is not any process which legislative power may devise. As said by Mr. Justice CURTIS in *Murray's Lessee v. Improvement Co.*, 18 How. 276:

"The article [of the constitution] is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave congress [the legislature] free to make any process 'due process of law' by its mere will."

The city charter prescribes that certain facts shall exist to authorize the city collector to advertise and sell, as has already been stated. It is a well-established principle of law that in proceedings *in invitum* looking to the seizure and appropriation of private property for public uses, every fact which in its nature is jurisdictional must exist before jurisdiction attaches to the tribunal attempting the seizure and appropriation. "Power is conferred upon the court, to be exercised on certain defined and limited contingencies; and these contingencies must have happened, and the conditions on which it can act must have been performed, before its act can be valid. Its authority does not attach until the law has been pursued and complied with." *Lagroue v. Rains*, 48 Mo. 538. "Any statute is unconstitutional which attempts to make a tax-deed conclusive evidence as to jurisdictional facts, or facts vital to the exercise of the power of taxation or sale, as distinguished from such facts as are merely formal, or of routine, or pertaining to the regularity or the manner of the exercise of such power." Black, Tax Titles, § 253. Judge Cooley (Tax'n, 470) expresses the principle thus:

"The officer who makes the sale sells something he does not own, and which he can have no authority to sell, except as he is made the agent of the law for the purpose. But he is made such agent only by certain steps, which are to precede his action, and which, under the law, are conditions to his authority."

If, therefore, as we have attempted to show, the sale of this property to the city in 1879 withdrew it from future sale by the collector, his advertisement and sale in 1884 were clearly *coram non judice*. He had no jurisdiction over the subject-matter. The supreme court of this state has held that it was not within the constitutional competency of the legislature to make such deeds conclusive evidence to such extent as to cut off inquiry as to whether facts vitally essential to the exercise of the jurisdiction in the tax proceedings existed. *Abbott v. Lindenbower*, 42 Mo. 162; *Ewart v. Davis*, 76 Mo. 129-134. Section 82 of this same article of the charter declares that—

"The tax-book and all other books and papers made or kept by the officers of the city, or in any manner relating to any tax, shall be received in all courts as evidence of all the facts stated therein, and of the validity of the tax-deed," etc.

It would indeed be a queer and unique statute which should provide for the admission in evidence in all courts, to support the validity of a tax-deed, the city books, or other books and papers pertaining thereto, while at the same time and place declaring that such evidence should not be admitted to impeach the validity of the deed. The sword of justice should be two-edged, and cut both ways. The office of a corresponding provision under the revenue laws of the state was held by the supreme court to admit such records and papers in evidence to assail a tax-title

where it was sought, as here, to shut off such proof by the conclusive effect of the deed itself. *Ewart v. Davis*, 76 Mo. 135. It is not apparent that there is anything in the points ruled in *De Treville v. Smalls*, 98 U. S. 517, in conflict with what is here held; for neither the statute there construed, nor those of the states cited, extended to or undertook to assert the position that the deed itself should conclude all inquiry as to whether the property at the time of the sale was subject to the summary process for taxes. In other words, the statute did not declare an *ex parte* deed valid where there was a lack of power to sell in the mode pursued. For, as said by the court in the *De Treville Case*: "It [the deed] may be regular in form and in the mode of its conduct, but it cannot be valid, unless authorized by law." *Vide Marsh v. Fulton Co.*, 10 Wall. 683, 684; *Railroad Co. v. Parks*, 32 Ark. 131; *Radcliffe v. Scruggs*, 46 Ark. 96.

If, however, our conclusion as to the validity of the tax-deed be untenable, there is another obstacle in the way of plaintiff's recovery, which we think is unsurmountable. On the 31st day of January, 1870, the state of Missouri by legislative enactment (Laws Mo. 1870, p. 355) gave its consent to the purchase of this property by the United States. The essential provisions of this act are, in substance, as follows:

(1) The consent of the state is given to the purchase by the United States of a piece of land in Kansas City, not exceeding one acre in quantity, on which to erect a building for the accommodation, &c., of the United States courts, post-office, internal revenue, and other government offices. (2) Jurisdiction is given to the United States over this land when purchased, so long as it shall use the same, subject to the right of entry by the state authorities for the purpose of executing civil and criminal process.

Then follows section 4:

"The jurisdiction hereby ceded shall not vest until the United States shall have acquired the title to the land by purchase or grant, and so long as the said land shall remain the property of the United States, when acquired as aforesaid, and no longer, the same shall be and continue exonerated from all taxes, assessments, and other charges which may be levied or imposed under the authority of the state."

So the sovereign—the local state government—consented to this purchase by the superior government before it was made, and covenanted on its part that, when the United States should acquire the title of the owner, the jurisdiction of the state should cease over the property, and that of the United States should attach, with the single reservation of the right of entry for service of legal process. Then follows the covenant of assurance that, whenever the state obtained such property by purchase or grant, the property thenceforth should be forever "exonerated from all taxes, assessments, and other charges, which may be levied or imposed under the authority of the state." The taxing power is the attribute of sovereignty, and the exercise of the highest jurisdiction. As it is a power to be exercised or forborne at the will of the sovereign having jurisdiction, it follows logically that the sovereign may cede away such right, and release the burden. And when the grant has been accepted by the general government, and the conditions of the purchase have been fully

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performed, such grant becomes a solemn compact, which the general government would not permit the state to violate. The term "exonerated" was, presumably, employed in its ordinary acceptation: "to be relieved of as a charge; to be discharged or exempted." Be the contention of plaintiff's counsel correct, that the lien of the city government on this property, so far as the owner and all other persons were concerned, attached on the 1st day of January, 1879, yet under the city charter (section 4, art. 6) the fiscal year begins on the third Monday in April, which in 1879 was the 21st day of April. The assessment is made between the 1st day of January and the third Monday of April, and is delivered to the council at its first meeting of the fiscal year. The council then by ordinance proceeds "to levy taxes for the fiscal year." A copy of this, with the assessment books, is delivered to the auditor, who then extends the taxes, and delivers the tax-book to the collector on the 1st day of May. Sections 20, 21. From which it is manifest that the taxes for the year 1879 were not levied until after the 9th day of April, and after the United States had acquired title to the property by purchase. The mere fact that the property owned on the 1st day of January became liable to taxes for that fiscal year would not avail for the purpose of taxation, without an assessment and levy. Taxes not assessed or levied can never become an effectual lien. *Heine v. Commissioners*, 19 Wall. 659; *Greenough v. Coal Co.*, 74 Pa. St. 486-500; Black, Tax-Titles, § 43. The state, by the act of cession, covenanted, in effect, that when the government should purchase this property it would not thereafter make any levy; and if the state itself had proceeded as did the city to make a levy for the purpose of taxation, after the 9th day of April, 1879, this property would have been exonerated therefrom. The municipal corporation of Kansas City is an integral part of the state. It is but an adjunct of the state power, to aid in carrying out the ends of government. It is therefore no less an action taken by the state when done through the agency of a subordinate municipal corporation. When the superior sovereignty ceded away its right and jurisdiction to make this levy and sale, it necessarily negatived and withdrew the power of its inferior, existing by its consent, and acting as one of its governmental instruments, to do that which itself could not. *Cooley, Tax'n*, (2d Ed.) 82-84; *U. S. v. Railroad Co.*, 17 Wall. 328, 329; *O'Donnell v. Bailey*, 24 Miss. 386-388; *Van Brocklin v. State of Tennessee*, 117 U. S. 178, 6 Sup. Ct. Rep. 670.

Hitherto it seems to have gone without question that if, after a city had taken steps looking to the enforcement of a tax, the state legislature passed an act exempting such property from taxation, it put an end to the right of the city to proceed. *Van Brocklin v. State of Tennessee*, *supra*, 175, 176. Moreover, section 8, art. 1, of the federal constitution declares:

"Congress shall have power * * * to exercise exclusive legislation in all cases whatsoever * * * over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

The act of congress admitting the state of Missouri into the federal Union (section 4) "provided that no tax shall be imposed on lands or property of the United States." Congress authorized the secretary of the treasury to purchase this property for such needful buildings. 20 St. U. S. 39. Such buildings as were erected by the government on this lot are "needful" in the sense of the constitution, as they are a necessary means "employed by the government in executing its sovereign powers." *Fagan v. Chicago*, 84 Ill. 227. The moment, therefore, the government acquired this property, its jurisdiction over it became absolute and exclusive, except in the particular of the reservation expressed in the act of cession by the state legislature; and by the very law of the state's creation and admission into the federal Union its power to impose—to levy—a tax on this property, ceased,—died,—because by the purchase it became "lands or property of the United States." If the right of the state or its subordinate municipality be conceded to proceed to enforce by levy and sale a tax after the acquisition of the title by the government, the legal sequence would logically follow that the state could enter upon this territory, over which it had ceded jurisdiction to the United States, and oust the government officers, its judges, and ministerial officers, and deliver over the property to the purchaser, which is precisely what was sought to be accomplished by the institution of this action in the state court. This might produce serious embarrassments and complications, as it is calculated to obstruct the operations of the general government. Such ill-omened results the constitution designed to obviate by freeing such "needful" property, after acquisition of title by the United States, from state jurisdiction, process, or interruption, which might interfere with its full enjoyment for government purposes. *Railroad Co. v. Lowe*, 114 U. S. 525, 5 Sup. Ct. Rep. 995; *Van Brocklin v. State of Tennessee*, 117 U. S. 151, 6 Sup. Ct. Rep. 670.

Since writing the foregoing opinion my attention has been called to an opinion of Judge BREWER, of this circuit, delivered at Little Rock, Ark., in *Martin v. House*, ante, 694. The manuscript opinion is before me. The view expressed by me herein is not only entertained by Judge BREWER, but he applied the principle to the instance of a judgment creditor who had obtained his judgment lien on the property in the state court before acquisition of title by the government for the purpose of a custom-house, etc. The short statute of limitation prescribed by the city charter for bringing actions of ejectment against such tax purchaser, after deed obtained, it is scarcely needful to say, can have no application to this contention. In the first place, the provision applies only where the tax purchaser is in possession, and the action is brought "against" him. *Spurlock v. Dougherty*, 81 Mo. 171-182; *McReynolds v. Longenberger*, 57 Pa. St. 13-29. Such statutes of limitation do not run against the government. Nor can it be tolerated that the state legislature could enforce an act which required the general government to bring a possessory action for the recovery of property of which it was already possessed under the protection of constitutional authority. It follows that the issues are found for the defendants. Judgment accordingly.

UNITED STATES *v.* SCOTT *et al.*

(Circuit Court, N. D. California. September 23, 1889.)

PUBLIC LANDS—CUTTING TIMBER—PAYMENT FOR LAND.

A party prosecuted for cutting timber on the public lands under section 2461, Rev. St., is only relieved from the criminal prosecution and liabilities provided for in said section 2461 by payment of \$2.50 per acre for the land on which it is cut, in pursuance of the provisions of the act of 1878, (1 Supp. Rev. St. p. 329, § 5;) he is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut.

(*Syllabus by the Court.*)

At Law.

J. T. Carey, U. S. Atty., for plaintiffs.

J. J. Scribner and R. T. Devlin, for defendants.

Before SAWYER, Circuit Judge, and SABIN, District Judge.

SAWYER, J., (SABIN, District Judge, dissenting.) This is an action to recover twenty-six thousand and odd dollars, the value of lumber manufactured from timber cut on the public lands of the United States, described in the complaint. The third defense set out is, that, after the cutting of said timber, and manufacturing of it into lumber, the defendants were indicted for the offense of cutting the same timber under section 2461 of the Revised Statutes of the United States; that after said indictment, the defendants paid into the court in which it was pending, the sum of two dollars and fifty cents per acre for all lands upon which said timber had been cut, and were, thereby, "relieved from *further* prosecution and liability therefor," in pursuance of section 5 of the act of June 3, 1878, entitled "An act for the sale of timber lands in the states of California, Oregon and Nevada, and in Washington Territories." 1 Supp. Rev. St. 329. The United States moves to strike out this defense, as constituting no valid answer to the suit, and as being, therefore, irrelevant. On the part of the defendant it is claimed, that section 5 covers not only all criminal prosecutions, and relieves them "from further prosecutions and liability therefor," incurred under section 2461, Rev. St., but, that, it exonerates and relieves them from all civil liability for the lumber cut, or for its value. The United States, on the other hand, claim, that they are only relieved from the penal liabilities incurred under said section 2461, and the question thus raised is the one to be now determined. Section 2461 makes it an offense against the United States to cut and destroy or remove timber from the public lands in the way alleged in the complaint; and provides, that, "any person so cutting timber," shall pay a fine not less than triple the value of the trees cut, or timber so destroyed, or removed, and shall be imprisoned not exceeding 12 months. There is, therefore, a criminal liability created which is to be prosecuted and punished by indictment—the penalty being both fine and imprisonment. Now what is the *subject-matter* of section 5 of the act of 1878? Manifestly, by the terms of the statute, persons prosecuted and the liabilities for which they

are prosecuted, "for violating section two thousand four hundred and sixty-one." They are to be relieved from "further prosecution and liability," under said former section. It would be a strained construction, to extend the section to other civil rights of the United States, not specifically, or at all, mentioned. The subject-matter of the provision seems, manifestly, limited to prosecutions under section 2461. When the timber is once severed from the land, it ceases to be a part of the realty, and becomes personal property, having no further relation to the realty whatever. But the title to the personal property is still in the United States. The property becomes subject to the laws that govern personal property. The relation of the parties to the property becomes changed. Under the case of *Wooden-Ware Co. v. U. S.*, 106 U. S. 432, 1 Sup. Ct. Rep. 398, the United States can replevy the lumber or timber, wherever found, and if it cannot be found, and the cutting was knowingly and willfully done, recover the full value of the lumber, or timber, with the enhanced value by reason of its manufacture, and carrying to market. Suppose in the case of timber cut prior to the act of 1878, in violation of section 2461, the United States had recovered the lumber or timber made, or its enhanced value in an action of replevin, I apprehend, that this would not have relieved the parties from the criminal liability and prosecution under the statute. The latter was an additional liability created for the protection of the timber on the public lands. So, also, if the proceedings were reversed, and a conviction had, and punishment executed under the statute, I apprehend, that the party would not thereby be relieved from his civil liability, under the general law of the land, wholly independent of the statute. The United States would still own the lumber. The two liabilities are entirely independent of each other. They have no relation whatever to each other. So also, if since the passage of the act of 1878, the United States under the rule established in *Wooden-Ware Co. v. U. S.* should recover the lumber or timber, or its enhanced value after carried to market, this, I take it, would not, even now, relieve the party cutting it from prosecution criminally under section 2461, Rev. St. If he should upon such subsequent prosecution, pay into court two dollars and fifty cents per acre as provided by section 5 of the act of 1878, it would hardly be contended, I think, that he would be entitled to a credit for the amount already recovered by the United States for the value of the lumber. The value of the lumber recovered would, doubtless, in many cases, be ten times the amount of two dollars and a half per acre for the land on which it had been cut. If he would be entitled to a credit to the amount of two dollars and a half per acre, it would be upon the principle that the government authorizes him to buy all the timber there was on the land before it was denuded after having been detected in his offense, and upon that theory the government when seeking to convict him should refund the full amount of its recovery in the civil suit, over the sum of two dollars and a half per acre. On this hypothesis, it would be a great advantage, instead of an inconvenience to the offender to be prosecuted criminally instead of civilly. There is little land I apprehend, that is worth being denuded of its timber, at all, for lumber or timber, upon

which parties would not gladly pay two dollars and a half per acre for the right to cut it, provided it cannot be done on easier terms. But if as trespassers they can cut and destroy on larger tracts of land and only occasionally, *when detected and prosecuted, criminally*, secure immunity by paying two dollars and a half per acre for small portions of their depredations, they are not likely to trouble themselves much about consequences. On that hypothesis, on the general result, it would be much more profitable to unlawfully *take than to buy* the timber, even if it could be bought. Such a construction of the act of 1878 as is contended for by defendant, would hold out a large premium to trespassers to utterly denude the public lands of their most valuable timber. I do not think congress in the act of 1878 contemplated any such absurd consequences.

I do not perceive that reversing the proceedings and indicting the party first, and beginning the civil action afterwards, would vary the rights of the parties. I am of the opinion that a payment in pursuance of section 5 of the act of 1878 does not discharge the party from liability other than that created by section 2461, Rev. St. and that the facts alleged in the third division of the answer, constitute no defense, and that that defense should be stricken out as irrelevant. It is so ordered.

STOUGHTON v. WOODARD *et al.*

(Circuit Court, W. D. Wisconsin. August 6, 1889.)

TRADE-MARKS—"COUGH CHERRIES."

The words "Cough Cherries," as applied to a confection, are not descriptive of the qualities of the article, but are sufficiently arbitrary and fanciful to be appropriated as a trade-mark.

In Equity. On bill for injunction.

Action by Dwight G. Stoughton against Marshall J. Woodard and others to restrain defendants from using complainant's trade-mark.

Coltzhause, Sylvester & Scheiber, for complainant.

Hall & Skinner, for defendants.

BUNN, J. This is an application by the complainant for a temporary injunction to restrain the defendants from using the complainant's trade-mark. The case stands upon the allegations of the complainant's bill. By said bill it appears that in September, 1886, the complainant, residing at Hartford, Conn., and engaged in the manufacture and sale of confections, adopted as a trade-mark, under the laws of Connecticut, the words "Cough Cherries" for a certain brand of confections made and sold by him; that he has continued such manufacture and sale, in connection with the use of such trade-mark, from 1886 to the present time; that he has expended large sums of money in advertising said confection, so that the goods sold under this designation have become widely

known to the trade; that no one had ever used the said words in connection with the manufacture and sale of confections before; that the goods so manufactured and sold by complainant under said trade-mark are of a form roughly approximating an oblate spheroid, of a reddish color, of a cherry flavor, and medicated for alleviating coughs and colds. It is further alleged, and the fact is not controverted, that the defendants have, since the 15th day of February, 1888, at Watertown, Wis., been engaged in making and selling, without complainant's leave, confections similar to those of complainant, put up in a similar manner, and labeled with the same words, "Cough Cherries."

The only question for the court to determine is whether the words adopted by the complainant can properly be used and appropriated as a trade-mark. And under the principles established by adjudged cases I think they may. The rule applicable to the case is perhaps laid down as well in *Selchow v. Baker*, 93 N. Y. 59, as in any adjudged case, as follows:

"That when a manufacturer has invented a new name, consisting either of a new word or words in common use, which he has applied for the first time to his own manufacture, or to an article manufactured for him, to distinguish it from those manufactured and sold by others, and the name thus adopted is not generic or descriptive of the article, its qualities, ingredients, or characteristics, but is arbitrary or fanciful, and is not used merely to denote the grade or quality, he is entitled to be protected in the use of that name."

In that case the complainant had manufactured and sold pictures of animals in sections arranged in such a manner that when put together in a certain way a picture of an animal would be presented. These pictures they had put up in boxes and labeled "Sliced Animals." The court held that the words were not simply descriptive of the articles sold, but were more or less arbitrary and fanciful. I think the same rule applies to this case. The words "Cough Cherries" are not properly merely descriptive of the qualities of the thing manufactured and sold, but are to a large extent arbitrary and fanciful, quite as much so as "Sliced Animals," applied to pictures of animals in parts or sections. If the label adopted had been "Cough Candy," "Cough Remedy," or "Cough Confection," or if the article sold had been cherries in fact, and labeled as these goods were, the case would come within the ordinary rule that, when the words adopted are simply descriptive of the qualities of the article sold, they will not be sustained as a trade-mark, on the principle that what is already the common property of everybody cannot be exclusively appropriated as the property of any individual. But the words "Cough Cherries," applied to a confection, are clearly distinguishable, in my judgment, from all the cases I have examined where the court has refused to sustain a trade-mark on the principle above stated. An injunction will issue as prayed.

UNITED STATES v. TOZER.

(Circuit Court, E. D. Missouri, N. D. September 30, 1889.)

1. CARRIERS—INTERSTATE COMMERCE ACT—CARRIAGE FOR SAME PERSON.

A grocery company of Hannibal, Mo., ordered a broker in Chicago to ship two barrels of sugar to a customer in Hepler, Kan. This order was executed by shipping the sugar over the C., B. & Q. R. Co. A through bill of lading was taken in the name of the broker, with the customer indicated as consignee, which reserved to the C., B. & Q. Co. the right to forward the property from Hannibal, Mo., over the line of any connecting carrier. At the latter place the sugar was unloaded, placed in the warehouse of the Mo. Pac. Ry. Co., and thence loaded on its cars, and carried to Hepler, where the total freight charges, at the rate of 51 cents per hundred, were paid by the consignee. Of this rate 34 cents per hundred only were retained for the Mo. Pac. Ry. Co. The Mo. Pac. Ry. and the C., B. & Q. Co. had a standing arrangement by which rates were fixed from Chicago to points on the Missouri Pacific's line, by adding an arbitrary sum—five cents—to the rate from Hannibal to such points. On the same day, the grocery company sold to the same customer one barrel of sugar, and shipped it over the Mo. Pacific's road from Hannibal to Hepler, and paid the freight charges in advance, which were at the rate of 46 cents per hundred. *Held*, that the two services were not rendered for one and the same party in such sense that there could be no undue discrimination, within the meaning of the interstate commerce act.

2. SAME—DISCRIMINATION IN RATES—SECTION 3.

Section 3 of the interstate commerce act, which declares it to be unlawful for a carrier to give "an undue or unreasonable preference" to any person, firm, corporation, or locality, or to subject any person, etc., to any undue or unreasonable prejudice or disadvantage "in any respect whatsoever," does not refer solely to facilities afforded to shippers, but applies also to discrimination in rates.

3. SAME—ADJUSTMENT OF THROUGH RATES.

Congress did not intend to leave carriers the power to grant undue preferences, or to subject persons or places to undue disadvantages, by any devices, or by any adjustment of joint through rates with relation to local rates. When two carriers establish a joint through rate, the proportion thereof that one carrier receives for carriage of property between two points on its line may be compared with its local rates between the same points, for the purpose of establishing that an unreasonable preference has been given, or that a shipper has been subjected to an undue disadvantage.

4. SAME—PROVINCE OF JURY.

Whether the difference between such local rate and the proportion of a joint through rate is reasonable or unreasonable, is a question of fact for the jury.

Indictment for Violation of Interstate Commerce Act. On motion for new trial and in arrest of judgment.

George D. Reynolds, U. S. Atty., and *Charles Claflin Allen*, for plaintiff.
Thomas J. Portis and *Aldace F. Walker*, for defendant.

THAYER, J. The defendant having been convicted on the second and third counts of the indictment, for violation of the third section of the interstate commerce act, forbidding unreasonable preferences, etc., (39 Fed. Rep. 369,) the case is again before the court, on a motion in arrest of judgment and for a new trial.

The first point demanding consideration is one made by defendant's counsel to the effect that no preference was given in the present case, and that no person or corporation was subjected to an undue disadvantage,

because the Hayward Grocery Company, the complainant, made both shipments in question,—that is to say, the one from Chicago to Hepler, Kan., and the one from Hannibal, Mo., to the same point. It is said that, inasmuch as both services were rendered for the same person, it cannot be said that any preference or discrimination within the meaning of the law was shown. Undoubtedly the point is well taken if the service in each instance was rendered for the same party. The facts, as developed by the testimony, are that the Hayward Grocery Company, in June, 1887, ordered Randall & Fowler to ship two barrels of sugar from Chicago, Ill., to John Viets, at Hepler, Kan., who appears to have been a customer of the grocery company. Randall & Fowler were merchandise brokers. They executed the order by buying and shipping the sugar over the Chicago, Burlington & Quincy Railroad, taking therefor a bill of lading in their own name as consignors. Under the head of "Marks and Consignees" was written "John Viets, Hepler, Kan.," and underneath that the following words appear where rates are usually specified: "From Chicago to Hepler—Tariff." Across the face of the bill of lading was stamped a notice to the effect that the Chicago, Burlington & Quincy Railroad Company expressly reserved the right to forward the property from the terminus of its own road by the road of any connecting carrier whom it might select. At Hannibal, Mo., it selected the Missouri Pacific Railway to complete the carriage to the point of destination. The sugar was there unloaded, placed in the warehouse of the Missouri Pacific Railway Company, and thence loaded into one of its cars on June 15, 1887, and carried forward by the latter company to Hepler. The total freight charge from Chicago to Hepler, Kan., was paid to the Missouri Pacific Railway Company, on the arrival of the property, by John Viets, the consignee, the rate being 51 cents per hundred, and of this sum the defendant Tozer, as agent of the Missouri Pacific Railway Company, advanced to the Chicago, Burlington & Quincy Railroad Company its proportion, on receipt of the property at Hannibal, Mo. The Chicago, Burlington & Quincy Railroad Company and the Missouri Pacific Railway Company had a standing arrangement in force at the time of this transaction, whereby the rate on sugar and fourth-class freight from Chicago, Ill., to points on the Missouri Pacific's road in Kansas, Nebraska, and the Indian Territory, via the Chicago, Burlington & Quincy Railroad, the town of Hannibal, and the Missouri Pacific Railway, was to be ascertained and fixed by adding to the established rate from Hannibal to such points an arbitrary sum, to-wit, five cents per hundred. The rate from Hannibal to Hepler, Kan., over the Missouri Pacific Railway, on shipments originating at Hannibal, was 46 cents per hundred on sugar, in June, 1887. On the shipment made from Chicago by Randall & Fowler to John Viets, the consignee accordingly paid a rate of 51 cents per hundred. Of this sum the Missouri Pacific Railway Company retained, as it appears, 34 cents only, and accounted to the Chicago, Burlington & Quincy for 17 cents per hundred of the alleged joint or through rate. The other shipment that figures in this controversy was made by the Hayward Grocery Company at Hannibal, on June 17, 1887. On that day the

grocery company sold and shipped one barrel of sugar to John Viets, at Hepler, Kan., over the Missouri Pacific Railway; and paid the freight charges in advance. For the latter service the defendant, as agent of the railway company, charged the grocery company at the rate of 46 cents per hundred from Hannibal to Hepler.

On this state of facts the court is of the opinion that the two services were not rendered for one and the same party, in such sense that there could be no preference or discrimination within the meaning of the law. The bill of lading, as the court construes it, was a through bill of lading, and bound the Chicago, Burlington & Quincy Railroad Company to carry the property through to the point of destination at tariff rates,—that is to say, at 51 cents per hundred. The service rendered by the Missouri Pacific Railway Company as to the Chicago shipment was a service rendered for the Chicago, Burlington & Quincy Railroad Company, to enable it to complete its contract of affreightment. On delivery of the sugar to the Chicago, Burlington & Quincy Railroad Company, at Chicago, title vested in the purchaser or consignee; subject, of course, to the right of stoppage *in transitu*, in case of the insolvency of the consignee before actual delivery. Indeed it does not appear that the Hayward Grocery Company was at all interested in the through rate made by the Chicago, Burlington & Quincy Railroad Company on that shipment, as the freight was to be paid at the point of destination by the purchaser, and it was so paid. The other service rendered in connection with the shipment originating at Hannibal was a service rendered for the grocery company, as it both employed the carrier and paid for the service to be rendered in advance. There was ample evidence, in the opinion of the court, to support the charge laid in the second and third counts of the indictment, that the defendant charged 46 cents per hundred for a service rendered the grocery company, and a less compensation for a service rendered the Chicago, Burlington & Quincy Railroad Company. In no aspect of the case can the two carriers be regarded as joint contractors with the grocery company for the transportation for it of two barrels of sugar from Chicago to Hepler. The Chicago, Burlington & Quincy Railroad Company either employed the Missouri Pacific Railway to carry out a contract for through carriage, which it had undertaken, or in the matter of engaging the services of the Missouri Pacific Railway Company it acted as agent for the consignee of the goods, and it appears to the court to be immaterial, so far as this case is concerned, in which of the two capacities it acted.

It is next insisted that section 3 of the interstate commerce act relates and has reference solely to facilities afforded to shippers, and not to rates, and that no discrimination in rates will constitute an undue "preference or disadvantage" within the meaning of the law. This point was raised, considered, and overruled at the trial, and it seems hardly necessary to enter upon a discussion of that question again. The intent of the law-maker in this section of the act seems clear enough. It is declared to be unlawful for a carrier to give "an undue or unreasonable preference" to any person, firm, corporation, or locality, or to subject any person, firm,

corporation, or locality to any undue or unreasonable prejudice or disadvantage "in any respect whatsoever." After such emphatic language declaring that a preference given in any respect whatsoever shall be unlawful, it seems obvious that courts are not authorized by any principle of construction to create an exception by saying that an undue preference given in the matter of rates shall not be deemed unlawful, or that, if a shipper is put to an unreasonable disadvantage merely in the matter of rates, he shall not be esteemed to have any right of redress under the third section. But this question has been practically settled by judicial determination of the meaning of the English statute, from which the third section of the interstate commerce act was borrowed. The second section of the English "railway and canal traffic act" of 1854, prohibits undue and unreasonable preferences, and also prohibits railway companies from subjecting persons to any undue or unreasonable prejudice or disadvantage. The settled construction of that act appears to be that the prohibitions in question include preferences in rates, as well as in facilities. *Colliery Co. v. Railway Co.*, 3 Nev. & McN. 426; *Denaby v. Railway Co.*, L. R. 11 App. Cas. 97; Harp. Int. St. Com. 66-68, and cases cited.

Very similar to the point last considered is the proposition urged for the first time on the hearing of the motion for a new trial, that no disparity existing between the rate charged on the shipment originating at Hannibal and the Missouri Pacific's proportion of the rate on the Chicago shipment can be alleged as a preference or discrimination, and hence as a violation of the third section of the act. It is said that, the one rate having been fixed by the Missouri Pacific Railway Company, alone, between stations on its own line, and the other being its proportion of a joint rate, the law does not allow any comparison between the two rates for the purpose of establishing a preference; and, further, that the public is in nowise concerned in the division of the joint rate as between the connecting carriers. With reference to such contention it will suffice to say that, as the third section of the act *ex industria* prohibits preferences and discriminations "in any respect whatsoever," it appears to the court that the proposition above stated is not tenable, unless it be a fact that no adjustment of joint through rates with respect to other rates over the lines of the connecting carriers can operate as an undue preference, or as an unreasonable discrimination against persons and places. If joint through rates may be, and are, so adjusted with reference to other rates established by the connecting carriers as to operate as a preference or discrimination against persons and places, and such adjustment is unreasonable,—that is to say, is not justified by the circumstances of the case,—a carrier concerned in making such joint rate, by receiving the portion of the same allotted to him, may be guilty of a violation of the third section. The decision of the interstate commerce commission in the case of *Chamber of Commerce v. Railroad Co.*, 2 Int. St. Com. R. 570, 571, proceeded clearly on the assumption that the rates charged from Milwaukee to the seaboard by the roads east of Milwaukee, on shipments originating at Milwaukee, might be a discrimina-

tion against shippers residing in the latter city, and a violation of the third section, by reason of the disparity between that rate and the percentage of the joint through rate from Minneapolis to the seaboard, which those roads accepted for the haul east of Milwaukee. It is true that in that case no discrimination was found to exist as a matter of fact, the commission holding that the difference of 2½ cents per hundred was not, under the circumstances, unreasonable. It seems evident to the court that it is within the power of the Missouri Pacific Railway Company and other carriers to unite with roads east of the Mississippi river in establishing joint rates from Chicago to points in Kansas, Arkansas, Nebraska, the Indian Territory, and Texas, which, by virtue of their unfair relation to the rates established from St. Louis, Hannibal, and other places to such points in the west and south-west, on shipments originating at St. Louis and Hannibal, would operate as an unreasonable discrimination against the latter cities, and as a serious impediment to their trade and commerce. I would not be understood by what is last said as intimating that in the opinion of the court such unfair joint rates have been already made, or that the testimony in this case establishes such fact. On that point I express no opinion. I mention the matter merely in illustration of the point that carriers clearly have it in their power to so adjust joint rates, with respect to other rates, as to operate both as an unreasonable preference given to persons and places, and as an undue discrimination against persons and places. Such grievances, if they in fact existed, could not be redressed under the second section of the act, because the services would not be rendered under "substantially similar circumstances and conditions;" and there might be no redress under the fourth section of the act, because the long and short haul clause would not necessarily be violated. If that kind of preferences and discriminations are not in violation of the third section, then such acts cannot be punished in a criminal proceeding. The court is of the opinion that congress did not intend to leave carriers the power to grant undue preferences by any devices, or the power to subject persons or localities to undue disadvantages by any adjustment of joint rates, without being liable to criminal prosecution under the act. It accordingly holds that the public has some concern in the division of joint rates as between carriers, and that an adjustment of joint rates, with respect to other rates established by the connecting carriers, may furnish adequate ground for a prosecution under the third section.

After a careful review of all the points urged in support of the motions, the court is of the opinion that no substantial error prejudicial to the defendant was committed by the court at the trial. If the defendant has any reason to complain, it is of the action of the jury in finding that there was an unreasonable disparity between the rate charged on the Hannibal shipment and the proportion accepted of the joint rate from Chicago. Whether the difference shown in the two rates was reasonable or unreasonable was certainly a question of fact for the jury, in the light of all the circumstances, and not a question of law for the court. *Diphwys v. Railway Co.*, 2 Nev. & McN. 73; *Denaby v. Railway Co.*,

supra. And if it be true, as suggested, that the selfishness of men is such that juries will declare any difference in rates to be unreasonable that operates to the disadvantage, or is supposed to operate to the disadvantage, of themselves or the community to which they belong, that is obviously a criticism of the law, and merely proves that questions of fact such as were tried in this case, which certainly demand for their solution special knowledge, and above all impartial consideration, ought to be submitted to some other tribunal than a jury of the locality where the alleged grievances exist. The motions are overruled.

THE ELFINMERE.

(District Court, E. D. Michigan. November 1. 1888.)

TOWAGE—STRANDING TOW.

A steam-barge, coming down Lake Huron with three schooners in tow, allowed herself to approach so near a lee shore that, in endeavoring to turn about, the rear vessels drifted to leeward, and were stranded. *Held*, the propeller was in fault for not keeping further out into the lake.

(*Syllabus by the Court.*)

In Admiralty.

These were libels for negligence in the loss of the schooners *Acontias* and *A. H. Moss*. The facts of the case were substantially as follows: On the 28th of October, 1887, at about 7:30 p. m., the steam-barge *Elfinmere* left Cheboygan, Mich., bound for Toledo, with the schooners *Nellie Mason*, *A. H. Moss*, and *Acontias* in tow, in the order named. The wind was then light, and the weather somewhat hazy. Towards midnight the wind shifted to the north-east, and began to blow heavily; the sea increased, and snow fell in flurries during the night. The tow passed *Presque Isle* light about 2 o'clock in the morning, at a distance variously estimated at from a quarter of a mile to a mile and a half. Shortly after passing this light, land was dimly seen off the starboard bow. The lead began to indicate shoaler water, and the steamer's wheel was put hard starboard, with the intention of heading the tow into the wind, and holding the schooners until daylight, or until the storm abated. In so doing, however, the *Acontias* and the *Moss* took the ground, the line between the first and second schooners was either cut or parted, and the *Acontias* and *Moss* went ashore, and became a total loss.

The court was assisted upon the argument by Commander *Elmer*, of the United States Navy, and Capt. *Joseph Nicholson*, of the Lake Marine.

H. H. Swan and *F. H. Canfield*, for libelants.

J. W. Finney and *H. C. Wisner*, for claimant.

BROWN, J., (orally.) I have felt no particular doubt as to what the result of this case should be, but on account of the large interests involved, and because I thought it possible there might be some question

of seamanship upon which I should be glad to take their opinion, I have called to my assistance the experienced gentlemen who have kindly consented to sit with me. We are quite agreed as to the proper disposition to be made of the case.

We think the libelants make a *prima facie* case in showing that the *Elfinmere* was a new, large, and powerful steamer, perfectly competent to handle the tow that she had taken in charge; that she came down the lakes from the Straits of Mackinaw or from Cheboygan upon the ordinary course, nothing unusual occurring until they reached Presque Isle. On the way down, and during the evening, the wind, which appears to have been a light breeze from the north or north-west, settled down into a stiff gale from the north-east; the weather became hazy, and snow began to fall so thick as at times to obscure the lights. They seem, however, to have passed Presque Isle light at a convenient and safe distance, we will say from a mile to a mile and a half, and while running about six miles an hour, and, as shown by the charts, about six miles distant from abreast of the light, two of her schooners were found ashore. This six miles she covered in an hour, or somewhat less. We think this statement makes a *prima facie* case of negligence in the conduct of the tow, and throws upon the steam-barge the duty of explanation.

The defense in this case—and it has been elaborated with a great deal of ingenuity—is that, after passing Presque Isle light, the lights of the stern vessel, the *Acontias*, disappeared, indicating to the master of the steam-barge that she had left the tow, that the tow-line had been broken, cut, or thrown off, and that there was great danger that the remainder of the tow would be lost, unless extraordinary measures were taken to keep the vessels off the shore; and that, with that in view, the master undertook to make the lee of False Presque Isle, and get into the harbor under the island.

There are three subordinate questions arising in this connection: (1) Whether this course was taken by reason of the apparent loss of the *Acontias*; (2) whether it was prudent to attempt to make False Presque Isle harbor in the weather that prevailed that night; (3) whether the attempt was made in a prudent way.

In regard to the first question, of the connection between the loss of the *Acontias* and the taking of this course, I have still some doubt. At first it seemed to me quite clear that it was a defense that had its origin in the imagination of counsel, rather than the facts of the case; but there is undoubtedly some reason for saying that the master became alarmed at the disappearance of the *Acontias*' light, and made up his mind that some unusual precautions were necessary, but whether this be so or not we do not regard as very material. There can be no question that they passed within sight of the range lights of Presque Isle, which are considerably to the westward of the light-house; and, as the tow must at that time have been three miles and a half to four miles from these range lights, it is not, as it seems to us, improbable that the crews of the tow may have seen the land; that is, that the snow may have lifted so much as to have enabled them to see the shore. It does not seem to us that their

testimony in this connection is at all incredible, and we think they may have seen the land for some time before they struck.

But the important questions are, was the master justified in attempting to seek this harbor that night? and did he do it in a proper manner? With regard to the first question we have great doubt whether he was justified in attempting to enter an unlighted harbor in a snow-storm, and in the night, when his only guide must have been the lights at the entrance of the harbor, which in that state of the weather it was difficult, if not impossible, for him to see at the ordinary distance. We have very grave doubt whether prudence should not have dictated to him to keep out into the lake upon a course south-east by east, half a point or a point further to the southward than he did,—a course which would have carried him clear of the land.

As to the question whether he used proper precautions in attempting to make False Presque Isle harbor, we have no doubt whatever. We think there was gross negligence in taking the course he did after passing Presque Isle light. Whether he took a course which pointed directly to the shore, as claimed by the libelants, and which ultimately led him so near the shore as to entail the loss of his two rear vessels, we have considerable doubt. We can hardly believe that he would take a course so far to the southward as that, but it is very evident that he took a course which soon carried him within sight of the shore, and when within sight of it, it was obviously too late to do anything, because, whether he turned sharp around and headed into the wind, or made a slow turn, in either case the tow would have tailed so far to the shore that the rear vessel would inevitably have got aground before he could get them off. If he had made up his mind to make False Presque Isle harbor that night, it seems to us that he should have kept on a course that would have kept him out of sight of land, making ample allowance for leeway, and should, by gauging the distance upon the chart with his mileage per hour, have continued on that course long enough to have gotten well below the island, and then to have ported and come around in the lee of the land. If he were steaming at the time at the rate of six miles an hour, and had continued upon a course south-east or south-east by east for two hours and a half or three hours, he might then, with probable safety, have ported and come around, and found smooth water under the lee of the land. But the course that he did take was altogether, as it seems to us, too near the land, and was one which could hardly fail, under the circumstances existing that night,—the thickness of the weather, and the direction and velocity of the wind,—to have taken the tow ashore. I have not changed the opinion at which I arrived last winter when the testimony was taken: that a grave fault was committed by the propeller in taking a course too near the shore. We think it was her duty beyond all question either to have headed into the wind, in the first place, or to have kept so far from the shore that she could get her tow into the wind without danger of the rear schooner's tailing and drifting upon the shore.

A decree will be entered for the libelants, with the usual reference to a commissioner to assess the damages.

ANGLE v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court, W. D. Wisconsin. July 10, 1889.)

In Equity.

Lamb & Jones, Ewing & Southard, and J. R. Doolittle, for complainant.
Pinney & Sanborn, for defendant.

HARLAN, Justice. The plaintiff recovered in this court, January 31, 1887, a judgment against the Chicago, Portage & Superior Railway Company for the sum of \$205,883.19, damages and costs. Execution having been issued and returned unsatisfied, this suit was instituted for the purpose of reaching and subjecting to the satisfaction of that judgment the same lands as are in controversy in the suit in this court just determined, of *Trust Co. v. Railway Co.*, ante, 143, and all notes, bonds, or moneys arising from sales, rents, stumpages, license charges, or proceeds of sale of such lands, in the hands either of the corporation last above named or of the judgment debtor. The allegations of the present bill are substantially the same as in the bill filed in the other suit. For the reasons stated in the opinion delivered in the suit brought by the Farmers' Loan & Trust Company, the court holds that the Chicago, Portage & Superior Railway Company has no interest in said lands which can be subjected in satisfaction of the above judgment against it. The demurrer is sustained, and the bill must be dismissed, with costs to the defendant. It is so ordered.

HAYES v. YAWGER. SAME v. FITCH. SAME v. VAN SICKLE. SAME v. DURSTON *et al.* SAME v. HOWLAND. SAME v. WHITE *et al.*

(Circuit Court, N. D. New York. July 23, 1889.)

COXE, J. These causes involve the same question presented in *Hayes v. Shoemaker*, ante, 319. No distinction was made against any of these defendants upon the argument or in the printed briefs. There was an implied understanding, at least, that the cases should stand or fall together. It is therefore unnecessary to file a separate decision in each case. In some of these cases the facts are stronger for the defendant than in the *Shoemaker Case*. In the case of *Hayes v. Durston* they are not so strong; but after a careful examination of the entire testimony I am convinced that all the cases are within the principle of *Whitney v. Butler*, 118 U. S. 655, 7 Sup. Ct. Rep. 61, and that in each a judgment must be entered for the defendant.